Resolutions with Reports

to the House of Delegates

AMERICAN BAR ASSOCIATION

2015 MIDYEAR MEETING • HOUSTON, TEXAS • FEBRUARY 9, 2015

NO RESOLUTION PRESENTED HEREIN REPRESENTS THE POLICY OF THE
ASSOCIATION UNTIL IT SHALL HAVE BEEN APPROVED BY THE HOUSE OF
DELEGATES. INFORMATIONAL REPORTS, COMMENTS AND SUPPORTING
DATA ARE NOT APPROVED BY THE HOUSE IN ITS VOTING AND REPRESENT
ONLY THE VIEWS OF THE SECTION OR COMMITTEE SUBMITTING THEM.
RESOLUTIONS WITH REPORTS
TO THE HOUSE OF DELEGATES

Hilton Americas Houston Hotel
Lanier Ballroom, Level 4
Houston, Texas
February 9, 2015

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**RESOLUTIONS WITH REPORTS**

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Resolutions with Reports numbered 100 through 113 can be found in this book. Resolutions with Reports submitted by state and/or local bar associations will be numbered in the “10” series. Late Resolutions with Reports submitted will be numbered in the “300” series. These reports will be distributed at the opening session of the House of Delegates meeting. Informational Reports can be found on the ABA’s website at http://www.americanbar.org/groups/leadership/house_of_delegates/2015-houston-midyear-meeting.html (click on Informational Reports).

*This report can be found with the Blue Late Report and Supplemental Materials to be distributed at the opening session of the House of Delegates meeting.
Young Lawyers Division
Criminal Justice Section
Death Penalty Due Process Review Project
Death Penalty Representation Project
Commission on Domestic and Sexual Violence
Commission on Youth at Risk
Commission on Domestic and Sexual Violence
Commission on Homelessness and Poverty
Commission on Youth at Risk
Standing Committee on Disaster Response and Preparedness
Commission on Homelessness and Poverty
Section of Individual Rights and Responsibilities
Criminal Justice Section
National Native American Bar Association
Commission on Homelessness and Poverty
Section of Individual Rights and Responsibilities
The Bar Association of the District of Columbia
Bar Association of San Francisco
Commission on Homelessness and Poverty
Coalition on Racial and Ethnic Justice
Commission on Youth at Risk
Center for Racial and Ethnic Diversity
Commission on Hispanic Legal Rights and Responsibilities
Commission on Sexual Orientation and Gender Identity
Council for Racial and Ethnic Diversity in the Educational Pipeline
PRELIMINARY CALENDAR
of the
HOUSE OF DELEGATES
of the
AMERICAN BAR ASSOCIATION

Hilton Americas Houston Hotel
Lanier Ballroom, Level 4
Houston, Texas

February 9, 2015

All sessions of the House of Delegates will be held on Monday, February 9, 2015, in the Lanier Ballroom, Level 4, at the Hilton Americas Houston Hotel, in Houston, Texas. It is anticipated that the House meeting will begin at 8:30 a.m., and will adjourn at approximately 5:00 p.m. when the House has completed its agenda.

The Final Calendar of the House of Delegates meeting will be placed on House members' desks at the opening session on Monday morning, February 9. Sections, committees, delegates, affiliated organizations and bar associations, which have submitted Resolutions with Reports, oral information or late reports authorized by the Committee on Rules and Calendar, will be calendared.

The index, which appears at the end of this book, will assist House members in finding reports received by the November 19, 2014 filing deadline. Resolutions with Reports numbered 100 through 113 appear in this book. Informational Reports can be found on the ABA’s website at http://www.americanbar.org/groups/leadership/house_of_delegates/2015-houston-midyear-meeting.html (click on Informational Reports).

Any late Resolutions with Reports, those received after November 19, 2014, will be considered by the House if the Committee on Rules and Calendar recommends a waiver of the time requirement and the recommendation is approved by a two-thirds vote of the delegates voting. Late Resolutions with Reports will be distributed at the opening session of the House, along with any additional Resolutions with Reports submitted by state or local bar associations.

The preliminary calendar of the House of Delegates meeting is as follows:
The Chair of the House of Delegates, Patricia Lee Refo, Presiding

Presentation of Colors

Invocation

1. Report of the Committee on Credentials and Admissions
   Leslie Miller, Arizona

   Approval of the Roster

2. Report of the Committee on Rules and Calendar
   Reginald M. Turner, Jr., Michigan

   Approval of the Final Calendar

3. Report of the Secretary
   Mary T. Torres, New Mexico

   Approval of the Summary of Action

4. Statement by the Chair of the House of Delegates
   Patricia Lee Refo, Arizona

5. Statement by the President
   William C. Hubbard, South Carolina

6. Statement by the Treasurer
   G. Nicholas Casey, Jr., West Virginia

7. Statement by the Executive Director
   Jack L. Rives, Illinois

8. Presentation of Resolutions with Reports which any State or Local Bar
   Association wishes to bring before the House of Delegates

9. Presentation of Resolutions with Reports of Sections, Committees and Other
   Entities
   100-113 Resolutions with Reports
   300 Late Resolutions with Reports

ADJOURNMENT
AMERICAN BAR ASSOCIATION
2014-2015
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Immediate Past President
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Jack L. Rives, Chicago, IL

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2017
Second District
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2017
Third District
Thomas R. Curtin, Morristown, NJ
2015
Fourth District
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2017
Fifth District
William T. Coplin, Jr., Demopolis, AL
2015
Sixth District
David F. Bienvenu, New Orleans, LA
2017
Seventh District
Stephen E. Chappelear, Columbus, OH
2016
Eighth District
Eduardo R. Rodriguez, Brownsville, TX
2016
Ninth District
John S. Skilton, Madison, WI
2015
Tenth District
Joseph B. Bluemel, Kemmerer, WY
2016
Eleventh District
Jimmy Goodman, Oklahoma City, OK
2016
Twelfth District
Harry Truman Moore, Paragould, AR
2017
Thirteenth District
John C. Schulte, Missoula, MT
2016
Fourteenth District
Laura V. Farber, Pasadena, CA
2015
Fifteenth District
Kenneth G. Standard, New York, NY
2015
Sixteenth District
Timothy W. Bouch, Charleston, SC
2015
Seventeenth District
Paul T. Moxley, Salt Lake City, UT
2015
Eighteenth District
Robert T. Gonzales, Baltimore, MD
2016
Judicial Member-at-Large
Hon. Jodi B. Levine, Oklahoma City, OK
2015
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<th>Position</th>
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<tr>
<td>Section Members-at-Large</td>
<td>2015</td>
<td>Kenneth W. Gideon</td>
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<td>2015</td>
<td>Timothy B. Walker</td>
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<td>2016</td>
<td>Pamela C. Enslen</td>
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<td>2016</td>
<td>David Russell Poe</td>
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<td>2017</td>
<td>William R. Bay</td>
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<td>2017</td>
<td>Donald R. Dunner</td>
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<td>Michael E. Flowers</td>
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<td>Ruthe Catolico Ashley</td>
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<td>2016</td>
<td>Marcia Milby Ridings</td>
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<td></td>
<td>2017</td>
<td>Pamela A. Bresnahan</td>
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<td>Young Lawyer Members-at-Large</td>
<td>2015</td>
<td>William Ferreira</td>
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<td>2017</td>
<td>Min K. Cho</td>
<td>Orlando, FL</td>
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<td>Law Student Member-at-Large</td>
<td>2015</td>
<td>Chloe Raquel Woods</td>
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REPORT OF THE
ABA PRESIDENT
TO THE
HOUSE OF DELEGATES

The report of the President will be presented at the time of the
Midyear Meeting of the House of Delegates.
REPORT OF THE TREASURER

TO THE

HOUSE OF DELEGATES

To permit the presentation of current financial data, the written report of the Treasurer will be distributed at the time of the Midyear Meeting of the House of Delegates.
REPORT OF THE EXECUTIVE DIRECTOR
to the
HOUSE OF DELEGATES
(submitted December 12, 2014)

This report highlights American Bar Association activities from June 5, 2014, to December 12, 2014.

Introduction

The last time the ABA held its Midyear Meeting in Texas -- in Dallas, in 2013 -- the Board of Governors passed a resolution directing the ABA staff to create business plans for the critical areas of membership and non-dues revenue. When the Board next met, in Chicago in June 2013, we received approval for an aggressive and comprehensive set of initiatives we labeled “ABAction!” The name signals our intention not only to develop plans, but to implement them. I first briefed the House of Delegates on our plans at the Annual Meeting in San Francisco that summer. Two years in, we have achieved some impressive successes with our efforts to identify new sources of non-dues revenue and to develop attractive and effective programs to retain members.

The ABA is headed in the right direction. We ended fiscal year 2014 with our fourth consecutive year of membership growth. Moreover, we continue to establish new programs, such as the Immigrant Child Advocacy Network and Veterans’ Claims Assistance Network, while keeping expenses as low as possible. As a result of such efforts, fiscal year 2014 showed consolidated revenue more than $1 million higher than budget and consolidated expenses almost $4 million lower than budget. [Note that those figures are subject to the final audit report, which is not complete as of this writing.]

ABAAction!

ABAAction! currently includes 45 initiatives to grow membership and non-dues revenue. Among new programs, an ABA Wine Club launched in November as the first offering of ABA Leisure, an effort to connect members with programs centered on shared lifestyle interest. ABA members receive special club pricing for curated wine shipments from the Terlato Wine Group, which represents a portfolio of more than 90 rated wines. Other ABA Leisure programs set to be implemented soon include golf and travel. An inaugural golf outing is planned for February 8 at the Golf Club of Houston during the Midyear Meeting. More than just opportunities for networking, ABA Leisure programs will raise non-dues revenue through participation fees, royalties, product sales, and sponsorships.

The ABA Academy continues to expand. Our catalog of offerings under the “Essentials” CLE series, launched in January 2014, now includes 136 basic-skills courses contributed by 16 ABA entities. In July, under the “Minding Your Business” banner, the ABA Academy
established a cybersecurity certificate program tailored to the needs of law firm attorneys, in-house counsel, and government and public sector lawyers. In coming months, the Academy will offer programs supported by industry leaders in various fields, such as Wells Fargo for packages on law firm financing and Savills Studley for real estate courses.

Beginning in November, members and staff have worked across entities on an initiative to better coordinate the content development and marketing of ABA books and CLE. Spearheaded by the Standing Committees on Continuing Legal Education and Publishing Oversight, “Content Convergence” encourages entities to work together on the development and delivery of their products in order to increase efficiency, develop new revenue streams, and improve customer service.

Related to that initiative, we recently restructured the product marketing staff, eliminating distinctions and redundancies between CLE and book marketing, and bringing together the marketing staffs of ABA Publishing and the Center for Professional Development. Although full-time staff was not reduced, the ABA will save about $100,000 in salaries from redefined positions in the new structure.

To generate further efficiencies and assure current best practices, in November I appointed a Staff Working Group to examine current publishing practices across the ABA, identify best publishing practices, review staffing and other expenses, and develop recommendations for consideration by the Board of Governors in June.

Efforts to improve the Flagship Book Program are paying off. The program ended fiscal year 2014 with 59 new releases and a 42 percent increase in revenue over the prior year (more than $2 million in revenue). We anticipate further growth this fiscal year, with more than 70 new titles and $3 million in revenue, as we continue to implement new marketing plans and expand our catalog. Strategies include the roll-out of our new Ankerwycke brand, created to help broaden the appeal of our titles among everyday consumers. The ABA’s first book under the new branding, “Supreme Ambitions,” was released in December. The book has received excellent reviews, including one from The New York Times. Seven additional Ankerwycke titles will be published in time for North America’s leading publishing event, Book Expo America, in March.

Our rate of e-book production doubled in fiscal year 2014, thanks to a more efficient process that reduced the conversion time from one month to one week. With a total of 359 electronic ABA titles now available, we have ramped up efforts to expand the reach of our publications. Nearly 300 of these books were added to the LexisNexis library in September, which has resulted in $60,000 in sales thus far. Twenty-six other such licensing arrangements have also been established, including one with the world’s largest image-based legal research database. In the coming months, further licensing growth is expected through non-U.S. publishers interested in the foreign rights to our catalog.

We are seeing improved results with the ABA Job Board, which ended the last three months of fiscal year 2014 ahead of its revenue goal. The Job Board raised nearly $77,000 in fiscal year 2014, 10 percent more than the year before and an increase of 118 percent since fiscal
year 2010. Nonetheless, we desire substantially stronger growth. The goal is to have the nation’s recognized premier job board for attorneys. In the next three months, we will implement several new strategies, including additional recruitment products, new incentives for advertisers, and a new app for job posters that integrates with ABA social media channels. The Job Board should also benefit from a realignment of the ABA Career Center (highlighted below).

One of our membership initiatives is showing particularly positive results: The Full Firm Membership Program added some 3,000 new dues-paying members through the addition of 16 law firms in fiscal year 2014. As of December 5, Full Firm membership included 19,839 members, 22 percent more than the year before at the same time. We continue to enhance this membership segment. For example, we will soon pilot a diversity training program for large firms. At this time, nine firms are actively considering proposals for Full Firm membership.

We’re working a number of other initiatives as well. In January, we will launch “AmBar Meetings,” a new business unit that will provide meeting planning services to law firms and small bar associations. We are working on the Board-approved pilot program between the ABA and Rocket Lawyer to connect the Association’s network of practicing lawyers with prospective clients through a cloud-based, technologically advanced platform.

We’re continuing to evaluate the optimum alignment of staff. The most recent change is the creation of our Law Practice and Technology Group. This group combines the Law Student Division, the Young Lawyers Division, and the Senior Lawyers Division with the Law Practice Division and the ABA Career Center. It will enable staff to better focus on the life cycle of our profession.

**Other Membership and Non-Dues Revenue Initiatives**

The ABA ended fiscal year 2014 with 394,722 members -- a gain of about 1,800 from the year before. We of course seek more significant numbers, but this is our fourth consecutive year of modest membership growth. The number of members grew in the lawyer and associate categories, but the number of law students dipped by some 1,500, to 38,700.

We have prioritized several ABAction! projects for law students. We’re looking forward to the recommendations of the Board of Governors’ Task Force to Examine Association Policies Impacting Recruitment and Retention of Law Students.” That effort is complemented by a Staff Working Group on Law Students.

We understand the importance of enhancing the member-value proposition, and communicating it effectively. This year’s Bar Exam Prep Online Resource brought in 1,300 new law school-graduate members, who signed up to access bar exam tips. Most also participated in the related webinar. That effort builds on recent membership-value initiatives, such as the popular Free CLE Series and Free Career Advice Series.

The campaign’s success inspired another recent endeavor, “Leave a Good Tip,” a new social media campaign that nearly tripled the number of fans of the Young Lawyer’s Division’s Facebook page. Participants shared practice tips for prizes, and the advice was showcased in
“First-Year Lawyers: 30 Tips in 30 Minutes,” a free resource for ABA members ($19.95 for nonmembers). During the two-week effort, the number of Facebook fans grew from about 1,400 to just under 4,000. Such creative campaigns helped ABA social media accounts expand at a strong pace in fiscal year 2014: Our Facebook pages grew by about 45 percent (+9,552 attorneys, +3,153 law students); on LinkedIn, we increased our base of followers by more than 58 percent (+13,781); and our Twitter audience grew by about 42 percent (+13,393). The ABA’s social media footprint can be reviewed here.

ABA Advantage, our member-discount program, brought in more than $6.3 million in fiscal year 2014, almost $1 million more than its budgeted goal. Top performers for the year were Bank of America, Hertz, Ricoh and Mercedes. Combined, they accounted for 88% of total royalties for the year. Royalties from Ricoh were up 25% and Mercedes royalties increased nearly 60% from the prior year. Both increases were a result of continued strong sales, along with an increase in per-car payments from Mercedes. Starwood was another top revenue generator. Some companies, including UPS, HP, and Xerox, generated less non-dues revenue last year than in the year before. Negotiations are actively underway for affinity relationships with a legal technology firm and two wireless service providers.

Our partnership with National Book Network (NBN), one of North America’s largest book distributors for independent publishers, continues to expand our marketing reach and sale success among non-member attorney and non-attorney consumers. Enhanced visibility for our books in such mainstream outlets as Amazon and Barnes & Noble, improved background materials on ABA titles for use by NBN’s sales staff, and significantly enhanced participation by NBN throughout the product development and pricing process pushed sales in this important channel to $1.57 million in fiscal year 2014, a 94 percent gain over the previous year.

Finances and Operations

Grant Thornton is currently completing the audit to finalize our financial statements for fiscal year 2014. Pre-audit results show a very strong performance, measured against our budget. Consolidated revenues of $204.3 million are $1.4 million higher than budget, and consolidated expenses of $204.2 million are $3.8 million below budget.

Notably, the Association’s investment portfolio increased to $326 million, up $44 million over last year and double the $163 million consolidated value in fiscal year 2010. Almost a third of the increase is attributable to the sale of our building in Washington, D.C., and the rest resulted from wise investments in a very positive market. Our net assets increased by $23 million to $220 million in fiscal year 2014.

Advocacy, Communications, and Civic Engagement

The keynote by U.S. Supreme Court Chief Justice John G. Roberts, Jr. attracted broad media attention to our 2014 Annual Meeting. Registered press included national outlets such as Reuters, Associated Press, NPR, National Law Journal, and CSPAN, as well as local media such as the Boston Globe and Boston Herald. More than 30 press releases were issued to 1,260 reporters around the country. Among coverage, the National Journal reported on U.S. Homeland
Security Secretary Jeh Johnson’s speech at the General Assembly and the Wall Street Journal shared news of the ABA’s partnership with online legal services company Rocket Lawyer. Additional media included the Washington Post, New Jersey Record, Business Week, Bloomberg BNA, and Thomson Reuters.

As President Hubbard took office, several news outlets reported on his upcoming term. Hometown media -- the Post and Courier and Columbia Regional Business Report -- touted his new post, while legal media such as the National Law Journal, American Lawyer, Metropolitan Corporate Counsel, and On Lawyering shared news of his new initiatives. Among national media, the Chicago Sun-Times published a September 15 editorial in which Hubbard discussed access to justice. Other ABA officers in the news include President-Elect Paulette Brown, featured in the Boston Globe.

Among other media opportunities, President Hubbard urged Americans to reflect on the importance of the Constitution and the Bill of Rights on Constitution Day (September 17) with a press statement and a radio news release that reached more than 26.6 million listeners of 1,149 stations nationwide. Additionally, to recognize the 25th anniversary of the fall of the Berlin Wall, Hubbard spoke on the ABA Rule of Law Initiative and other efforts to advance democracy in an op-ed published by almost a dozen news outlets, including domestic ones such as Newsday, The Tampa Tribune, and The Intelligencer, as well as international newspapers such as The Korea Herald (Seoul) and The Nation (Bangkok).

With the recent dramatic influx of unaccompanied children and families from Central America coming through the southwest border, President Hubbard formed the new ABA Working Group on Unaccompanied Minor Immigrants to address the need for pro bono legal assistance. Comprised of members from several Association entities, the group established the Immigrant Child Advocacy Network in November, a new website that provides volunteer attorneys with training materials and pro bono opportunities.

The new website and working group are a culmination of several months of activity on the issue. In July, an ABA delegation traveled to San Antonio to learn firsthand about the border crisis, which resulted in a press statement that generated news coverage in The New York Times and the Dallas Morning News. In October, President William Hubbard sent a letter to Vice President Joe Biden that urged additional federal resources.

On the front lines of the immigration crisis is the Association’s South Texas Pro Bono Asylum Representation Project (ProBAR), which celebrated its 25th anniversary in November. ProBAR’s programs to assist detained, unaccompanied immigrant youth recently obtained nearly $5 million from the Vera Institute of Justice to expand its work. As the border crisis dominated news headlines last summer, project representatives were interviewed by more than 100 news outlets, including the Associated Press and NPR.

Thanks to a $100,000 Enterprise Fund grant, the ABA formally launched the Veterans’ Claims Assistance Network as a pilot in St. Petersburg and Chicago. More than 550 lawyers have volunteered to help former service members with their disability compensation claims since
the program was established in August. News coverage in the National Law Journal and Federal News Radio underscore the importance of this initiative.

The 2014 Silver Gavel Awards were presented on July 22 at the National Press Club in Washington, D.C. Organized by the Division for Public Education, this year’s ceremony featured remarks by Senior Editor Dahlia Lithwick of Slate.com. A full list of the award winners is available here.

The annual National Pro Bono Celebration took place October 19-25. Developed by the Standing Committee on Pro Bono and Public Service five years ago to raise awareness of the need for pro bono services, this year’s festivities included more than 700 unique events in more than 40 jurisdictions.

The Commission on the Future of Legal Services released an issues paper to solicit comment on the access and delivery of legal services. The Commission will also collect testimony on the topic at its first public hearing on February 7 during the Midyear Meeting in Houston.

Since June, several useful resources for lawyers, policymakers, and the general public have been published by ABA entities. They include the Section of Intellectual Property Law’s “A Call for Action for Online Piracy and Counterfeiting Legislation;” ABA National Task Force on Stand Your Ground Laws’ findings on the self-defense law; Commission on Law and Aging’s free guide, “Law Enforcement Legal Issues Related to Elder Abuse;” “A Lawyer’s Guide to Detecting and Preventing Money Laundering” developed by several ABA entities as well as the International Bar Association and Law Societies of Europe; and Formal Ethics Opinions 467, 468, and 469 from the Standing Committee on Ethics and Professional Responsibility.

The ABA continues its strong opposition to proposed legislation that would put an excessive tax burden on lawyers through an accrual accounting requirement. In September, the ABA and more than two dozen state and local bar associations led an effort, with the American Institute of CPAs and other organizations, to send a bipartisan letter to Congressional leaders. Signed by 233 House members, the letter expressed concern that the accounting requirement would dampen business growth and stifle job creation. The effort follows a July 10 statement from President Hubbard to a subgroup of the House Small Business Committee on the advantages (and fairness) of the cash method of accounting.

Also on Capitol Hill, President Hubbard sent a letter in September to the U.S. Senate Banking Committee in support of legislation that would provide credit unions with the same level of insurance protection ($250,000 per person, per institution) as banks for Interest on Lawyer Trust Accounts (IOLTAs). The Lame Duck Congress approved the legislation, which will often result in the higher interest rates that credit unions offer. This will provide an improved stream of funding for legal services.

The Governmental Affairs Office (GAO) has mounted a strong campaign against recent threats to two student loan forgiveness programs. In October, the ABA met with Senator Dick Durbin (D-IL) and senior Department of Justice officials to press for continued funding for a
federal program that provides state and local prosecutors and public defenders with direct repayment of their student loans. And the ABA joined with the Legal Services Corporation and met with White House and Department of Education officials to discuss the negative impact of an administration budget proposal that substantially lowers the benefits of loan forgiveness for public service.

Recent accomplishments of the ABA Rule of Law Initiative (ROLI) demonstrate the depth and breadth of the Association’s work abroad. ROLI investigated police holding cells in the Democratic Republic of Congo to locate children that had been placed in the facilities inappropriately. In Guinea, ROLI established two legal aid clinics. ROLI drafted a judicial code of ethics for the Haitian High Judicial Council. In the Mexican Senate, ROLI pushed legislation on mandatory bar membership.

ROLI held educational programs in several countries. This includes training on the new Kazakhstan criminal procedure code for members of the country’s Supreme Court, a distance-learning program on corruption crimes for the Moldova National Institute of Justice, and the first training for public interest lawyers in China on lesbian, gay, bisexual, and transgender rights. ROLI also published a technical assistance guide on rule of law reform, “Community Participation in Transitional Justice: A Role for Participatory Research,” for USAID officers worldwide.

**Awards**

In July, the Chicago Association of Direct Marketing recognized last year’s successful “Lawyers as Leaders” member recruitment campaign with their top “Tempo Award,” which is chosen from all first-place winners. The competition was intense and included entries from agencies like Ogilvy & Mather and FCB Chicago, as well as major marketers of big-budget brands like Huggies, AT&T, and McDonald’s.

"ABA/AARP Checklist for Family Survivors" received the Bronze Award from the prestigious 2014 Living Now Book Awards, which recognizes the world’s best lifestyle and home-style books. In 2015, the ABA will publish two additional books with AARP, one on caregiver resources and another on checklists for family heirs.

**Closing**

We do not underestimate the challenges we face as we seek a secure future for the American Bar Association. The decline in law school enrollment and the shifting dynamics affecting the legal profession are significant factors, and we’re working hard on those and many other issues. We must properly prioritize our resources. We’re taking a positive approach, viewing the challenges we face as opportunities to grow an ever-stronger, more vibrant and relevant Association.

The ongoing guidance and support from members of the House of Delegates are vital to our success. Your continued strong leadership is essential to our progress.
I welcome your ideas and questions, especially on our dynamic growth plan, ABAction! Through our combined efforts, we can achieve the growth and improvements needed to secure the Association's future.

Respectfully submitted,

Jack L. Rives
Executive Officer and
Chief Operating Officer
The following are the activities in which the Committee on Scope and Correlation of Work ("Scope") has engaged since its last report to the House of Delegates at the American Bar Association's 2014 Annual Meeting. Scope has continued to fulfill its constitutional mandate as a Committee of the House of Delegates, and the only one elected by it. It has carried forward its review of the structure, function and activities of Association committees and commissions to evaluate the effectiveness of their functioning and determine if overlapping functions exist.

Scope held its last meeting Friday, December 5, 2014 in Chicago, Illinois. Scope will meet again in conjunction with the ABA's Midyear Meeting on Sunday, February 8, 2014, in Houston, Texas.

Scope concluded that the following entities are active and not engaging in a function that unnecessarily overlaps with or duplicates the activities of other ABA entities:

**Audit (Standing Committee)** - Scope commends the Standing Committee for its excellent work.

**Constitution and Bylaws (Standing Committee)** - Scope commends the Standing Committee for its excellent work.

**Interest on Lawyer Trust Accounts (Commission)** - Scope commends the Standing Committee for its excellent work.

**Lawyer Assistance Programs (Commission)** - Scope commends the Commission for its excellent work.

**Lawyers' Professional Liability (Standing Committee)** - Scope commends the Standing Committee for its excellent work.

**Legal Aid and Indigent Defendants (Standing Committee)** - Scope commends the Standing Committee for its excellent work.

**Membership (Standing Committee)** - Scope's review of the Standing Committee consisted of consultations with staff, several liaisons and more than half the members of the Standing Committee. Although the review made it clear that the Standing Committee and the Membership and Marketing Division (M&MD) are hard-working and have achieved some successes, it is also clear that confusion and dissatisfaction exist at the staff, governance and volunteer levels.

A major issue is whether the Standing Committee and M&MD should concentrate on revenue or numbers. That is, should the emphasis be on collecting as much dues revenue as possible or
adding as many members as possible? A "major challenge" has been the change in direction from year to year from President to President, an "inherent inconsistency." The Standing Committee "needs a commitment that will stay in place for at least three years and perhaps five years. We need a long-term strategy."

The M&MD and the Standing Committee get conflicting directions from three of the Committees of the ABA Board of Governors. "The Finance Committee cares only about dues, Operations and Communications Committee wants more members and now the Program, Evaluation and Planning Committee wants to get involved." Directions, often conflicting, also come from the officers and from volunteers.

Scope encourages the Committees of the ABA Board of Governors, specifically the Finance Committee, Operations and Communications Committee, and the Program, Evaluation and Planning Committee to work with each other to develop a clear consensus about their goals for the Standing Committee for a period of three to five years and to communicate that consensus to the Standing Committee to avoid sending conflicting directions.

**Meetings and Travel (Standing Committee)** - Scope acknowledges that the Meetings and Travel Department is staffed by extraordinary professionals who are extremely proficient at their jobs, but, the Standing Committee should actively contribute to enhancing the efforts of the staff and maximizing the success of their work.

**Paralegals (Standing Committee)** - Scope commends the Standing Committee for its excellent work. Scope encourages the President-elect during the appointment process to consider appointing to the Standing Committee, Board Liaisons who are experienced lawyers with some knowledge of and experience with the role of paraprofessionals in the practice of law.

**Pro Bono and Public Services (Standing Committee)** - Scope commends the Standing Committee for its excellent work.

**Technology and Information Systems (Standing Committee)** - Scope commends the Standing Committee for its excellent work.

**Annual Meeting Program Planning (Special Committee)** - Scope recommends that the Special Committee give attention to improved scheduling and opportunities for ethics credits in Annual Meeting CLE programming.

**Death Penalty Representation (Special Committee)** - Scope commends the Special Committee for its excellent work.

**Scope's 2015 Midyear Agenda will include:**
Standing Committee on Armed Forces Law, Standing Committee on Legal Assistance for Military Personnel, Standing Committee on Law and National Security, and Task Force on Gatekeeper Regulation and the Profession.
Scope's 2015 Spring Agenda will include:

Respectfully Submitted,

[Signature]

Richard A. Soden, Chair
John L. McDonnell, Jr.
Leslie Miller
Estelle H. Rogers
Thomas M. Fitzpatrick
Michael E. Burke, IV, Chair, SOC
Timothy W. Bouch, ex-officio
Laura V. Farber, ex-officio

Dated: December, 2014
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact legislation and regulation that will promote the following components in the provision of care to persons with advanced illness:

1. Finance and payment mechanisms that support access to person-centered care coordination and care management across all care settings, providers, medical conditions, and time;

2. Advance care planning through counseling, disclosure and meaningful discussion of prognosis, goals of care, personal values, and treatment preferences, including planning for family caregivers’ needs;

3. Access to palliative care, community-based supportive services, and caregiver support to enable persons with advanced illness to remain in the home and community in accord with their preferences and needs;

4. Expanded research to improve care delivery and payment practices that will benefit individuals and families facing advanced illness;

5. A strong health care workforce educated and equipped with the clinical and social skills to serve people with advanced illness and their families and caregivers; and

6. Health information technology that promotes advance care planning and effective information sharing across time, place, and provider.
REPORT

The purpose of this resolution is to support legislation and regulation that promote access to comprehensive long-term supportive services and care for persons with advanced illness. *Advanced illness* occurs when one or more conditions become serious enough that general health and functioning decline, treatment aimed at cure begins to lose its effect, and quality of life increasingly becomes the focus of care. People with advanced illness typically have multiple chronic conditions and face a progressive decline in health and function that is becoming irreversible. In short, a person with advanced illness has entered the “gray zone” between treatable and terminal illness. These are patients who may need both chronic care and acute care, as well as advanced care and eventually end-of-life care. They face a progressive disease process.

Persons with advanced illness represent a growing population in our aging society whose needs, along with their family caregivers’ needs, have been largely unmet by current health delivery and financing systems. The resolution urges development and implementation of innovations that prioritize person-centered care planning and coordination, home-based supportive services, palliative care, expanded research in delivery practices and standards, greater workforce development, effective health information technology, and finance and payment mechanisms that support care coordination and care management services.

Our fragmented, uncoordinated approach to advanced illness exacts a terrible toll from our sickest and most vulnerable citizens and their families. This may be best illustrated by a story submitted to the Institute of Medicine (hereinafter IOM) as public testimony during the IOM’s preparation of its recent major report, *Dying in America: Improving Quality and Honoring Individual Preference Near the End of Life.*

As my 88-year-old father-in-law was in decline with eight different chronic conditions, he had more specialists than we could keep track of, and nobody was steering the ship. Most of all, his pain was poorly managed, but finding an outpatient palliative care physician was impossible, even in a city like Los Angeles. He resisted hospice mainly because he thought that meant he was giving up, so he continued to suffer and experience recurring runs to the emergency room. When he finally agreed to home hospice, his care and condition improved dramatically, and during the final month he lived under hospice he was comfortable, he had heartfelt conversations with all 11 of his children, and he died in peace and dignity in his home. It was a good death, but the period of serious,

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1 Coalition to Transform Advanced Care, *What is Advanced Illness,* http://advancedcarecoalition.org/what-is-advanced-illness.

2 This report utilizes, with permission, material from Brad Stuart, Andrew MacPherson & Gary Bacher, “Advanced Care Model Honors Dignity, Integrates Health System For Seriously Ill People And Loved Ones,” *Health Aff.* blog (Dec. 23, 2013), http://healthaffairs.org/blog/index.php?s=Advanced+Care+Model+Honors+Dignity&submit=Go.

progressive illness before hospice was a nightmare, because hospice-type care is kept out of reach until the last moments of life. 4

The inadequacies of current approaches also place a growing burden on our health care system. Hospital treatment of advanced illness absorbs a large fraction of the Medicare budget. Over one quarter of all Medicare expenditures pay for care in the last year of life, a proportion that has not changed much in 35 years.5 Research by the Centers for Medicare and Medicaid Services (CMS)6 shows that about 30 percent of this final-year spending is concentrated in the month prior to death, and 80 percent of Medicare dollars spent during that final month go toward hospital treatment. Moreover, geographic variability in expenditures bears little relationship to patient diagnoses, preferences, or other patient-related factors, but rather to supply of services and hospital beds.7 Among Medicare beneficiaries who died between 2001 and 2005, Medicare in-patient costs for the two years prior to death varied almost fourfold across hospital regions, from about $15,000 in Dubuque, Iowa to more than $57,000 in Manhattan. In New York alone, inpatient spending was highest in Manhattan ($57,360) and the Bronx ($53,716), while costs were about one-third of that level in Binghamton ($18,339) and Elmira ($19,664). 8

Most individuals facing advanced illness are not yet eligible for hospice, and many are reluctant to become “hospice patients,” often because health professionals lack skill in broaching the subject and because acceptance of hospice requires the individual to forgo regular Medicare benefits.9 For these and other reasons, hospice is often not used as effectively as it might be. Although it was conceived as an alternative to hospitalization, hospice today often amounts to a brief final addendum to a long siege of aggressive inpatient care.10

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4 Id. at 2-5.


6 http://healthaffairs.org/blog/author/stuart.


8 Id., at 32


The concept of “terminal condition” as a useful clinical or policy trigger for care has failed. Clinically, prognoses remain ambiguous even very close to death. For example, in one study of persons dying of heart failure, the median length of life prognosis on the day before death was a 50-50 chance of living another six months. The timing of death is not precise. Good care for the dying requires taking care of many who will live for a long time with their serious illness. Accordingly, this resolution adopts the terminology of “advanced illness,” as defined above, rather than focusing on terminal condition or end of life. Advanced illness spans the progression from chronic to end-of-life care.

The resolution reflects an emerging model policy framework for access to care by persons with advanced illness. Pilots of this model have been shown to pay off in better person-centered care and in savings to Medicare. Research published by the Agency for Healthcare Research and Quality and in journals such as Health Affairs and the Cleveland Clinic Journal of Medicine has found that prototypes such as Aetna’s Compassionate Care and Sutter Health’s Advanced Illness Management (AIM) achieve excellent patient, family and physician satisfaction scores with savings of over $2,000 per program enrollee per month. Savings are produced, not by cutting or denying services, but by providing a new kind of care management and informed decision-making to ensure that personal choice drives treatment.

A growing body of research supports the principles detailed in this resolution, including analyses done by the Institute of Medicine, National Academy of Social Insurance, the Urban Joanne Lynn, “Living Long in Fragile Health: The New Demographics Shape End of Life Care,” Hastings Center Rep. Special Report S14-8 (2005).


Randall Krakauer, et al., “Opportunities To Improve The Quality Of Care For Advanced Illness,” 28 Health Aff. 1357-1359 (Sep./Oct. 2009), http://content.healthaffairs.org/content/28/5/1357.abstract

Sutter Health Advanced Illness Management (AIM) program, see: www.sutterhealth.org/quality/focus/advanced-illness-management.html

IOM, supra n. 3.

Institute, the Centers for Disease Control and Prevention, and America’s Health Insurance Plans (AHIP).

What this Resolution Does

The resolution is based upon elements identified in existing innovative models of advanced care in the literature that have been shown to work. Their key elements are reflected in the principles and policy framework articulated both by the Coalition to Transform Advanced Care (C-TAC) and the Institute of Medicine. C-TAC is a diverse alliance of more than 100 patient and consumer advocacy groups, health care professionals and providers, private sector stakeholders, faith-based organizations, and health care payers with the mission to help provide all Americans, especially the sickest and most vulnerable, with comprehensive, high quality, person- and family-centered care that is consistent with their goals and values and honors their dignity.

The resolution promotes the following:

1. Finance and payment mechanisms that support access to person-centered care coordination and care management across all care settings, providers, medical conditions, and time.

Care options are determined more by various payment incentives and resources available than by the personal goals of individuals, families, and caregivers. The current fee-for-service payment method does not encourage efficient use of services or proper care coordination and lacks concepts of shared risk and shared accountability, thereby encouraging reimbursement for quantity over quality.

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22 Among C-TACs members are: AARP, Alzheimer’s Association, American Academy of Hospice and Palliative Medicine (AAHPM), American Academy of Nursing (AAN), American Cancer Society, American Cancer Society Cancer Action Network, American Diabetes Association, American Heart Association, American Hospital Association, American Society of Clinical Oncology (ASCO), The Arc of the United States, Association of American Medical Colleges (AAMC), Institute of Medicine (IOM), LeadingAge, National Academy of Elder Law Attorneys (NAELA), National Center for Medical-Legal Partnership, National Hospice and Palliative Care Organization (NHPCO), National Partnership for Women & Families, UCLA Healthcare Ethics Center, and the Visiting Nurse Associations of America.

23 Jack Hadley, et al., “Factors Associated with Geographic Variation in Cost per Episode of Care for Three Medical Conditions,” 4 Health Econ Rev. 8 (2014); also see Wennberg, supra, n. 7.
isolate episodes of care over time, such that providers may treat recurring medical events in isolation of one another, resulting in repeated tests and other diagnostic work. There is little incentive to integrate treatment over the course of time in order to better treat the whole person, rather than discrete problems. Multiple promising initiatives have been underway under the CMS Center for Medicare and Medicaid Innovation but the evidence base for effective finance and payment mechanism is still at an early stage.24

Care coordination and care management that reaches across care settings, treatments and provides continuity over time has been shown to be an essential component of quality chronic care.25 It can be provided through multiple modalities, but its success depends on its engagement with the patient and its reach across time, place, and treatment.26

The IOM’s recent Dying in America report recommends “financial incentives for...
- Medical and social support services that decrease the need for emergency room and acute care services,
- Coordination of care across settings and providers (from hospital to ambulatory settings as well as home and community).

The IOM report also directly addresses the need for person-centered care recommending that it “be seamless, high-quality, integrated, patient-centered, family-oriented, and consistently accessible around the clock.”27

Patient-centeredness is one of the six key elements of a well-functioning health care system, defined by the Institute of Medicine in its 2001 landmark report, Crossing the Quality Chasm, it defined patient centered as “providing care that is respectful of and responsive to individual patient preferences, needs, and values and ensuring that patient values guide all clinical decisions.”28 It further elaborated on several dimensions of


26 Id.

27 IOM, supra n. 3, at 2-45.

patient-centered care: (1) respect for patients’ values, preferences, and expressed needs; (2) coordination and integration of care; (3) information, communication, and education; (4) physical comfort; (5) emotional support—relieving fear and anxiety; and (6) involvement of family and friends. The concept has become a pivotal precept in health systems reform and has also been incorporated in Medicaid regulations for home and community based services.

2. Advance care planning through counseling, disclosure and meaningful discussion of prognosis, goals of care, personal values, and treatment preferences, including planning for family caregivers’ needs.

Effective advance care planning depends on an ongoing, informed, shared decision making process among the patient, family, and providers. At its best it takes place within a community-wide health system that organizes itself to engage patients and those closest to them in discussion of their values and their healthcare goals. Care plans are recorded and documented so that all health providers have access to them and know how to use them to provide the right treatment at the right time. The ultimate goal is to make sure that patients receive just the treatment they want based on informed decisions and to avoid over- or under- treatment.

Planning models based on this framework have been shown to effectively elicit and document patient goals of care and preferences and comply with them in the final stages of the patient’s life. The IOM describes the ideal model as a “Life-Cycle Model of Advance Care Planning” beginning at adulthood as part of primary care and continuing through changing health and life circumstances, diagnoses of chronic conditions, declining health, and one’s final stage of life. The discussion changes according to the stage.

29 Id., at 49
30 42 C.F.R. § 441.725
31 Institute of Medicine, National Academy of Sciences, Approaching Death: Improving Care at the End of Life 68-72, Marilyn J. Field & Christine K. Cassel, eds. (1997).
33 Id.
35 IOM, supra, at 3-52 to 3-54.
3. Access to palliative care, community-based supportive services, and caregiver support to enable persons with advanced illness to remain in the home and community in accord with their preferences and needs.

The DHHS Centers for Medicare & Medicaid Services (CMS) and the National Quality Forum (NQF) both provide a definition of palliative care, used to characterize palliative care in the United States:

Palliative care means patient and family-centered care that optimizes quality of life by anticipating, preventing, and treating suffering. Palliative care throughout the continuum of illness involves addressing physical, intellectual, emotional, social, and spiritual needs and to facilitate patient autonomy, access to information, and choice.36

The following features characterize palliative care philosophy and delivery:

- Care is provided and services are coordinated by an interdisciplinary team;
- Patients, families, palliative and non-palliative health care providers collaborate and communicate about care needs;
- Services are available concurrently with or independent of curative or life-prolonging care;
- Patient and family hopes for peace and dignity are supported throughout the course of illness, during the dying process, and after death.
- Palliative care is provided by a team of doctors, nurses and other specialists who work together with a patient’s other doctors to provide an extra layer of support. It is appropriate at any age and at any stage in a serious illness and can be provided along with curative treatment.37

Most people with advanced illness prefer to remain at home and, when the time comes, to die at home.38 Thus, access to palliative care in the community is essential,39 along with community-based supportive services to enable the individual to remain in the


37 Id.


39 Barbara Gomes, N. Calanzani & I.J. Higginson, “Benefits and Costs of Home Palliative Care Compared with Usual Care for Patients with Advanced Illness and Their Family Caregivers,” 311(1) JAMA, 1060-1 (March 12, 2014).
community and to help family caregivers who provide the majority of care to family members with disabilities. Palliative care has also been shown to increase patient and family satisfaction with care, lower costs, and, in some cases, increase longevity for dying patients.

4. Expanded research to improve care delivery and payment practices that will benefit individuals and families facing advanced illness.

Pay-for-quality initiatives have become an increasingly important policy strategy for improving quality performance and reducing health care costs in the United States. This trend in health quality requires meaningful and feasible quality measures. While some measures of quality exist for homebound elders and individuals in hospice programs, a great gap still exists in developing measures that capture the experience of the advanced care population across care settings, across providers, and over time.

There has been progress, most notably through the National Quality Forum (NQF) which in 2012 released its report endorsing 14 measures for accountability and quality improvement in palliative and end of life care, but much still needs to be done. NQF has a current project to review potential measures of person- and family-centered care, including health-related quality of life, functional status, and experience with care.

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40 AARP Public Policy Institute, Beyond 50.09 Chronic Care: A Call to Action for Health Reform (March 2009), http://www.aarp.org/health/medicare-insurance/info-03-2009/beyond_50_hcr.html


46 National Quality Forum, Palliative Care and End-of-Life Care Measures (February 2012), http://www.qualityforum.org/Publications/2012/04/Palliative_Care_and_End-of-Life_Care_e2%80%94A_Consensus_Report.aspx

has also been attempting to identify appropriate measures for care coordination, which is especially challenging because it is a complex, multi-dimensional concept. 48

5. A strong health care workforce educated and equipped with the clinical and social skills to serve people with advanced illness and their families and caregivers.

The existing workforce is insufficient to care adequately for the growing number of Americans with advanced illness for several reasons including:

- A pending crisis in geriatric workforce capacity. 49 Looming shortages of nurses, primary care physicians, chaplains and other spiritual advisors, direct care workers, and social workers threatens the care of individuals with advanced illness. This will place increased burden on family caregivers, who currently provide the vast majority of long-term care and, increasingly, complex care with inadequate training. 50
- Existing Medicare and Medicaid regulations and payment systems often limit providers from optimizing efficiencies, using emerging technologies fully, and enabling interdisciplinary teams to provide appropriate supportive care to individuals and families living with advanced illness, especially for individuals who are eligible under both Medicare and Medicaid (“dual eligible”). 51
- Advanced illness focused training and protocols are lacking. There is little communication among health care providers, especially across care settings, and little incentive to coordinate services with other providers. In addition, care professionals need training in the provision of basic caregiving and supportive services that can be helpful to individuals with advanced illness and avoid adverse and unwanted health outcomes (e.g., person-centered decision-making skills, care planning and transitions, palliative care knowledge and skills, medication management, etc.). 52


50 Christine T. Kovner, Mathy Mezey & Charlene Harrington, “Who Cares For Older Adults? Workforce Implications Of An Aging Society,” 21 Health Aff. 578-89 (September 2002), http://content.healthaffairs.org/content/21/5/78.abstract?sid=7f05b4e-148f-42cc-8bd3-98ea97076607; see also, AARP Public Policy Institute, Center to Champion Nursing in America, Creating a 21st Century Nursing Workforce to Care for Older Americans: Modernizing Medicare Support for Nursing Education (2009), http://assets.aarp.org/rgcenter/ppi/health-care/twentyfirstcenturynursing.pdf

51 IOM, supra n. 3, at 5-50 to 5-52; Harris Meyer, “The Coming Experiments In Integrating and Coordinating Care For ‘Dual Eligibles’,” 31 Health Aff. 1151-1155 (June 2012), http://content.healthaffairs.org/content/31/6/1151.abstract?sid=04e3239a-d327-4f69-8891-9a7bb7ffbd09.

One of the key recommendations of the IOM *Dying in America* report states: Educational institutions, credentialing bodies, accrediting boards, state regulatory agencies, and health care delivery organizations should establish the appropriate training, certification, and/or licensure requirements to strengthen the palliative care knowledge and skills of all clinicians who care for individuals with advanced serious illness who are nearing the end of life.53

6. **Health information technology that promotes advanced care planning and effective information sharing across time, place, and provider.**

Health and health information technologies hold great promise in ensuring the quality and efficiency of care delivery systems of the future for individuals with advanced illness. Such technologies can improve communication among individuals, medical providers, home and community-based services, and family caregivers to ensure more efficient integration between current “silos” of services. Paper records have reinforced these silos over both place and time, because they are so tied to their physical location and so vulnerable to loss and disorganized accumulation over time. Information technology efforts must also include the development of standards, protocols, and incentives to ensure its quality and efficacy across settings and providers.54

Consistent with this position is the IOM recommendation urging policy and payment systems to:

require the use of interoperable electronic health records that incorporate advance care planning to improve communication of individuals’ wishes across time, settings, and providers, documenting (1) the designation of a surrogate/decision maker, (2) patient values and beliefs and goals for care, (3) the presence of an advance directive, and (4) the presence of medical orders for life-sustaining treatment for appropriate populations.55

**Need for ABA Action**

Comprehensive, high-quality, person- and family- centered care that is consistent with one’s goals and values and honors their dignity is an issue challenging the well-being and stability of every family with aging loved ones facing advanced and eventually fatal illness. Such access is a human rights issue as well as a clinical and social issue.56

53 IOM, supra n. 3, at 4-24.


55 IOM, supra n. 3, at 5-52.

56 "Everyone has a right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the
Congress has sought and failed to address the issue comprehensively or even incrementally. The CLASS Act, a modest voluntary social insurance program enacted as part of the Affordable Care Act, failed the test of financial viability and was eventually repealed by Congress. Concurrent with its repeal, Congress created a Commission on Chronic Care that failed to reach consensus on fundamental financing and payment frameworks for long-term care. A number of bills were introduced in the 113th Congress that address some of the elements of this resolution, but none comprehensively; and, if no Congressional action is taken, all will die at the close of 2014. These bills include the following:

- **Community Integration Act of 2014 (S. 2515)**, introduced on 6/24/14 by Sen. Tom Harkin (D-IA) -- provides coverage for both advance care planning services as well as coordination services to those with advanced illness by a hospice or other provider through an interdisciplinary team.

- **Personalize Your Care Act (H.R. 1173)**, introduced 03/14/2013 by Rep. Earl Blumenauer (D-OR) -- establishes a requirement to provide Medicare & Medicaid coverage for advance care planning consultations every five years or whenever there is a change in an individual’s health status.

- **Care Planning Act (S. 1439)**, introduced 08/01/2013 by Senator Mark Warner (D-VA) and Johnny Isakson (R-GA) - provides coverage for both advance care planning services as well as coordination services to those with advanced illness by a hospice or other provider through an interdisciplinary team.

- **Palliative Care and Hospice Education and Training Act (S. 641)**, introduced 03/21/2013 by Sen. Ron Wyden (D-OR). Identical to H.R. 1339, introduced by Rep. Eliot Engel (D-NY) -- would, among other things, award grants or contracts to establish palliative care and hospice education centers, schools, teaching hospitals, and support for Graduate Medical Education (GME) programs to teach palliative care medicine and distribute academic career awards to advanced illness practitioners.

- **Patient Centered Quality Care for Life Act (H.R. 1666)**, introduced 4/23/13 by Rep. Emanuel Cleaver (D-MO). Identical to S. 2800, introduced 9/11/14 by Mark Begich (D-AK) and Angus King (I-ME) -- requires, among other things, the convening of a

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Patient-Centered Health Care and Quality of Life Stakeholder Strategic Summit, establishes a national quality of life education and awareness grants program initiative, establishes a health care professional workforce training grants program initiative, and expands national research programs in symptom management, palliative, psychosocial, and survivorship care.

There were also at least ten bills targeting the needs of family caregivers.\(^{59}\)

### Related ABA Policy

The ABA has policy addressing certain aspects of long-term care and advance care planning. The proposed resolution is consistent with and complements related ABA policy.

A 1989 policy (89M105) supports:
- the enactment of Federal and State legislation providing a coordinated and comprehensive system of care and support for Americans of all ages with long-term care needs. Any system of long-term care should be consistent with but not limited to the following principles:
  1. Provide equitable access to care without undue financial hardship, such as impoverishing spouses or dependents;
  2. Provide procedural fairness;
  3. Provide for appropriate beneficiary choice with respect to the nature and setting for delivery of care, including institutional and home care, subject to costs and other constraints;
  4. Assure appropriate quality consistent with the principles recommended by the Institute of Medicine for nursing home care and by the American Bar Association in its 1987 resolution with respect to home care quality;
  5. Ensure responsible financing through appropriate means, which could involve a mixture of public funding and individual cost sharing.

This policy was supplemented by another adopted in 1992 (92M112), supporting:
- the adoption of legislation, regulations and other initiatives which encourage private insurance, employment related benefits and other mechanisms that will address the long-term care needs of our aging population. Such legislation, regulations, and other initiatives should include:
  1. Tax law changes and interpretations which foster, rather than restrict, the growth of private insurance, employment related benefits and other mechanism that offer benefits for long-term care;
  2. Better enforcement of existing consumer protection provisions and the possible adoption

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\(^{59}\) E.g., S.2866 & H.R. 5633, A Bill to Authorize Grants for the Support of Caregivers; S.2842, A Bill to Amend the Public Health Service Act to establish a Caregiver Corps program; H.R. 5024, Social Security Caregiver Credit Act of 2014; H.R. 4892 & S.2243, Military and Veteran Caregiver Services Improvement Act of 2014; S.1583, Mental Health Support for Veteran Families and Caregivers Act; H.R. 4122, Older Americans Act Reauthorization; H.R.3443, Streamlining Support for Veterans and Military Caregivers Act; H.R. 3672, S.O.S Veterans Caregivers Act; H.R. 3383, Caregivers Expansion and Improvement Act of 2013; H.R.5287, To amend the Internal Revenue Code of 1986 to provide a tax credit for expenses for household and elder care services necessary for gainful employment; H.R. 4145, Elder Care Tax Credit Act.
of additional measures that will protect the consumer in the sale, financing, and deliver of long-term care products and services;

3. Generally, the initiation of creative public and private options for providing, financing, and delivering long-term care, including home and community based care.

The ABA also has several policies related to health care decision-making rights, specifically the following:

- A 2008 policy supporting decision-making protocols to ensure that the wishes of patients with advanced chronic progressive illnesses are translated into visible and portable medical orders such as "Physicians Orders for Life-Sustaining Treatment (08A103).
- A 2011 policy calling for stronger efforts to expand the availability of home and community-based services as a viable long-term care option for persons with disabilities, based on the principles of the Supreme Court's 1999 Olmstead decision (11A106A).
- A 2012 policy calling for amendments to the federal Patient Self Determination Act that would strengthen patient's advance care planning rights and procedures for health care decisions (12A106A).

Finally, the ABA has a string of policies supporting universal access to health care, including policies adopted in 1990, 1994, and 2009, the last of which was adopted in support of the Affordable Care Act (09A10A).

Conclusion

Dying today is not what it used to be. Most Americans will die in old age after an extended period of decline caused by chronic conditions. Most will face a time when one or more conditions become serious enough that general health and functioning decline, treatment aimed at cure begins to lose its effect, and quality of life increasingly becomes the focus of care. This is the transition point to advanced illness and progresses through an indefinite time period until death. Within our current health “system,” there are numerous regulatory barriers – as well as clinical, social, and financial barriers – that reinforce fragmented, uncoordinated, and unsupportive care currently being delivered to the sickest and most vulnerable Americans and that require simultaneous interventions to overcome them.

This resolution sets forth six evidenced-based, system elements that together can help advance the state of the art of policy, practice, delivery systems, and payment reform to provide individuals with advanced care needs access to comprehensive, high quality care, consistent with their goals and values and which honors their dignity. Such access is a human rights issue as well as a clinical and social issue. Systems reform is always complex, necessitating engagement with all the elements described in the resolution concurrently in an integrated way.

Adoption of this resolution affords an opportunity for the ABA to reaffirm its role in raising the consciousness of policy makers about the serious needs of vulnerable populations and reminding them that access to health, long-term, and end-of-life care is a human rights as well as a clinical and social issue. The current policy resolution is entirely consistent with the history of existing ABA policies relating to access to chronic care and end of life care. Accordingly, the
Commission on Law and Aging and the Health Law Section request the House of Delegates to adopt the resolution herein.

Respectfully submitted,

David M. English, Chair
Commission on Law and Aging

Michael E. Clark, Chair
Health Law Section

February 2015
GENERAL INFORMATION FORM

Submitting Entity: Jointly by Commission on Law and Aging and the Health Law Section

Submitted By: David M. English, Chair, Commission on Law and Aging, and Michael E. Clark, Chair, Health Law Section

1. Summary of Resolution(s).
This resolution supports legislation and regulation that promotes access to and financing of high-quality, comprehensive long-term supportive services for persons with advanced illness. This is a growing population in our aging society whose needs, along with their family caregivers’ needs, have been largely unmet by current health delivery and financing systems. The resolution urges development and implementation of innovations that prioritize person-centered care planning and coordination, home-based supportive services, palliative care, expanded research in delivery practices and standards, greater workforce development, effective health information technology, and payment mechanisms that support these elements.

2. Approval by Submitting Entity.
Approved by Commission on Law and Aging on October 24, 2014.
Approved by Health Law Section Council November 2014.

3. Has this or a similar resolution been submitted to the House or Board previously?
No

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?
The ABA has existing, concordant policies that support a coordinated and comprehensive system of care and supports for Americans of all ages with long-term care needs. This policy complements those policies by targeting the special needs of individuals and families facing advanced and eventually fatal illnesses.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

6. Status of Legislation. (If applicable) There is no comprehensive pending legislation, but there are multiple bills that have addressed parts of this resolution, but all will have expired at the end of the 113th Congress in 2014 unless Congress acts.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Some of the bills introduced in the 113th Congress will likely be reintroduced in some form in the 114th Congress. The ABA will be able to comment on those bills to the extent this resolution applies. The Commission on Law and Aging also networks with many other groups that have advocated for laws and policy congruent with
this resolution. These groups include the Coalition to Transform Advanced Care, the Consumer Voice for Quality Care, AARP, the National Hospice and Palliative Care Organization, and the Center for Medicare Advocacy, among others.

8. **Cost to the Association.** (Both direct and indirect costs)
   None

9. **Disclosure of Interest.** (If applicable)
   None

10. **Referrals.**
    • Standing Committee on the Delivery of Legal Services
    • Standing Committee on Governmental Affairs
    • Standing Committee on Legal Aid and Indigent Defendants
    • Standing Committee on Pro Bono and Public Service
    • Special Committee on Bioethics and the Law
    • Commission on Disability Rights
    • Commission on Domestic and Sexual Violence
    • Commission on Homelessness and Poverty
    • Commission on Hispanic Legal Rights and Responsibilities
    • Government and Public Sector Lawyers Division
    • Section of Administrative Law and Regulatory Practice
    • Section of Dispute Resolution
    • Section of Family Law
    • Section of Individual Rights and Responsibilities
    • The Judicial Division
    • Section of Litigation
    • Section of Real Property, Probate and Trust law
    • Section of Science and Technology Law
    • Senior Lawyers Division
    • Section of State and Local Government Law
    • Section of Tort, Trial and Insurance Practice
    • Young Lawyers Division
    • National Legal Aid & Defender Association

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)
    Charlie Sabatino, Director
    ABA Commission on Law and Aging
    1050 Connecticut Ave., NW, Ste. 400
    Washington, DC 20036
    202-662-8686 (office)
    charles.sabatino@americanbar.org
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

David English, Chair, Commission on Law and Aging
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or Gregory L. Pemberton, Health Law Section Delegate
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Indianapolis, IN 46282-0200
317-236-2313 (office), 317 431-9013 (cell)
Gregory.Pemberton@icemiller.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This resolution supports legislation and regulation that promotes access to and financing of high-quality, comprehensive long-term supportive services for persons with advanced illness. This is a growing population in our aging society whose needs, along with their family caregivers’ needs, have been largely unmet by current health delivery and financing systems. The resolution urges development and implementation of innovations that prioritize person-centered care planning and coordination, home-based supportive services, palliative care, expanded research in delivery practices and standards, greater workforce development, effective health information technology, and payment mechanisms that support these elements.

2. **Summary of the Issue that the Resolution Addresses**

   Most Americans today die in old age after an extended period of decline caused by chronic conditions. Most will face a time when one or more conditions become serious enough that general health and functioning decline, treatment aimed at cure begins to lose its effect, and quality of life increasingly becomes the focus of care. This is the transition point to *advanced illness* and progresses through an indefinite time period until death. Within our current health “system,” there are numerous barriers to access to quality care – clinical, social, and financial – that reinforce fragmented, uncoordinated, and unsupportive care currently to the sickest and most vulnerable Americans and that require simultaneous interventions to overcome them.

3. **Please Explain How the Proposed Policy Position will address the issue**

   Legislative and regulatory change at the federal level, especially in Medicare and Medicaid, can change the incentives that currently encourage unwanted and sometimes harmful treatment so that, instead, they encourage person-centered care planning and coordination, home-based supportive services, palliative care, expanded research in delivery practices and standards, greater workforce development, effective health information technology, and the payment mechanisms that support these elements.

4. **Summary of Minority Views**

   None as of this writing.
RESOLVED, That the American Bar Association reapproves the following paralegal education programs: Community College of the Air Force, Paralegal Program, Maxwell AFB, AL; California State University East Bay, Paralegal Studies Program, Hayward, CA; Johnson County Community College, Legal Studies Program, Overland Park, KS; Eastern Kentucky University, Paralegal Studies Program, Richmond, KY; Suffolk University, Applied Legal Studies Program, Boston, MA; Madonna University, Paralegal Studies Program, Livonia, MI; North Hennepin Community College, Paralegal Program, Brooklyn Park, MN; Pitt Community College, Paralegal Technology Program, Greenville, NC; Bronx Community College, Paralegal Studies Program, Bronx, NY; Mercy College, Legal Studies Program, Dobbs Ferry, NY; Rhodes State College, Paralegal/Legal Studies Program, Lima, OH; University of Cincinnati, Paralegal Program, Cincinnati, OH; University of Tulsa, Paralegal Studies Program, Tulsa, OK; Lehigh-Carbon Community College, Paralegal Studies Program, Schnecksville, PA; Horry-Georgetown Technical College, Legal Assistant/Paralegal Program, Conway, SC; Volunteer State Community College, Paralegal Studies Program, Gallatin, TN; Spokane Community College, Paralegal Program, Spokane, WA and Mountwest Community and Technical College, Paralegal Studies Program, Huntington, WV.

FURTHER RESOLVED, That the American Bar Association withdraws the approval of Daymar College, Paralegal Studies Program, Owensboro, KY, at the request of the institution.

FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the August 2015 Annual Meeting of the House of Delegates for the following programs: University of Alaska Fairbanks, Paralegal Studies Program, Fairbanks, AK; Auburn University Montgomery, Paralegal Education Program, Montgomery, AL; Samford University, Division of Paralegal Studies, Birmingham, AL; University of Arkansas Fort Smith, Legal Assistance/Paralegals Program, Fort Smith, AR; Everest College Phoenix, Paralegal Program, Phoenix, AZ; Coastline Community College, Paralegal Studies Program, Fountain Valley, CA; El Camino Community College, Paralegal Studies Program, Torrance, CA; Fremont College, Paralegal Studies Program, Cerritos, CA; National University, Paralegal Studies Program, Los Angeles, CA; Pasadena City College, Paralegal Studies Program, Pasadena, CA; Santa Ana College, Paralegal Studies Program, Santa Ana, CA; University of California LA-UCLA Ext, Paralegal Training Program, Los Angeles, CA; University of California, Irvine Extension, Paralegal Certificate Program, Irvine, CA; University of California, San Diego, Legal Assistant Training Program, La Jolla, CA; University of California, Santa Barbara, Paralegal Professional Certificate Program, Santa Barbara, CA; Quinnipiac University, Legal Studies Program, Hamden, CT; Nova Southeastern University, Paralegal Studies Program, Fort Lauderdale, FL; Seminole State College of Florida fka Seminole Community College, Legal Assistant/Paralegal
38 Program, Sanford, FL; Clayton State University, Legal Studies Program, Morrow, GA;
39 Northwestern College fka Northwestern Business College, Institute of Legal Studies,
40 Bridgeview, IL; Robert Morris University, Chicago, Paralegal Studies Program, Chicago, IL;
41 Robert Morris University, Springfield, Paralegal Studies Program, Springfield, IL; Rockford
42 Career College fka Rockford Business College, Paralegal Program, Rockford, IL; William
43 Rainey Harper College, Paralegal Studies Program, Palatine, IL; Vincennes University, Paralegal
44 Program, Vincennes, IN; Sullivan University, Louisville, Institute for Legal Studies, Louisville,
45 KY; University of Louisville, Paralegal Studies Program, Louisville, KY; Tulane University,
46 Paralegal Studies Program, New Orleans, LA; Stevenson University fka Villa Julie College,
47 Paralegal Program, Owings Mills, MD; Baker College of Auburn Hills, Paralegal Program,
48 Auburn Hills, MI; Eastern Michigan University, Legal Assisting Program, Ypsilanti, MI; Henry
49 Ford Community College, Paralegal Studies Program, Dearborn, MI; Minnesota State University
50 Moorhead, Paralegal Program, Moorhead, MN; Missouri Western State University, Legal
51 Studies Program, St. Joseph, MO; Webster University, Legal Studies Program, St. Louis, MO;
52 University of Southern Mississippi, Paralegal Studies Program, Hattiesburg, MS; University of
53 Great Falls, Paralegal Studies Program, Great Falls, MT; University of Montana – Missoula,
54 Paralegal Studies Program, Missoula, MT; College of Saint Mary, Paralegal Studies Program,
55 Omaha, NE; Metropolitan Community College, Legal Assistant Program, Omaha, NE;
56 Brookdale Community College, Paralegal Studies Program, Lincroft, NJ; Fairleigh Dickinson
57 University, Paralegal Studies Program, Madison, NJ; Mercer County Community College,
58 Paralegal Program, Trenton, NJ; Middlesex County College, Legal Studies Department, Edison,
59 NJ; Raritan Valley Community College, Paralegal Studies Program, Somerville, NJ; Genesee
60 Community College, Paralegal Studies Program, Batavia, NY; Long Island University Brooklyn,
61 Paralegal Studies Program, Brooklyn, NY; Nassau Community College, Paralegal Program,
62 Garden City, NY; New York City College of Technology, Paralegal Studies Program, Brooklyn,
63 NY; Queen’s College, Paralegal Studies Program, Flushing, NY; St. John’s University, Paralegal
64 Studies Program, Jamaica, NY; Suffolk County Community College, Paralegal Studies Program,
65 Selden, NY; Capital University Law School, Paralegal Program, Columbus, OH; Cuyahoga
66 Community College, Paralegal Studies/Legal Nurse Consulting Program, Parma, OH; Kent State
67 University, Paralegal Studies Program, Kent, OH; Sinclair Community College, Paralegal
68 Program, Dayton, OH; University of Toledo (Scott Park), Paralegal Studies Program, Toledo,
69 OH; Ursuline College, Legal Studies Program, Pepper Pike, OH; East Central University, Legal
70 Studies Program, Ada, OK; Central Pennsylvania College, Paralegal Program, Summerdale, PA;
71 Delaware County Community College, Paralegal Studies Program, Media, PA; Harrisburg Area
72 Community College, Paralegal Studies Program, Harrisburg, PA; Orangeburg-Calhoun
73 Technical College, Paralegal Program, Orangeburg, SC; Technical College of the Low Country,
74 Paralegal Program, Beaufort, SC; Western Dakota Technical Institute, Paralegal Program, Rapid
75 City, SD; Walters State Community College, Paralegal Studies Program, Morristown, TN;
76 Kaplan College, General Practice Paralegal Program, Dallas, TX; Lamar State College, Paralegal
77 Studies Program, Port Arthur, TX; Marymount University, Paralegal Studies Program,
78 Arlington, VA; Tacoma Community College, Paralegal Program, Tacoma, WA; Northeast
79 Wisconsin Technical College, Paralegal Studies Program, Green Bay, WI; Casper College,
80 Paralegal Studies Program, Casper, WY; and Laramie County Community College, Paralegal
81 Studies Program, Cheyenne, WY.
REPORT

In August, 1973, the House of Delegates of the American Bar Association adopted the Guidelines for the Approval of Legal Assistant Education Programs as recommended by the Special Committee on Legal Assistants, now known as the Standing Committee on Paralegals. The Committee subsequently developed supporting evaluative criteria and procedures for seeking American Bar Association approval. Applications for approval were accepted formally beginning in the Fall of 1974.

Programs applying for approval or reapproval are required to submit a self-evaluation report which provides a comprehensive description of the program, including but not limited to the following areas: organization and administration, financial support, curriculum, faculty, admissions, student services, advisory committee, library, and physical plant. An on-site visit to the program is conducted by representatives of the Association if the contents of the self-evaluation report indicate compliance with the ABA Guidelines.

No applications for initial approval are submitted in this report. However, for an initial approval, the inspection team is chaired by a member of the Approval Commission of the Standing Committee on Paralegals, or a specially designated past commissioner, and consists of a lawyer, an experienced paralegal or a director of another institution's program. On a reapproval visit, the team, which is again chaired by a member of the Approval Commission, or a specially designated past commissioner, includes two of the previously mentioned groups. The purpose of the on-site visit is to verify the information provided in the self-evaluation report and to acquire supplementary information helpful to making an evaluation and which can only be obtained through the person-to-person contact and the observation the visit affords. The visit is conducted over a one and one-half day period and consists of a series of meetings with the advisory committee, students, faculty and other individuals involved to a lesser extent and in some aspect of the program, such as the registrar, financial officer, placement coordinator and admissions and counseling staff. The team also observes legal specialty classes in session and may inspect various program data, such as detailed curriculum materials, admission and placement records, student evaluations of faculty members, and courses.

Following the on-site visit a written report is prepared by team members. The Approval Commission reviews the evaluation report and makes its recommendations to the Standing Committee on Paralegals, which in turn, submits its recommendation to the American Bar Association House of Delegates for final action.

The following schools were recently evaluated for reapproval. Having demonstrated compliance with the Guidelines for the Approval of Paralegal Education Programs, the Standing Committee on Paralegals recommends that reapproval be granted to the following programs:

Community College of the Air Force, Paralegal Program, Maxwell AFB, AL
Community College of the Air Force is a two-year community college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Applied Science degree in Paralegal Studies.
California State University East Bay, Paralegal Studies Program, Hayward, CA
California State University East Bay is a four-year university accredited by the Western Association of Schools and Colleges. The university offers a Certificate in Paralegal Studies.

Johnson County Community College, Legal Studies Program, Overland Park, KS
Johnson County Community College is a two-year community college accredited by the North Central Association of Colleges and Schools. The college offers an Associate of Arts degree, a Certificate in Paralegal Studies, and a Legal Nurse Consulting Certificate.

Eastern Kentucky University, Paralegal Studies Program, Richmond, KY
Eastern Kentucky University is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers a Bachelor of Arts degree, an Associate of Applied Science degree, a Minor, and a Certificate in Paralegal Studies.

Suffolk University, Applied Legal Studies Program, Boston, MA
Suffolk University is a four-year university accredited by the New England Association of Colleges and Schools. The university offers a Bachelor of Science degree, a Bachelor of Arts degree, an Associate of Arts degree, and a Certificate in Paralegal Studies.

Madonna University, Paralegal Studies Program, Livonia, MI
Madonna University is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers a Bachelor of Science degree, an Associate of Science degree, a Certificate in Paralegal Studies, and a Nurse Paralegal Certificate.

North Hennepin Community College, Paralegal Program, Brooklyn Park, MN
North Hennepin Community College is a two-year community college accredited by the North Central Association of Colleges and Schools. The college offers an Associate of Science degree and a Certificate in Paralegal Studies.

Pitt Community College, Paralegal Technology Program, Greenville, NC
Pitt Community College is a two-year community college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Applied Science degree and a Certificate in Paralegal Studies.

Bronx Community College, Paralegal Studies Program, Bronx, NY
Bronx Community College is a two-year community college accredited by the Middle States Association of Colleges and Schools. The college offers an Associate of Applied Science degree in Paralegal Studies, an Associate of Applied Science degree in Paralegal Studies with a Lay Advocate Option, and a Certificate in Paralegal Studies.

Mercy College, Legal Studies Program, Dobbs Ferry, NY
Mercy College is a four-year college accredited by the Middle States Association of Colleges and Schools. The college offers a Bachelor of Science degree with a Specialization in Paralegal Studies.
Rhodes State College, Paralegal/Legal Studies Program, Lima, OH
Rhodes State College is a two-year college accredited by the North Central Association of Colleges and Schools. The college offers an Associate of Applied Business degree and a Certificate in Paralegal Studies.

University of Cincinnati, Paralegal Program, Cincinnati, OH
The University of Cincinnati is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers a Bachelor of Science degree and a Certificate in Paralegal Studies.

University of Tulsa, Paralegal Studies Program, Tulsa, OK
The University of Tulsa is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers a Certificate in Paralegal Studies.

Lehigh-Carbon Community College, Paralegal Studies Program, Schnecksville, PA
Lehigh-Carbon Community College is a two-year community college accredited by the Middle States Association of Colleges and Schools. The college offers an Associate of Applied Science degree, a Certificate in Paralegal Studies, and a collaborative program with Kutztown University for completion of a Bachelor of Arts or Bachelor of Science degree in another field with a Minor in Paralegal Studies.

Horry-Georgetown Technical College, Legal Assistant/Paralegal Studies Program, Conway, SC
Horry-Georgetown Technical College is a two-year technical college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Applied Science degree and a Certificate in Paralegal Studies.

Volunteer State Community College, Paralegal Studies Program, Gallatin, TN
Volunteer State Community College is a two-year community college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Science degree, and Associate of Applied Science degree, and a Certificate in Paralegal Studies.

Spokane Community College, Paralegal Program, Spokane, WA
Spokane Community College is a two-year community college accredited by the Northwest Association of Schools and Colleges. The college offers an Associate of Applied Science degree, a Certificate in Paralegal Studies, and a Legal Nurse Consulting Certificate.

Mountwest Community and Technical College, Paralegal Studies Program, Huntington, WV
Mountwest Community and Technical College is a two-year community and technical college accredited by the North Central Association of Colleges and Schools. The college offers an Associate of Applied Science degree.

Applications for reapproval have been filed by the following schools and are currently being evaluated. Until the evaluation process has been completed, the Committee recommends that the term of approval for each program be extended until the 2015 Annual Meeting of the American Bar Association House of Delegates.
University of Alaska Fairbanks, Paralegal Studies Program, Fairbanks, AK;
Auburn University Montgomery, Paralegal Education Program, Montgomery, AL;
Samford University, Division of Paralegal Studies, Birmingham, AL;
University of Arkansas Fort Smith, Legal Assistance/Paralegal Program, Fort Smith, AR;
Everest College Phoenix, Paralegal Program, Phoenix, AZ;
Coastline Community College, Paralegal Studies Program, Fountain Valley, CA;
El Camino Community College, Paralegal Studies Program, Torrance, CA;
Fremont College, Paralegal Studies Program, Cerritos, CA;
National University, Paralegal Studies Program, Los Angeles, CA;
Pasadena City College, Paralegal Studies Program, Pasadena, CA;
Santa Ana College, Paralegal Studies Program, Santa Ana, CA;
University of California LA-UCLA Ext, Paralegal Training Program, Los Angeles, CA;
University of California, Irvine Extension, Paralegal Certificate Program, Irvine, CA;
University of California, San Diego, Legal Assistant Training Program, La Jolla, CA;
University of California, Santa Barbara, Paralegal Professional Certificate Program, Santa Barbara, CA;
Quinnipiac University, Legal Studies Program, Hamden, CT;
Nova Southeastern University, Paralegal Studies Program, Fort Lauderdale, FL;
Seminole State College of Florida fka Seminole Community College, Legal Assistant/Paralegal Program, Sanford, FL;
Clayton State University, Legal Studies Program, Morrow, GA;
Northwestern College fka Northwestern Business College, Institute of Legal Studies, Bridgeview, IL;
Robert Morris University, Chicago, Paralegal Studies Program, Chicago, IL;
Robert Morris University, Springfield, Paralegal Studies Program, Springfield, IL;
Rockford Career College fka Rockford Business College, Paralegal Program, Rockford, IL;
William Rainey Harper College, Paralegal Studies Program, Palatine, IL;
Vincennes University, Paralegal Program, Vincennes, IN;
Sullivan University, Louisville, Institute for Legal Studies, Louisville, KY;
University of Louisville, Paralegal Studies Program, Louisville, KY;
Tulane University, Paralegal Studies Program, New Orleans, LA;
Stevenson University fka Villa Julie College, Paralegal Program, Owings Mills, MD;
Baker College of Auburn Hills, Paralegal Program, Auburn Hills, MI;
Eastern Michigan University, Legal Assisting Program, Ypsilanti, MI;
Henry Ford Community College, Paralegal Studies Program, Dearborn, MI;
Minnesota State University Moorhead, Paralegal Program, Moorhead, MN;
Missouri Western State University, Legal Studies Program, St. Joseph, MO;
Webster University, Legal Studies Program, St. Louis, MO;
University of Southern Mississippi, Paralegal Studies Program, Hattiesburg, MS;
University of Great Falls, Paralegal Studies Program, Great Falls, MTY;
University of Montana - Missoula, Paralegal Studies Program, Missoula, MT;
College of Saint Mary, Paralegal Studies Program, Omaha, NE;
Metropolitan Community College, Legal Assistant Program, Omaha, NE;
Brookdale Community College, Paralegal Studies Program, Lincroft, NJ; Fairleigh Dickinson University, Paralegal Studies Program, Madison, NJ; Mercer County Community College, Paralegal Program, Trenton, NJ; Middlesex County College, Legal Studies Department, Edison, NJ; Raritan Valley Community College, Paralegal Studies Program, Somerville, NJ; Genesee Community College, Paralegal Studies Program, Batavia, NY; Long Island University Brooklyn, Paralegal Studies Program, Brooklyn, NY; Nassau Community College, Paralegal Program, Garden City, NY; New York City College of Technology, Paralegal Studies Program, Brooklyn, NY; Queen’s College, Paralegal Studies Program, Flushing, NY; St. John’s University, Paralegal Studies Program, Jamaica, NY; Suffolk County Community College, Paralegal Studies Program, Selden, NY; Capital University Law School, Paralegal Program, Columbus, OH; Cuyahoga Community College, Paralegal Studies/Legal Nurse Consulting Program, Parma, OH; Kent State University, Paralegal Studies Program, Kent, OH; Sinclair Community College, Paralegal Program, Dayton, OH; University of Toledo (Scott Park), Paralegal Studies Program, Toledo, OH; Ursuline College, Legal Studies Program, Pepper Pike, OH; East Central University, Legal Studies Program, Ada, OK; Central Pennsylvania College, Paralegal Program, Summerdale, PA; Delaware County Community College, Paralegal Studies Program, Media, PA; Harrisburg Area Community College, Paralegal Studies Program, Harrisburg, PA; Orangeburg-Calhoun Technical College, Paralegal Program, Orangeburg, SC; Technical College of the Low Country, Paralegal Program, Beaufort, SC; Western Dakota Technical Institute, Paralegal Program, Rapid City, SD; Walters State Community College, Paralegal Studies Program, Morristown, TN; Kaplan College, General Practice Paralegal Program, Dallas, TX; Lamar State College, Paralegal Studies Program, Port Arthur, TX; Marymount University, Paralegal Studies Program, Arlington, VA; Tacoma Community College, Paralegal Program, Tacoma, WA; Northeast Wisconsin Technical College, Paralegal Studies Program, Green Bay, WI; Casper College, Paralegal Studies Program, Casper, WY; and Laramie County Community College, Paralegal Studies Program, Cheyenne, WY.

Respectfully submitted,
Laura C. Barnard, Chair
Standing Committee on Paralegals
February 2015
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Paralegals
Submitted By: Laura C. Barnard, Chair

1. **Summary of Resolution(s).**
   
   Resolves that the House of Delegates grants reapproval to eighteen paralegal education programs, withdraws the approval of one program at the request of the institution, and extends the term of approval to seventy-three paralegal education programs.

2. **Approval by Submitting Entity.**
   
   October, 2014

3. **Has this or a similar resolution been submitted to the House or Board previously?**
   
   This resolution has not been previously submitted.

4. **What existing Association policies are relevant to this resolution and how would they be affected by its adoption?**
   
   This resolution supports the Guidelines for the Approval of Paralegal Education Programs, as adopted by the House of Delegates.

5. **What urgency exists which requires action at this meeting of the House?**
   
   Action is timely.

6. **Status of Legislation.** (If applicable.)
   
   N/A

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**
   
   Approved programs are notified of the action of the House of Delegates by the Standing Committee on Paralegals. The programs are monitored for compliance during the approval term by the Standing Committee.

8. **Cost to the Association.** (Both direct and indirect costs.)
   
   None
9. Disclosure of Interest. (If applicable.)

N/A

10. Referrals.

None

11. Contact Person. (Prior to the meeting.)

Peggy C. Wallace, Staff Counsel
Standing Committee on Paralegals
American Bar Association
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(312) 988-5618

12. Contact Person. (Who will present the report to the House.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Standing Committee on Paralegals resolve (s) that the House of Delegates grants reapproval to eighteen programs, withdraws the approval of one program, and extends the term of approval of seventy-three programs.

2. Summary of the issue which the Resolution Addresses

The programs recommended for reapproval in the enclosed report meet the Guidelines for the Approval of Paralegal Education Programs.

3. An explanation of how the proposed policy position Will Address the Issue

The programs recommended for reapproval in this report have followed the procedures required by the Association and are in compliance with the Guidelines for the Approval of Paralegal Education Programs.

4. A summary of any minority views or opposition which have been identified

No other positions on this resolution have been taken by other Association entities, affiliated organizations or other interested groups.
RESOLUTION

RESOLVED, That the American Bar Association reaccredits for an additional five-year term the following designated specialty certification programs for lawyers:

Civil Trial Advocacy program of the National Board of Trial Advocacy, a division of the National Board of Legal Specialty Certification; and

Social Security Disability Law program of the National Board of Trial Advocacy, a division of the National Board of Legal Specialty Certification.
REPORT

Background and Synopsis of the Recommendations

At the 1993 Midyear Meeting, via Resolution 105, the House adopted Standards for Accreditation of Specialty Certification Programs For Lawyers and delegated to the Standing Committee on Specialization the task of evaluating programs sponsored by organizations that apply to the ABA for accreditation, and making recommendations to the House of Delegates about the periodic renewal of accreditation.

The adoption of the Standards in February, 1993, followed an August, 1992, House resolution (Resolution 128) requesting that the Association develop standards for accrediting private organizations that certify lawyers as specialists, and that the Association establish and maintain a mechanism to accredit such organizations that meet those standards. The 1992 resolution affirmed that a national accreditation mechanism administered by the Association according to uniform standards would be an efficient and effective means of dealing with a multiplicity of organizations that are offering, or planning to offer, certification programs.

At the 1999 Annual Meeting, via Resolution 107A, the House extended the initial period of accreditation approved in the Standards from three to five years. In addition, the House lengthened the period of reaccreditation from every third year to every fifth year.

At the 2015 ABA Midyear Meeting the period of accreditation for two of the accredited legal specialty certification programs of the National Board of Legal Specialty Certification will expire: (1) the Civil Trial Advocacy program of the National Board of Trial Advocacy ("NBTA"), a division of the National Board of Legal Specialty Certification (the accreditation period of this program was extended for six months at the 2014 Annual Meeting); and (2) the Social Security Disability Law Advocacy program of the NBTA.

The application of the Civil Trial Advocacy program was given extended consideration (necessitating the extension of that program’s accreditation period) principally because the NBTA has been granting Civil Trial Advocacy certification to applicants who pass the examinations of similar certification programs administered by the state bars of Florida (Civil Trial) and Texas (Civil Trial Law and Personal Injury Law), and the Supreme Court of New Jersey (Civil Trial), necessitating the Standing Committee’s review of those state programs’ examinations. The volume of examinations to be reviewed for that program’s application was thus far greater than for other programs’ applications.

On the advice of the accreditation review panels and examination reviewers whom the Standing Committee appointed for these applications, the Standing Committee is here recommending reaccreditation of both the NBTA’s Civil Trial Advocacy and Social Security Disability Law programs for additional five-year terms. On the advice of its exam reviewers, however, the Standing Committee has advised the NBTA that there were topical dissimilarities between the Texas Bar’s Civil Trial Law examination and NBTA’s own Civil Trial Advocacy examinations, and that the NBTA should no longer accept passage of the Texas Bar’s Civil Trial
Law examination for certification of applicants to NBTA’s Civil Trial Advocacy program without further review and approval of the Standing Committee.

Requirements for Re-accreditation in the ABA Standards; Description of the Applicants

Sections 5.01 and 5.02 of the Standards require that “a certifying organization shall be required to apply for re-accreditation prior to the end of the fifth year of its initial accreditation period and every five years thereafter,” and that re-accreditation “shall be granted” if the certifying organization shows that the program continues to comply with the Standards’ detailed accreditation requirements. (Those accreditation requirements are set out in an endnote to this Report.) The NBTA complied with those requirements.

Reaccreditation and Evaluation Procedures for the NBTA Certification Programs

In evaluating the NBTA programs recommended for reaccreditation here, the Standing Committee followed the Rules it adopted on March 2, 1993, as amended on April 24, 1993, June 27, 1995, January 5, 1996, July 8, 1999, July 21, 2001, November 1, 2002, November, 2006, and June, 2013. The NBTA filed an application for reaccreditation of the Civil Trial Advocacy program with the Standing Committee in the summer of 2013, and filed an application for reaccreditation of the Social Security Disability Law program in the spring of 2014. The applications were accompanied by payment of a reaccreditation fee for the specialty certification programs for which the applicants sought reaccreditation.

In order to ensure that each of the programs continues to comply with ABA Standards, the Standing Committee requires that the following accompany all applications:

i. Current versions of the applicant's governing documents, including articles of incorporation, bylaws, and resolutions of the governing bodies of the applicant or any parent organization, which resolutions relate to the standards, procedures, guidelines or practices of the applicant’s certification programs;

ii. Biographical summaries of members of the governing board, senior staff and members of advisory panels, certification committees, examination boards and like entities involved with the certification process, including specific information concerning the degree of involvement in the specialty area of persons who review and pass upon applications for certification;

iii. All materials furnished to lawyers seeking certification, including application forms, booklets or pamphlets describing the certification program, peer reference forms, rules and procedures, evaluation guides and any other information furnished to the public or the media regarding the certification process;

iv. A copy of the recent examinations given to applicants for specialty certification, along with a description of how the exam was developed, conducted and reviewed; a description of the grading standards; and the names of persons responsible for determining pass/fail standards.
Because in addition to passage of the examinations it administers itself for the Civil Trial Advocacy program, the NBTA had accepted applicants’ passage of examinations administered by the Florida Bar’s Board of Legal Specialization in Civil Trial Law, the New Jersey Supreme Court’s Board on Attorney Certification in Civil Trial Law, and the Texas Board of Legal Specialty Certification in Civil Trial Law and Personal Injury Law. Recent examinations from all of these programs were made available, on a confidential basis, for review by examination reviewers appointed by the Standing Committee.

**Accreditation Review Panelists:**

The Accreditation Review Panels appointed by the Standing Committee consisted of a chair and two other members, as well as the appointed examination reviewers. Applicants were provided notice, in writing, of the names and affiliations of the members of the Accreditation Review Panel and the examination reviewers. The reaccreditation procedures provide certifying organizations the opportunity to object for cause to the appointment of examination reviewer. The Accreditation Review Panel members were:

**NBTA Social Security Disability Law**

**Alice Neece Mine** (Raleigh, North Carolina), **Chair.** Ms. Mine is the Director of the North Carolina State Bar’s Board of Legal Specialization and the current Chair of the ABA Standing Committee on Specialization.

**Wesley Avery** (Valencia, California). Mr. Avery is certified as a specialist in Bankruptcy Law by the State Bar of California and by the American Board of Certification. Mr. Avery is a past Chairman of the Board of Legal Specialization of the State Bar of California and a current member of the ABA Standing Committee on Specialization.

**Jessica Thomas** (Minneapolis, Minnesota). Ms. Thomas is the director of the Minnesota State Bar Association’s Certified Legal Specialist programs.

**NBTA Civil Trial Law**

**Daniel Gourash** (Cleveland, Ohio), **Chair.** Mr. Gourash is a partner in the Cleveland firm of Seeley, Savidge, Ebert & Gourash LPA. He is a former Chair of the ABA Standing Committee on Specialization.

**Dian Gilmore** (Cedar Rapids, Iowa). Ms. Gilmore is the Executive Director of the American Board of Certification.

**Daniel Trujillo** (Denver, Colorado). Mr. Trujillo is the Director of Certification Programs for the National Association of Counsel for Children.
Examination Reviewers:

The appointed examination reviewers for the NBTA applications were:


Patricia C. Bobb (Chicago, Illinois), NBTA Civil Trial Advocacy examinations. Ms. Bobb is a principal in the Chicago firm of Patricia C. Bobb and Associates and a member of the ABA Standing Committee on Medical Professional Liability. Ms. Bobb examined the Civil Trial Law examinations of the New Jersey Supreme Court’s Board on Attorney Certification.

David Lee (Chicago, Illinois) NBTA Civil Trial Advocacy examinations. Mr. Lee is the principal of the Law Office of David L. Lee in Chicago, and the President of the National Employment Lawyers Association. Mr. Lee examined the Civil Trial Advocacy examinations prepared by the NBTA itself; the Civil Trial examinations prepared by the Florida Bar’s Board of Legal Specialization; and the Civil Trial examinations prepared by the Texas State Bar’s Board of Legal Specialty Certification.

Keith Hebeisen (Chicago, Illinois) NBTA Civil Trial Advocacy examinations. Mr. Hebeisen is a partner in the Clifford Law Offices in Chicago and a member and past Chair of the ABA Standing Committee on Medical Professional Liability. Mr. Hebeisen reviewed the Personal Injury Law examinations prepared by the Texas State Bar’s Board of Legal Specialty Certification.

The Standing Committee formally considered the reports of the Accreditation Review Panels and examination reviewers at its meetings on October 25, 2014, and November 6, 2014, and determined that the Civil Trial Advocacy and Social Security Disability Law programs of the NBTA continue to comply with the Standards. The Standing Committee therefore recommends to the House of Delegates that the NBTA programs in Civil Trial Advocacy and Social Security Disability Law be reaccredited for a further five year period.

Respectfully submitted,

Alice Neece Mine, Chair
Standing Committee on Specialization
February 2015

The accreditation requirements appear in Section 4 of the Standards and are as follows:

4.01 Purpose of Organization -- The Applicant shall demonstrate that the organization is dedicated to the identification of lawyers who possess an enhanced level of skill and expertise, and to the development and improvement of the professional competence of lawyers.
4.02 Organizational Capabilities -- The Applicant shall demonstrate that it possesses the organizational and financial resources to carry out its certification program on a continuing basis, and that key personnel have by experience, education and professional background the ability to direct and carry out such programs in a manner consistent with these Standards.

4.03 Decision Makers -- A majority of the body within an Applicant organization reviewing applications for certification of lawyers as specialists in a particular area of law shall consist of lawyers who have substantial involvement in the specialty area.

4.04 Uniform Applicability of Certification Requirements and Nondiscrimination
(A) The Applicant's requirements for certifying lawyers shall not be arbitrary and shall be clearly understood and easily applied. The organization may only certify those lawyers who have demonstrably met each standard. The requirements shall be uniform in all jurisdictions in which the Applicant certifies lawyers, except to the extent state or local law or regulation imposes a higher requirement.
(B) Membership in any organization or completion of educational programs offered by any specific organization shall not be required for certification, except that this paragraph shall not apply to requirements relating to the practice of law which are set out in statutes, rules and regulations promulgated by the government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.
(C) Applicants shall not discriminate against any lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age. This paragraph does not prohibit an Applicant from imposing reasonable experience requirements on lawyers seeking certification or recertification.

4.05 Definition and Number of Specialties-- An Applicant shall specifically define the specialty area or areas in which it proposes to certify lawyers as specialists.
(A) Each specialty area in which certification is offered must be an area in which significant numbers of lawyers regularly practice. Specialty areas shall be named and described in terms which are understandable to the potential users of such legal services, and in terms which will not lead to confusion with other specialty areas.
(B) An Applicant may seek accreditation to certify lawyers in more than one specialty area, but in such event, the organization shall be evaluated separately with respect to each specialty program.

4.06 Certification Requirements -- An Applicant shall require for certification of lawyers as specialists, at a minimum, the following:
(A) Substantial Involvement -- Substantial involvement in the specialty area throughout the three-year period immediately preceding application to the certifying organization. Substantial involvement is measured by the type and number of cases or matters handled and the amount of time spent practicing in the specialty area, and require that the time spent in practicing the specialty be no less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice.
(B) Peer Review -- A minimum of five references, a majority of which are from attorneys or judges who are knowledgeable regarding the practice area and are familiar with the competence of the lawyer, and none of which are from persons related to or engaged in legal practice with the lawyer.
(1) Type of References -- The certification requirements shall allow lawyers seeking certification to list persons to whom reference forms could be sent, but shall also provide that the Applicant organization send out all reference forms. In addition, the organization may seek and consider reference forms from persons of the organization's own choosing.
(2) Content of Reference Forms -- The reference forms shall inquire into the respondent's areas of practice, the respondent's familiarity with both the specialty area and with the
lawyer seeking certification, and the length of time that the respondent has been practicing law and has known the applicant. The form shall inquire about the qualifications of the lawyer seeking certification in various aspects of the practice and, as appropriate, the lawyer's dealings with judges and opposing counsel.

(C) Written Examination -- An evaluation of the lawyer's knowledge of the substantive and procedural law in the specialty area, determined by written examination of suitable length and complexity. The examination shall include professional responsibility and ethics as it relates to the particular specialty.

(D) Educational Experience -- A minimum of 36 hours of participation in continuing legal education in the specialty area in the three-year period preceding the lawyer's application for certification. This requirement may be met through any of the following means:

(1) Attending programs of continuing legal education or courses offered by Association accredited law schools in the specialty area;
(2) Teaching courses or seminars in the specialty area;
(3) Participating as panelist, speaker or workshop leader at educational or professional conferences covering the specialty area; or
(4) Writing published books or articles concerning the specialty area.

(E) Good Standing -- A lawyer seeking certification is admitted to practice and is a member in good standing in one or more states or territories of the United States or the District of Columbia.

(F) Affirmation of Compliance -- A lawyer seeking certification shall affirm in a manner satisfactory to Applicant that the lawyer's practice in the specialty area is consistent with the lawyer's status as a certified specialist.

4.07 Impartial Review -- The Applicant shall maintain a formal policy providing lawyers who are denied certification an opportunity for review by an impartial decision maker.

4.08 Requirements for Re-certification -- The period of certification shall be set by the Applicant, but shall be no longer than five years, after which time lawyers who have been certified must apply for re-certification. Re-certification shall require similar evidence of competence as that required for initial certification in substantial involvement, peer review, educational experience evidence of good standing, and affirmation of compliance.

4.09 Revocation of Certification -- The Applicant shall maintain a procedure for revocation of certification. The procedures shall require a certified lawyer to report his or her disbarment or suspension from the practice of law in any jurisdiction to the certifying organization.
1. **Summary of Resolution(s).**

The recommendation requests that the American Bar Association grant reaccreditation to the Civil Trial Advocacy and Social Security Disability Law programs of the National Board of Trial Advocacy, a division of the National Board of Legal Specialty Certification.

2. **Approval by Submitting Entity.**

At its meetings on October 25, 2014, and November 6, 2014, the Standing Committee on Specialization considered the applications and voted unanimously that it submit these recommendations to the House of Delegates for consideration at the 2015 Midyear Meeting.

3. **Has this or a similar resolution been submitted to the House or Board previously?**

Yes. Each of these specialty certification programs have been previously accredited and re-accredited by the House of Delegates.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

At its August 1992 meeting, acting upon a recommendation proposed by 16 state and local bar associations, the House of Delegates passed a resolution (Resolution 128) calling for the Association to establish standards for accrediting private organizations that certify lawyers as specialists and to establish and maintain a mechanism to accredit such organizations that meet those standards. In February 1993, the House of Delegates adopted the Standards for Accreditation of Specialty Certification Programs for Lawyers (via Midyear Resolution 105), and delegated to the Standing Committee the task of evaluating organizations that apply to the Association for accreditation, and to periodically review accreditation after its initial grant.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?**

Not Applicable

6. **Status of Legislation.** (If applicable)

Not Applicable
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

Implementation will be self-executing if the programs are reaccredited by the House of Delegates.

8. **Cost to the Association.** (Both direct and indirect costs)

There are no unreimbursed costs associated with the reaccreditation of specialty certification programs as proposed in the recommendation. The costs associated with the reaccreditation process are defrayed by fees charged to the organizations seeking reaccreditation.

Expenses are kept to a minimum by utilizing volunteers to serve as members of the Accreditation Review Panels, which evaluate the applications for reaccreditation. Staff members who provide services to the Standing Committee act as program advisors and administrators. Activities requiring in-person meetings are conducted at regularly scheduled and funded meetings of the Standing Committee on Specialization. Other functions needed for the evaluation process are conducted by mail, fax and telephone conference call. Costs associated with these functions, as well as those incurred in the printing of materials, are reimbursed out of the aforementioned fees.

9. **Disclosure of Interest.** (If applicable)

None

10. **Referrals.**

None

11. **Contact Name and Address Information.** (Prior to the meeting.)

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12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

The recommendation requests that the American Bar Association grant reaccreditation to the Civil Trial Advocacy and Social Security Disability Law programs of the National Board of Trial Advocacy, a division of the National Board of Legal Specialty Certification.

2. **Summary of the Issue that the Resolution Addresses**

To respond to a need to regulate certifying organizations, the House of Delegates adopted standards for accreditation of specialty certification programs for lawyers, and delegated to the Standing Committee the task of evaluating organizations that apply to the ABA for accreditation and reaccreditation. This Resolution acquits the Standing Committee’s obligation to periodically review programs that the House of Delegates has accredited and recommend their further reaccreditation or revocation of accreditation.

3. **Please Explain How the Proposed Policy Position will address the issue**

The recommendation addresses the issue by implementing previous House resolutions calling on the ABA to evaluate specialty certification organizations that apply for accreditation and reaccreditation.

4. **Summary of Minority Views**

The Standing Committee on Specialization approved the proposed recommendation unanimously. No opposition has been identified.
RESOLVED, That the American Bar Association approves the Uniform Fiduciary Access to Digital Assets Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the Act.
REPORT

Uniform Fiduciary Access to Digital Assets Act

- A Summary -

In the Internet age, the nature of property and our methods of communication have changed dramatically. A generation ago, a human being delivered our mail, photos were kept in albums, documents were saved in file cabinets, and money was kept on deposit at the corner bank. For most people today, at least some of their property and communications is stored as data on a computer server and accessed via the Internet.

Collectively, a person’s digital property and electronic communications are referred to as “digital assets” and the companies that store those assets on their servers are called “custodians.” Access to digital assets is usually governed by a terms-of-service agreement provided by the custodian that is not transferable to a person other than the account holder. This creates problems when account holders die or otherwise lose the ability to manage their own digital assets.

A fiduciary is a trusted person with the legal authority to manage another’s property, and the duty to act in that person’s best interest. The Uniform Fiduciary Access to Digital Assets Act (UFADAA) concerns four common types of fiduciaries:

1. Executors or administrators of deceased persons’ estates;
2. Court-appointed conservators of protected persons’ assets;
3. Agents appointed under powers of attorney; and
4. Trustees.

UFADAA gives people the power to plan for the management and disposition of their digital assets in the same way they can make plans for their tangible property: by providing instructions in a will, trust, or power of attorney. If a person fails to plan, the same court-appointed fiduciary that manages the person’s tangible assets can manage the person’s digital assets, distributing those assets to heirs or disposing of them as appropriate.

Under UFADAA, fiduciaries that manage an account holder’s digital assets have the same right to access those assets as the account holder, but only for the limited purpose of carrying out their fiduciary duties. Thus, for example, an executor may access a decedent’s email account in order to make an inventory of estate assets and ultimately to close the account in an orderly manner, but may not publish the decedent’s confidential communications or impersonate the decedent by sending email from the account. Moreover, a fiduciary’s management of digital assets may be limited by other law. For
example, a fiduciary may not copy or distribute digital files in violation of copyright law, and may not access the contents of communications protected by federal privacy laws.

In order to gain access to digital assets, UFADAA requires a fiduciary to send a request to the custodian, accompanied by a certified copy of the document granting fiduciary authority, such as a letter of appointment, court order, or certification of trust. Custodians of digital assets that receive an apparently valid request for access are immune from any liability for good faith compliance.

Some custodians of digital assets provide an online planning option by which account holders can affirmatively choose to delete or preserve their digital assets after some period of inactivity. UFADAA defers to the account holder’s choice in such circumstances, but overrides any provision in a click-through terms-of-service agreement that prevents fiduciary access outright.

UFADAA is an overlay statute designed to work in conjunction with a state’s existing laws on probate, guardianship, trusts, and powers of attorney. Enacting UFADAA will extend a fiduciary’s existing authority over a person’s tangible assets to include the person’s digital assets, with the same fiduciary duties to act for the benefit of the represented person or estate. It is a vital statute for the digital age, and should be enacted by every state legislature as soon as possible.


Respectfully submitted,

Harriet Lansing
President
National Conference of Commissioners
on Uniform State Laws
February 2015
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Harriet Lansing, President

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Fiduciary Access to Digital Assets Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2014 Annual Meeting.

3. Has this or a similar resolution been submitted to the House or Board previously?

No

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The ABA has no existing policies on fiduciary law, probate procedures, or estate administration. The ABA has approved the Uniform Trust Code and portions of the Uniform Probate Code for adoption in those states desiring to implement the substantive provision of those acts. The Uniform Fiduciary Access to Digital Assets Act furthers some of the same objectives advanced by those uniform acts by extending the applicability of certain provisions to digital property. The Resolution respects the ABA policies on privacy by deferring to federal privacy laws, including the Stored Communications Act, the Electronic Communications Privacy Act, and relevant provisions of the Health Insurance Portability and Accountability Act.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Fiduciary Access to Digital Assets Act has not yet been enacted in any jurisdiction, but Delaware enacted a substantially similar law in 2014 by working in collaboration with the drafters of the uniform act.
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

The National Conference will present the Act to state legislatures for consideration and enactment.

8. **Cost to the Association.** (Both direct and indirect costs)

None

9. **Disclosure of Interest.** (If applicable)

None

10. **Referrals.**

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project and those that expressed interest were provided with tentative drafts. The Drafting Committee’s work can be found at http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets and the final act is available for download at http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf.

The ABA Advisor for the Uniform Fiduciary Access to Digital Assets Act was Karin Prangley of the Section of Real Property, Trust and Estate Law. ABA Section Advisors included Christina Kunz from the Business Law Section and Vicki Levy Eskin and David Shulman from the Solo, Small Firm, and General Practice Division.

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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terry.morrow@uniformlaws.org
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

RESOLVED, That the American Bar Association approves the Uniform Fiduciary Access to Digital Assets Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the Act.

2. Summary of the Issue that the Resolution Addresses

As the nature of our personal property has evolved, the law has failed to keep pace. As a result, fiduciaries have been unable to effectively administer estates containing digital property.

The Uniform Fiduciary Access to Digital Assets Act (UFADAA) extends a fiduciary’s traditional access to an account holder’s tangible assets to also include the account holder’s digital assets stored by a custodian and accessed via the Internet. The fiduciary’s access is subject to the account holder’s rights under any terms-of-service agreement and other laws, and the fiduciary remains bound by all the usual fiduciary duties. UFADAA provides default rules for access that may be overridden by the terms of an account holder’s estate plan or by the account holder’s affirmative act using an online account feature separate from the other terms of a terms-of-service agreement. UFADAA provides rules for four common types of fiduciaries: personal representatives of a decedent’s estate, conservators of a protected person’s estate, agents under a power of attorney, and trustees.

3. Please Explain How the Proposed Policy Position will address the issue

Approval of the Uniform Fiduciary Access to Digital Assets Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above. Enactment by a state legislature will extend a legally appointed fiduciary’s existing authority under other state laws to include authority over digital assets.

4. Summary of Minority Views

We know of no opposition at this time.
RESOLUTION

RESOLVED, That the American Bar Association approves the Uniform Recognition of Substitute Decision-Making Documents Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the Act.
REPORT

Uniform Recognition of Substitute Decision-Making Documents Act

-A Summary-

Substitute decision-making documents are widely used in every U.S. State and Canadian Province for both financial transactions and health care decisions. These documents are commonly called powers of attorney, proxies, or representation agreements, depending on the jurisdiction, and the governing law of the jurisdiction. Consequently, a person’s authority under a decision-making document may not be recognized if the document is presented in a place outside the state of its origin. In our modern mobile society, this can create serious problem problems for the people who rely on their agents to make decisions when they are unable to make decisions.

However, a person asked to accept a decision-making document from another state faces problems as well. Because the law varies by jurisdiction, significant legal research may be required to determine whether a foreign document actually complies with the law where it was executed.

The Uniform Recognition of Substitute Decision-Making Documents Act (URSDDA) is the result of a joint project between the Uniform Law Commission and the Uniform Law Conference of Canada to resolve these problems. The act employs a three-part approach to portability:

1. First, the act recognizes the validity of a substitute decision-making document for use in the enacting state if the document is valid as determined by the law under which it was created.

2. Second, the act preserves the meaning and effect of a substitute decision-making document as defined by the law under which it was created regardless of where the document is actually presented.

3. Third, the act protects the persons asked to accept a foreign document from liability for either acceptance or rejection, if they comply with the law in good faith.

This same three-part approach to portability was used as part of the Uniform Durable Power of Attorney Act, which the ABA House of Delegates approved in 2007. However, the Uniform Power of Attorney Act applies only to financial powers of attorney. The URSDDA extends the portability provisions to health care powers, and is also appropriate for enactment by states with non-uniform financial power of attorney statutes.

Although URSDDA was originally conceived to allow persons in the United States to accept substitute decision-making documents drafted in a Canadian province (and vice-versa) similar problems occur when an agent presents a substitute decision-making
document in another jurisdiction within the principal’s home country. Therefore, the act was drafted to allow acceptance of any foreign substitute decision-making document, whether executed in a domestic or international jurisdiction.


Respectfully submitted,

Harriet Lansing
President
National Conference of Commissioners on Uniform State Laws
February 2015
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Harriet Lansing, President

1. **Summary of Resolution(s).**

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Recognition of Substitute Decision-making Documents Act by the American Bar Association (ABA) House of Delegates.

2. **Approval by Submitting Entity.**

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2014 Annual Meeting.

3. **Has this or a similar resolution been submitted to the House or Board previously?**

No

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

The ABA has no existing policies concerning financial powers of attorney, but Policy 89A120 encourages the use of durable powers of attorney for delegation of health care decisions. This Resolution furthers that policy by ensuring powers of attorney are portable and legally enforceable in jurisdictions outside the jurisdiction of the power’s execution.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?**

Not applicable.

6. **Status of Legislation.** (If applicable)

The Uniform Recognition of Substitute Decision-Making Documents Act has not yet been enacted in any jurisdiction.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

The National Conference will present the Act to state legislatures for consideration and enactment.
8. Cost to the Association. (Both direct and indirect costs)

None

9. Disclosure of Interest. (If applicable)

None

10. Referrals.

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project and those that expressed interest were provided with tentative drafts. The Drafting Committee’s work can be found at
http://www.uniformlaws.org/Committee.aspx?title=Recognition%20of%20Substitute%20Decision-Making%20Documents and the final act is available for download at

The ABA Advisor for the Uniform Recognition of Substitute Decision-Making Documents Act was Robert L. Schwartz of the Health Law Section. Rolf C. Schuetz from the Solo, Small Firm, and General Practice Division served as an ABA Section Advisor.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

John A. Sebert, NCCUSL Executive Director
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12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

   Harriet Lansing, NCCUSL President  
   1 Heather Place  
   Saint Paul, MN 55102-2615  
   (651) 224-3017  
   harriellansing@cs.com
1. **Summary of the Resolution**

RESOLVED, That the American Bar Association approves the Uniform Recognition of Substitute Decision-Making Documents Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the Act.

2. **Summary of the Issue that the Resolution Addresses**

Substitute decision-making documents are called by different names in different jurisdictions (e.g. powers of attorney, proxies, and representation agreements), but are routinely used throughout the United States and Canada. In our modern, mobile society, legal recognition of documents executed in another jurisdiction is an increasingly common problem. New state laws are necessary to provide for legal recognition of foreign substitute decision-making documents while protecting persons asked to accept those documents from liability for good-faith compliance.

3. **Please Explain How the Proposed Policy Position will address the issue**

Approval of the Uniform Recognition of Substitute Decision-Making Documents Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above. Enactment by a state legislature will allow recognition of foreign-executed substitute decision-making documents and shield the persons who accept them from liability.

4. **Summary of Minority Views**

None known.
RESOLUTION

1 RESOLVED, That the American Bar Association approves the Uniform Voidable Transactions Act (as Amended in 2014), promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the act.
REPORT

Uniform Voidable Transactions Act (as Amended in 2014)

- Summary -

State of the Law

The Uniform Fraudulent Transfer Act was promulgated in 1984 and has been enacted by 43 states, the District of Columbia, and the U.S. Virgin Islands as of 2014. The act replaced the very similar Uniform Fraudulent Conveyance Act, which was promulgated in 1918 and remains in force in two states as of 2014.

The Uniform Act: Nature of Amendments

The 2014 amendments are the first changes to the act since its original promulgation. The amendments address a small number of narrowly-defined issues, and are not a comprehensive revision. The principal features of the amendments are as follows:

Name Change. The amendments change the title of the act to the “Uniform Voidable Transactions Act.” The name change is not motivated by the substantive revisions made by the amendments, which are relatively minor. Rather, the original title of the act, though sanctioned by historical usage, has always been a misleading description of its provisions in two respects. First, fraud is not, and never has been, a necessary element of a claim under the act. Second, the act has always applied to incurring obligations as well as transferring property.

Choice of Law. The amendments add, for the first time, a choice-of-law rule for claims governed by the act. (Section 10)

Evidentiary Matters. New provisions add uniform rules allocating the burden of proof and defining the standard of proof with respect to claims and defenses under the act. (Sections 2(b), 4(c), 5(c), (8g), and 8(h))

Deletion of the Special Definition of “Insolvency” for Partnerships. Under the general definition of "insolvency" in the act, a debtor is insolvent if, at a fair valuation, the sum of the debtor’s debts is greater than the sum of the debtor’s assets. The act as originally written set forth a special definition of “insolvency” applicable to partnerships, which adds to the sum of the partnership’s assets the net worth of each of its general partners. The amendments delete that special definition, with the result that a partnership will be subject to the general definition. (Section 2)

Defenses. The amendments refine in relatively minor respects several provisions relating to defenses available to a transferee or obligee, as follows:

- As originally written, Section 8(a) of the act creates a complete defense to an action under Section 4(a)(1) (which renders voidable a transfer made or obligation incurred with actual intent to hinder, delay, or defraud any creditor of the debtor) if the transferee or obligee takes in good faith and for a reasonably equivalent value. The amendments add to Section 8(a) the additional requirement that the reasonably equivalent value must be given to the debtor.
Section 8(b), derived from Bankruptcy Code §§ 550(a), (b) (1984), creates a defense for a subsequent transferee (a transferee other than the first transferee) that takes in good faith and for value, and for any subsequent good-faith transferee from such a person. The amendments clarify the meaning of Section 8(b) by rewording it to follow more closely the wording of Bankruptcy Code §§ 550(a), (b) (which is substantially unchanged as of 2014).

Section 8(e)(2) as originally written creates a defense to an action under Section 4(a)(2) or Section 5 to avoid a transfer if the transfer results from enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code. The amendments exclude from that defense acceptance of collateral in full or partial satisfaction of the obligation it secures (a remedy sometimes referred to as "strict foreclosure").

Series Organizations. The amendments add a new section (Section 11) that provides that each "protected series" of a "series organization" is to be treated as a person for purposes of the act, even if it is not treated as a person for other purposes. This change responds to the emergence of the "series organization" as a significant form of business organization.

Medium Neutrality. To accommodate modern technology, the amendments replace references in the act to a "writing" with "record" and make related changes.

Conclusion

The amendments do not contemplate that states will enact a uniform effective date. However, the lack of a choice-of-law rule for claims of the nature governed by the act under current law has led to uncertainty and wasteful litigation when the claims arise from transactions that touch on more than one jurisdiction. To alleviate that problem and install a clear and uniform choice-of-law regime for these claims, all states are urged to adopt the 2014 amendments as quickly as possible.

The Drafting Committee’s work can be found at:


Respectfully submitted,

Harriet Lansing
President
National Conference of Commissioners on Uniform State Laws
February 2015
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Harriet Lansing, President

1. **Summary of Resolution(s).**

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Voidable Transactions Act (as Amended in 2014) by the American Bar Association (ABA) House of Delegates.

2. **Approval by Submitting Entity.**

The National Conference of Commissioners on Uniform State Laws approved the Act at its July 2014 Annual Meeting.

3. **Has this or a similar resolution been submitted to the House or Board previously?**

No

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

The ULC previously brought the Uniform Fraudulent Transfer Act (UFTA) to the House of Delegates and the act was approved (85M103A). The Uniform Voidable Transactions Act (UVTA) (as Amended in 2014) is an updated version of the act formerly named the Uniform Fraudulent Transfer Act (UFTA). The act was retitled as part of the 2014 amendments. The Uniform Voidable Transactions Act (UVTA) (as Amended in 2014) supersedes the Uniform Fraudulent Transfer Act.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?**

Not applicable

6. **Status of Legislation. (If applicable)**

The Uniform Voidable Transactions Act (as Amended in 2014) has not yet been enacted in any state legislature. The Uniform Voidable Transactions Act (as Amended in 2014) was formerly named the Uniform Fraudulent Transfer Act (UFTA). The Uniform Fraudulent Transfer Act was promulgated in 1984 and has been enacted by 43 states, the District of Columbia, and the U.S. Virgin Islands.
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

The National Conference will present the Act to state legislatures for consideration and enactment.

8. **Cost to the Association.** (Both direct and indirect costs)

None

9. **Disclosure of Interest.** (If applicable)

None

10. **Referrals.**

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project and those that expressed interest were provided with tentative drafts. The Drafting Committee’s work can be found at:


The ABA Advisors for the Uniform Voidable Transactions Act (as Amended in 2014) were Patricia Redmond of the Business Law Section, Jay Adkisson of the Business Law Section, Dan Kleinberger of the Business Law Section, Charles Scherer of the International Law Section, and David Slenn of the Business Law Section.

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

John A. Sebert, Executive Director, National Conference of Commissioners on Uniform State Laws, 111 North Wabash, Suite 1010, Chicago, IL 60602; phone: 312/450-6603; cell: 312-218-1485; email: john.sebert@uniformlaws.org.

Terry Morrow, Legislative Director and Legal Counsel, National Conference of Commissioners on Uniform State Laws, 111 North Wabash Avenue, Suite 1010 Chicago, IL 60602; Office: (312) 450-6620; Cell: (312) 485-0451; email: tmorrow@uniformlaws.org.
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Harriet Lansing, NCCUSL President, 1 Heather Place, Saint Paul, MN 55102-2615; Phone: (651) 224-3017; email: harrietlansing@cs.com.
EXECUTIVE SUMMARY

1. Summary of the Resolution

That the American Bar Association approves the Uniform Voidable Transactions Act (as Amended in 2014) promulgated by the National Conference of Commissioners on Uniform State Laws in July 2013 as an appropriate Act for those states desiring to adopt the specific substantive law contained in the act.

2. Summary of the Issue that the Resolution Addresses

The Uniform Voidable Transactions Act (UVTA) (as Amended in 2014), formerly named the Uniform Fraudulent Transfer Act (UFTA), strengthens creditor protections by providing remedies for certain transactions by a debtor that are unfair to the debtor’s creditors. The 2014 amendments to the UVTA address a small number of narrowly defined issues, and are not a comprehensive revision of the UFTA/UVTA. The amendments, among other things, clarify terminology that was confusing to many courts and litigants. The amendments add a clear choice-of-law provision that offers predictability and reduces costs. The amendments also improve provisions for determining a debtor’s insolvency, address emerging legal developments, and provide crucial guidance to courts and litigants regarding key evidentiary matters.

3. Please Explain How the Proposed Policy Position will address the issue

Approval of the Uniform Voidable Transactions Act (as Amended in 2014) by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

4. Summary of Minority Views

We know of no opposition at this time.
RESOLUTION

RESOLVED, That the American Bar Association urges Congress to amend 31 U.S.C. § 330(a) and (b) to include within the scope of those provisions non-attorney “tax return preparers,” as that term is defined by 26 U.S.C. § 7701(a)(36) and Treasury Department regulations promulgated thereunder.

FURTHER RESOLVED, That the American Bar Association urges Congress to amend 31 U.S.C. § 330(d) to clarify that the Treasury Department has the authority to regulate persons who advise taxpayers with respect to the reporting of items on Federal tax returns, provided that the scope of any such regulation should not exceed the scope set forth in Treasury Department Circular 230 as published on June 12, 2014.
REPORT

I. Introduction

For 130 years, the Treasury Department has been authorized under 31 U.S.C. § 330 to regulate representatives of persons who practice before it. While the authorizing statute has been amended on several occasions, most recently in 2004, it remains largely unchanged since first enacted in 1884 to address unscrupulous practices arising in the wake of the Civil War.

The conduct of unscrupulous unregulated tax return preparers imposes significant costs on society, including by contributing to the “tax gap.” The clients of such preparers often find themselves ensnared in Internal Revenue Service examinations and collection proceedings, and those clients and the Internal Revenue Service are forced to expend significant resources to resolve those issues. Meanwhile, lawyers and certified public accountants (“CPAs”) who prepare tax returns operate within the confines of applicable professional standards (e.g., bar rules for lawyers and similar applicable rules for CPAs) and also are regulated under Circular 230 discussed below.

Regulations promulgated under 31 U.S.C. § 330 are set forth in Treasury Department Circular 230 (“Circular 230”). Those regulations have been amended numerous times in recent years to address the evolving and expanding role of paid tax advisors and to vest oversight of those advisors’ compliance with Circular 230 in the Internal Revenue Service’s Office of Professional Responsibility (“OPR”). As most recently modified, section 10.2(a)(4) of Circular 230 defines “practice before the Internal Revenue Service” to encompass:

[A]ll matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer’s rights, privileges, or liabilities under the laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing documents; filing documents; corresponding and communicating with the Internal Revenue Service; rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion; and representing a client at conferences, hearings, and meetings.

1 American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418, §§ 820, 822 (authorizing the imposition of monetary sanctions under revised 31 U.S.C. § 330(b) and adding 31 U.S.C. § 330(d) to provide that nothing in the statute shall be construed to limit the authority of the Treasury Department to regulate the issuance of written tax advice with respect to transactions that have the potential for tax avoidance or abuse).

Only certain types of persons are permitted to “practice before the Internal Revenue Service.” Specifically, section 10.3 of Circular 230 authorizes attorneys, CPAs, and certain other categories of “practitioners” to “practice before the Internal Revenue Service.”

Recent judicial decisions have limited the Treasury Department’s authority to regulate the conduct of paid tax advisors, including tax return preparers, under 31 U.S.C. § 330. As discussed further below, those decisions interpret the term “practice before the Internal Revenue Service” more narrowly than such term is defined in Circular 230, and in so doing, those decisions have the effect of limiting both the types of practitioners and the scope of conduct that OPR previously could regulate under Circular 230. By urging Congress to enact legislation to ensure that the Treasury Department has authority to regulate all persons who, for compensation, advise or represent taxpayers with respect to any matters arising under the Internal Revenue Code, including the reporting of items on Federal tax returns, the Association would (1) promote competence, ethical conduct and professionalism, (2) protect our members and the public from unscrupulous unregulated tax return preparers, and (3) promote accountability through oversight of paid tax advisors by OPR.

II. Recent Judicial Decisions

On February 11, 2014, the U.S. Court of Appeals for the D.C. Circuit held in Loving v. Internal Revenue Service, 742 F.3d 1013 (D.C. Cir. 2014) that amendments made to Circular 230 in 2011 to expand its scope and cover all paid tax return preparers exceeded the statutory authority provided to the Treasury Department in 31 U.S.C. § 330. The Court of Appeals affirmed the District Court’s prior order enjoining the Internal Revenue Service from implementing a broad program to test the initial competence of hundreds of thousands of previously unregulated paid tax return preparers and to subject those persons to minimum continuing education requirements. The Court based its decision on six separate factors, including a finding that paid tax return preparers are not “representatives” of persons before the Treasury Department within the meaning of 31 U.S.C. § 330 and that “practice” before the Treasury Department is limited to adversarial or other proceedings where a taxpayer designates a representative to act on his or her behalf, and does not include the submission of tax returns or other documents to the Internal Revenue Service.

Six months after the D.C. Circuit’s decision in Loving, the U.S. District Court for the District of Columbia in Ridgely v. Lew, 2014 U.S. Dist. LEXIS 96447 (D.D.C. July 16, 2014), held that regulations set forth in section 10.27 of Circular 230 limiting certain contingent fee arrangements that can be charged by tax practitioners also exceeded the statutory authority of 31
U.S.C. § 330. The plaintiff in Ridgely was a CPA who was admittedly a “representative” of persons before the Treasury Department in other contexts. The District Court held, however, that this did not provide a basis for subjecting the plaintiff’s fee practices to regulation under Circular 230 when preparing “ordinary” refund claims because that activity, standing alone, did not constitute “practice” before the Treasury Department. Other cases are pending in courts around the country that rely on the D.C. Circuit’s decision in Loving to further challenge the Treasury Department’s authority to regulate paid tax advisors.

The Loving Court noted that its decision should not be construed as a commentary on the need to regulate paid return preparers. “It might be that allowing the IRS to regulate tax-return preparers more stringently would be wise as a policy matter. But that is a decision for Congress and the President to make if they wish by enacting new legislation.”

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4 The Ridgely court explained that an “ordinary refund claim” is a tax refund claim that is filed after a taxpayer has filed his original tax return but before the Internal Revenue Service has initiated an audit of the return.

5 For example, in, Sexton v. Hawkins, a disbarred lawyer is seeking to enjoin OPR from investigating his ability to prepare and file tax returns, and to enjoin the Internal Revenue Service from limiting his access to the electronic tax return filing system. After being disbarred in South Carolina following his conviction in federal court for mail fraud and money laundering, OPR suspended his right to practice before the Internal Revenue Service. The District Court recently denied OPR’s motion to dismiss, finding that the court had jurisdiction to hear the claim and enjoining OPR from enforcing its document requests during the pendency of the action. Sexton v. Hawkins, 2014 U.S. Dist. LEXIS 153766 (D. Nev. Oct. 30, 2014). See also, Davis v. Internal Revenue Service, Case No. 14-cv-0261 (N.D. Ohio) (challenging the Internal Revenue Service’s authority to limit access to its electronic tax return filing system). Separately, in American Institute of Certified Public Accountants v. Internal Revenue Service, 2014 U.S. Dist. LEXIS 157723 (D.D.C. Oct. 27, 2014), the District Court dismissed on jurisdictional standing grounds a challenge brought by the national association representing CPAs to the Internal Revenue Service’s authority to promulgate a voluntary preparer compliance program through Rev. Proc. 2014-42, 2014-29 I.R.B. 192.

III. Broad Consequences of the Recent Judicial Decisions

In Loving and Ridgely, the courts interpreted the statutory reference to "practice of representatives of persons before the Department of the Treasury" in 31 U.S.C. § 330(a). The rationale in those cases may be extended to support the conclusion that any work done by a paid tax professional that does not involve direct interaction with the Internal Revenue Service in an adversarial or other proceeding in which the professional is authorized to bind the taxpayer is not subject to regulation under 31 U.S.C. § 330. This interpretation is noteworthy given that in 2004 Congress amended 31 U.S.C. § 330 to clarify that the statute does not limit the authority of the Treasury Department to impose practice standards applicable to certain written tax advice. Accordingly, without amendment, 31 U.S.C. § 330, as construed by the Court of Appeals in Loving, authorizes the Treasury Department to regulate certain written tax advice that is at least one step removed from the preparation and filing of a tax return, but does not authorize the regulation of persons who prepare, sign and file hundreds or thousands of tax returns with multiple millions of dollars in tax consequences. Ridgely goes one step further in calling into question the Treasury Department's authority to regulate a broader range of conduct by paid tax advisors that does not necessarily involve direct interaction with the Internal Revenue Service in a proceeding in which the taxpayer can bind the taxpayer. These include, for example, portions of the general due diligence rule in Circular 230 section 10.22, rules governing the submission of tax returns and other documents to the Internal Revenue Service in Circular 230 section 10.34, and rules governing certain written tax advice in Circular 230 section 10.37.

As the scope and complexity of the tax law continues to grow, taxpayers have increasingly come to rely on assistance from paid tax advisors in meeting their tax obligations. This has increased the need for those tax advisors to maintain a high level of competence and, at the same time, increased the need for oversight to ensure that minimum competence levels are maintained and that appropriate steps are taken to address incompetent and unscrupulous conduct. The Internal Revenue Code includes a number of civil and criminal penalty provisions that allow indirect regulation of paid tax advisors, but only through resource-intensive, after-the-fact proceedings. Recent studies have found that these provisions have not been adequate to

A broader range of conduct is arguably subject to regulation under 31 U.S.C. § 330(b) if it rises to the level of "incompetence" or "disreputable" conduct. Although that subsection was not at issue in Loving, it uses terms similar to those that the D.C. Circuit interpreted narrowly in that case, i.e., "practice before the [Treasury] Department" and "representative." 31 U.S.C. § 330(b).

American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418, § 820. Notably, the "covered opinion" rules in prior Circular 230 section 10.35 that the amendment to 31 U.S.C. § 330 was designed to cover have recently been repealed based on a determination by the Treasury Department and the Internal Revenue Service that the burden they imposed outweighed the benefit they provided in terms of improved compliance with the tax law. T.D. 9669, 79 Fed. Reg. 33685 (June 12, 2014).

These include the preparer penalty provisions in 26 U.S.C. §§ 6694 and 6695, the penalty under 26 U.S.C. § 6700 for promoting abusive tax shelters, the penalty under 26 U.S.C. § 6701 for aiding and abetting an understatement of tax and the civil injunction provisions in 26 U.S.C. §§ 7407 and 7408. See also 26 U.S.C. § 7201 (criminal sanction for attempting to evade or defeat tax), § 7206(2) (criminal sanction for willful aid or assistance in making false or
ensure that paid tax advisors provide the necessary level of assistance to their clients in complying with their obligations under the tax law.\textsuperscript{10}

Despite the complexity of the Internal Revenue Code and the Treasury Regulations, unregulated return preparers are not subject to minimum educational or other competency requirements. In contrast, attorneys and CPAs must complete prescribed courses of study and then pass state licensing exams to practice their professions. Enrolled agents who do not have prior experience working for the Internal Revenue Service must pass a written examination to demonstrate their knowledge of tax law and procedure. In addition, attorneys and CPAs are subject to ethical requirements and, in most jurisdictions, continuing professional education requirements.\textsuperscript{11}

The proposed resolution is intended to benefit consumers and the overall tax system. Given the pervasive and growing role of the tax law in a wide range of socio-economic activities, the need for some level of affirmative practice standards applicable to paid tax advisors cannot be disputed. Yet, under \textit{Loving}, the vast majority of paid tax return preparers are subject to no such standards. Because more than half of all taxpayers use paid return preparers who are excluded from regulation under Circular 230 as a result of the \textit{Loving} decision,\textsuperscript{12} a substantial portion of the nearly 150 million tax returns filed each year are prepared by persons who are not subject to any generally applicable standards of competency.\textsuperscript{13} Beyond obvious examples of fraud and incompetence, the absence of any generally applicable competency standards is a driving factor in negligent or unintentional noncompliance with the tax law. Not only does this noncompliance result in lost tax revenue, it also imposes significant risks on taxpayers and the Internal Revenue Service in dealing with erroneous tax filings. In light of the complexity of the fraudulent submissions to the IRS, § 7212 (criminal sanction for attempting to interfere with the administration of the tax law), and § 7216 (improper disclosure of taxpayer return information).


\textsuperscript{11} As noted above, enrolled agents, enrolled actuaries and enrolled retirement plan agents are subject to the ethical requirements of Circular 230 and are required to complete a minimum number of hours of continuing education credits, including a minimum number of hours of ethics or professional conduct study credits.

\textsuperscript{12} Introduction to the April 2014 GAO Report, \textit{supra}.

\textsuperscript{13} Recognizing the importance of the issue and to fill the regulatory vacuum, four states have implemented their own regimes for regulating otherwise unlicensed paid return preparers. Cal. Code Ann. §§ 22250 et seq.; Md. Code Ann. §§ 10-824 et seq.; NY CLS Tax §§ 32 et seq.; Or. Rev. Stat. §§ 673.457 et seq. While paid return preparers in these states are subject to regulation and oversight, their reach is limited to state tax matters and would only cover issues pertaining to federal tax returns if there happened to be substantive overlap between applicable state and federal tax regimes.
tax law, there is a continued and growing demand for paid tax advisors. Maintaining minimum competence and practice standards will strengthen the market for tax advisors while at the same time protecting consumers and safeguarding the tax system.

It is important to note that Circular 230 regulates all professionals practicing before the Internal Revenue Service, including lawyers. The Association has a long history of opposing efforts by federal agencies to establish ethical standards governing federal agency practice, arguing that primary regulation and oversight of the legal profession should be vested in the highest court of the state in which the lawyer is licensed. However, the Association has long recognized limited exceptions to this view for regulation by the specified agencies, including the Internal Revenue Service. For example, at the 1982 Annual Meeting, the House of Delegates adopted a resolution that provides, in part, that “Except as existing legislation expressly provides, no federal agency shall adopt standards of practice to govern the professional conduct of attorneys who represent clients subject to the administrative procedures of or regulation by that federal agency . . .” 14 The report that accompanied that Resolution explained that existing legislation authorized both the Internal Revenue Service and the Patent Office to regulate attorneys and other practitioners appearing before those agencies, and suggested that because (i) practice before those agencies is conducted by many practitioners who are not attorneys, and (ii) the bars of those agencies did not appear dissatisfied with the current state of affairs, it would not be prudent to advocate for change of those exceptions. 15 Given that the 1982 and similar policies recognized an exception for regulation by the Internal Revenue Service, and given that the proposed Resolution is limited to regulation of those practicing before the Internal Revenue Service, the proposed Resolution is consistent with the policies previously adopted by the Association.

IV. Conclusion

To improve compliance with tax law and reduce the risks imposed on taxpayers and the Internal Revenue Service by erroneous tax returns, and to ensure that all paid return preparers demonstrate satisfaction of minimum competency requirements and will be subject to oversight by OPR, this resolution urges Congress to clarify the authority of the Treasury Department to regulate any person who, for compensation, advises or represents taxpayers with respect to any matters arising under the Internal Revenue Code, including the reporting of items on Federal tax returns. Specifically, this resolution urges Congress to amend 31 U.S.C. §§ 330(a) and (b) to allow the Treasury Department to regulate non-attorney paid “tax return preparers,” as that term is defined by 26 U.S.C. § 7701(a)(36) and the regulations thereunder. Moreover, because the rationale of the recent judicial decisions discussed above may be extended to support the conclusion that any work done by a paid tax professional that does not involve direct interaction with the Internal Revenue Service in an adversarial or other proceeding in which the professional is authorized to bind the taxpayer is not subject to regulation under 31 U.S.C. § 330, this


15 Similarly, in October 2009 the Board of Governors adopted a resolution opposing provisions of the Consumer Financial Protection Act that would regulate lawyers engaged in the practice of law “except to the extent that lawyers are currently subject to regulation by a federal agency under existing law.”
resolution also urges Congress to amend 31 U.S.C. § 330(d) to clarify that the Treasury Department has the authority to regulate practice before the Internal Revenue Service as set forth in Circular 230 as published on June 12, 2014.

Under current law, regulations generally applicable to civil preparer penalties appropriately limit the definition of persons subject to those penalties to exclude persons who are not compensated for their work in assisting taxpayers in preparing returns, or whose work is otherwise too attenuated from the filing of a tax return or other submission to the Internal Revenue Service. In addition, the regulations at issue in Loving did not impose any application requirements, examinations, or continuing education requirements on lawyers or other regulated professionals because the bar rules or other applicable professional standards already operate to ensure that lawyers and other regulated professionals meet the minimum competency requirements that the regulations sought to impose on the otherwise non-regulated paid return preparers. Those limitations should continue to apply and we do not support any expansion of the scope of Circular 230 beyond its present form.

Respectfully submitted,

Armando Gomez, Chair
Section of Taxation
February 2015

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16 Treas. Reg. § 301.7701-15(f).
17 Treas. Reg. § 301.7701-15(a) (requiring that a person prepare “all or a substantial portion of” a tax return or claim for refund in order to be considered a “tax return preparer”).
1. **Summary of Resolution(s).**

The Resolution urges Congress to amend 31 U.S.C. § 330(a) and (b) to include within the scope of those provisions non-attorney “tax return preparers,” as that term is defined by 26 U.S.C. § 7701(a)(36) and Treasury Department regulations promulgated thereunder. The Resolution also urges Congress to amend 31 U.S.C. § 330(d) to clarify that the Treasury Department has the authority to regulate persons who advise taxpayers with respect to the reporting of items on Federal tax returns, provided that the scope of any such regulation should not exceed the scope set forth in Treasury Department Circular 230 as published on June 12, 2014. These changes would reverse the effect of recent judicial decisions limiting Treasury’s authority to regulate the conduct of paid tax advisors, including tax return preparers, to protect consumers and safeguard the tax system.

2. **Approval by Submitting Entity.**

This Resolution was discussed by the Council of the ABA Section of Taxation at a regularly scheduled meeting in Denver, Colorado on September 18, 2014, and was formally approved by the Council of the ABA Section of Taxation on November 13, 2014 through a vote conducted electronically in compliance with section 4.10 of the Section’s Bylaws. The Resolution will be presented for approval by the members of the ABA Section of Taxation during the plenary session of its Mid-Year Meeting in Houston, Texas on January 31, 2015.

3. **Has this or a similar resolution been submitted to the House of Board recently?**

No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

There are no Association policies that address the scope of the Treasury Department’s authority to regulate practice before the Internal Revenue Service in general, or with respect to paid tax return preparers. Through the blanket authority process, the Section of Taxation has supported efforts to regulate paid tax return preparers, including through testimony before the Internal Revenue Service,¹ and in a comment letter on proposed tax reform legislation.²

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Separately, the Standing Committee on Ethics and Professional Responsibility has issued formal opinions addressing the ethical relationship between the Internal Revenue Service and lawyers practicing before it, ethical considerations for lawyers issuing tax shelter opinions, and standards governing the position a lawyer may advise a client to take on a tax return. While limited to standards applicable to lawyers, the guidance expressed in those opinions has influenced the standards reflected in Treasury Department Circular 230. The proposed Resolution would not affect the guidance expressed in these formal opinions.

The Association has adopted policies in the past, including a resolution adopted in 1982 opposing efforts by federal agencies to adopt standards of practice to govern the professional conduct of attorneys who represent clients subject to the administrative procedures of or regulation by that federal agency, and a resolution adopted in 2009 opposing provisions of the Consumer Financial Protection Agency Act that would regulate lawyers engaged in the practice of law. Those policies, however, expressly excepted situations where lawyers were already subject to regulation by a federal agency, such as lawyers subject to regulation by the Internal Revenue Service under Circular 230. Accordingly, the proposed Resolution does not conflict with these pre-existing Association policies.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not applicable.


Legislation has been introduced in the 113th Congress providing for broader regulation of paid tax return preparers, but has not been enacted. The Obama Administration has also supported legislation authorizing the Treasury Department and Internal Revenue Service to regulate paid


4 Formal Opinion 346 (January 29, 1982).


tax return preparers. 7 Similar legislation authorizing the regulation of paid tax return preparers has been introduced in prior Congresses but has also never been enacted. 8

7. Brief explanation regarding plans for implementation of the Resolution, if adopted by the House of Delegates.

If the Resolution is adopted, the Section of Taxation would be well positioned to advocate on the Association’s position in support of legislation to regulate paid tax return preparers. The Section of Taxation would work with the Governmental Affairs Office to urge Congress to act quickly to make the recommended legislative changes.


Passage of the policy will incur no direct cost to the Association. Some staff time from the Section of Taxation and the Governmental Affairs Office would be required to support advocacy of this policy.


None known at this time.

10. Referrals.

The Section of Taxation has referred the proposed Resolution to all interested parties, including the Section of Administrative Law and Regulatory Practice, the Section of Business Law, the Section of Family Law, the Section of International Law, the Section of Real Property, Trust and Estate Law, the Solo, Small Firm and General Practice Division, the Center for Professional Responsibility and the Governmental Affairs Office, among others. The proposed Resolution will also be referred to the Section of State and Local Government Law.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

Armando Gomez
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7 See General Explanation of the Administration’s Fiscal Year 2015 Revenue Proposals, at 244 (March 2014).

12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number and e-mail address.)

Susan P. Serota  
Delegate, Section of Taxation  
c/o Pillsbury Winthrop Shaw Pittman LLP  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution urges Congress to amend 31 U.S.C. § 330(a) and (b) to include within the scope of those provisions non-attorney “tax return preparers,” as that term is defined by 26 U.S.C. § 7701(a)(36) and Treasury Department regulations promulgated thereunder. The Resolution also urges Congress to amend 31 U.S.C. § 330(d) to clarify that the Treasury Department has the authority to regulate persons who advise taxpayers with respect to the reporting of items on Federal tax returns, provided that the scope of any such regulation should not exceed the scope set forth in Treasury Department Circular 230 as published on June 12, 2014. These changes would reverse the effect of recent judicial decisions limiting Treasury’s authority to regulate the conduct of paid tax advisors, including tax return preparers, to protect consumers and safeguard the tax system.

2. Summary of the Issue that the Resolution Addresses

In 2011 the Treasury Department promulgated regulations under 31 U.S.C. § 330 to regulate paid tax return preparers. The Court of Appeals for the D.C. Circuit held in Loving v. Internal Revenue Service, 742 F.3d 1013 (D.C. Cir. 2014), that those regulations exceeded the Treasury Department’s authority. More recently, in Ridgely v. Lew, 2014 U.S. Dist. LEXIS 96447 (D.D.C. July 16, 2014), the U.S. District Court for the District of Columbia invalidated other regulations promulgated by the Treasury Department under 31 U.S.C. § 330 that limited certain contingent fee arrangements charged by tax practitioners. These and other cases have limited the Treasury Department’s authority to regulate the conduct of persons who, for compensation, advise or represent taxpayers with respect to any matters arising under the Internal Revenue Code, including the reporting of items on Federal tax returns.

3. Explanation of how the Resolution Will Address the Issue

By urging Congress to amend 31 U.S.C. § 330 to allow the Treasury Department to regulate paid tax return preparers, as that term is defined by 26 U.S.C. § 7701(a)(36) and the regulations thereunder, and provide a clear affirmative grant of authority of the Treasury Department to regulate a broader range of conduct engaged in by paid tax advisors, including applicable due diligence standards, fee arrangements and other activities of paid tax advisors that do not involve direct interaction with the Internal Revenue Service in an adversarial proceeding but nonetheless have a significant impact on the public fisc and on taxpayers’ compliance with their obligations under the tax law, the proposed Resolution would directly address the concerns presented in Loving. By approving this Resolution, the Association would (1) promote competence, ethical conduct and professionalism, (2) protect our members and the public from unscrupulous unregulated tax return preparers, and (3) promote accountability through oversight of paid tax advisors by the Internal Revenue Service’s Office of Professional Responsibility.

4. Summary of Any Minority Views of Opposition Which Have Been Identified

No minority views have been identified in opposition to the proposed Resolution.
RESOLVED, That the American Bar Association urges all federal, state, local, and territorial legislative bodies and/or governmental agencies to enact comprehensive laws that prohibit the private possession, sale, breeding, import, or transfer of dangerous wild animals, such as big cats, bears, wolves, primates, and dangerous reptiles, in order to protect public safety and health, and to ensure the humane treatment and welfare of such animals.
REPORT

This Tort, Trial and Insurance Practice Section Animal Law Committee resolution and policy recommendation addresses the private possession of dangerous wild animals. This report will discuss in depth the numerous public health and safety hazards, animal welfare concerns, legal liability, and insurance issues resulting from the current inconsistent patchwork of federal, state, and territorial laws on the subject. The issue of dangerous wild animals in private hands has significant importance to the public and has been the subject of debate in many state legislatures over the past 15 years. A recommendation by the ABA will assist those seeking to encourage decision makers to address these concerns with comprehensive and uniform laws that prohibit private possession of dangerous wild animals. Without consistency, individuals who do not properly care for their animals are free to forum shop for states without regulations, placing both the public and the animals at risk.

INTRODUCTION

Numerous scientific organizations and governmental entities all believe that certain wild animals are not safe or suitable to be kept as pets—these include the Association of Zoos and Aquariums, American Veterinary Medical Association, American Animal Hospital Association, Centers for Disease Control and Prevention, and United States Department of Agriculture. A consortium of 20 animal protection groups has organized to oppose such private possession, noting that dangerous wild animals behave unpredictably and cannot be domesticated simply through captive breeding or raising by hand. The process of “domestication,” such as that of dogs, is the result of thousands of years of selective breeding. Lions, tigers, leopards, bears, wolves, reptiles, and non-human primates belong in their natural habitats or at accredited facilities that have the appropriate knowledge and expertise to care for wild animals humanely and securely—not in the hands of unregulated individuals. According to one source there are an

1 For a comprehensive, recent overview of the subject, see Lauren Slater, Wild Obsession—The perilous attraction of owning exotic pets, National Geographic, 96 (April 2014) at http://ngm.nationalgeographic.com/2014/04/exotic-pets/slater-text.
2 Michael Scott, Ohio has had loose leash on selling wild animals for years, October 19, 2011 at http://blog.cleveland.com/pdextra/2011/10/ohio_has_had_loose_leash_on_se.html.
4 "The AVMA has concerns about animal welfare, husbandry, infectious diseases, public health and safety, and environmental impacts relative to ownership of wild animal species and their hybrids.” If owners or caretakers cannot ensure these aspects, the AVMA recommends prohibiting ownership or possession of wild animal species or their hybrids.” American Veterinary Medical Association policy statement, Ownership or Possession of Wild Animals or Their Hybrids, at https://www.avma.org/KB/Policies/Pages/Ownership-or-Possession-of-Wild-Animals-or-Their-Hybrids.aspx (last visited July 20, 2014).
5 "When wild animals are kept as pets, the results may often be tragic for the animals and the owners.” American Animal Hospital Association, Wild Animals as Pets Position Statement at https://www.aahanet.org/Library/WildAnimalPets.aspx (last visited July 20, 2014).
estimated “30,000 captive great cats, bears, wolves and other large carnivores living in substandard conditions throughout the U.S.”9 Each year privately owned dangerous wild animals seriously injure or kill humans, including children, such as the ten-year-old North Carolina boy who was “mauled by his aunt’s 400-pound tiger that she kept in her backyard.”10 In addition to the danger to public safety and the animals themselves, dangerous wild animals can cause harm to other animals and disrupt ecosystems.11

According to the Centers for Disease Control, wild animals carry diseases, such as Herpes B and salmonella, which harm and kill humans.12 International experts in infectious diseases warn that “[m]ost emerging infectious diseases are zoonotic (contagious diseases spread between animals and humans) [and] wildlife constitutes a large and often unknown reservoir.”13 One of the causes of the emergence of such diseases is the keeping of dangerous wild animals as pets.14 A recent U.N. report indeed found that “seventy percent (70%) of the new diseases that have emerged in humans over recent decades are of animal origin.”15

Dangerous wild animals have complex needs and require highly specific care. The AVMA advises that anyone who owns a dangerous wild animal should be educated in animal husbandry, welfare, and safety.16 However, several states that regulate ownership, such as Texas, still do not require any special training or relevant qualifications in animal husbandry before granting a permit to own a dangerous wild animal.17 The humane treatment of dangerous wild animals also requires proper shelter and species-appropriate space, yet many state laws often require only a cage, a pen, or a room.18

Responsible ownership also requires a significant financial commitment in order to provide proper food, medical care, and housing to these animals.19 Current state laws that regulate ownership of dangerous wild animals do not require proof of financial ability to meet the needs of dangerous wild animals. Wisely, some states do require liability insurance to be carried by

13 Chomel et al, supra note 7.
14 Id.
16 AVMA, supra note 5.
17 TEX. HEALTH & SAFETY CODE ANN. § 822.104.
18 See e.g. TEX. HEALTH & SAFETY CODE ANN. 822.101(7) (“Primary enclosure” means any structure used to immediately restrict an animal to a limited amount of space, including a cage, pen, run, room, compartment, or hutch.).
19 Captive Wild Animal Protection Campaign, supra note 9.
anyone possessing dangerous wild animals. But liability insurance policies only cover harm to others, and do not address the care of the animal throughout the course of his or her lifetime.

State regulatory schemes vary considerably on requirements related to public safety, health and animal welfare. Federal law currently provides no protection for dangerous wild animals kept as pets. Thus, the Section believes that the only way for government authorities to fully protect the public health and safety, and to eliminate animal welfare risks, is to prohibit the private ownership of dangerous wild animals.

Avoidable Tragedies

Zanesville, Ohio

On January 6, 2011, Ohio’s then-Governor Ted Strickland enacted a comprehensive Executive Order that prohibited the private “possession, sale, breeding and transfer of dangerous wild animals.” The order was promulgated in part by the death of Brent Kandra, who died from over 600 wounds sustained in an attack while feeding black bears at a privately owned “exotic animal farm” in Columbia Station, Ohio. Gov. Strickland’s order put substantial restrictions on private possession, including: prohibiting the acquisition of any new animals; requiring all existing animals to be registered; and ordering facilities containing dangerous wild animals to be regularly inspected by state officials. At the time Gov. Strickland’s Executive Order was issued, Ohio was one of seven states that had no regulation at all regarding the private possession of dangerous wild animals. When John Kasich assumed the Ohio Governorship in April 2011, he decided to let the existing Dangerous Wild Animals Executive Order expire. His rationale was that the State did not have the right to regulate dangerous wild animals that were not native to Ohio—despite the fact that there had been no such challenge from any affected third party, and that similar prohibitions on

20 TEX. HEALTH & SAFETY CODE ANN. §822.107. LIABILITY INSURANCE. (“An owner of a dangerous wild animal shall maintain liability insurance coverage in an amount of not less than $100,000 for each occurrence for liability for damages for destruction of or damage to property and death or bodily injury to a person caused by the dangerous wild animal.”).
21 Federal law currently only regulates interstate commerce in large cats and requires public exhibitors of dangerous wild animals to be licensed by the USDA.
possession already existed in many other states. Indeed, "courts have almost universally upheld the validity of exotic pet regulations as a legitimate exercise of state police power that does not infringe on the constitutional protections of equal protection, due process, or takings." Six months later, on October 18, 2011, convicted felon Terry Thompson of Zanesville, Ohio, who owned more than 50 large, dangerous wild animals, including tigers, lions, monkeys, and grizzly bears, cut the fences, released all the animals, and then took his own life. As these suddenly freed animals made their way into the countryside, frantic 911 calls began pouring in to local authorities, who immediately closed local schools and flashed warning signs on interstate highways. When law enforcement officials arrived at the scene they quickly had to choose between using lethal force to stop the animals or risking harm to human life. With nightfall approaching the difficult decision was made, and over the next few hours police officers shot and killed 49 of the dangerous wild animals that Thompson had released. The final death tally included 18 Bengal Tigers, 17 Lions, 6 Black Bears, 2 Grizzly Bears, 3 Mountain Lions, 2 Wolves and 1 Baboon.

What makes the Zanesville incident all the more tragic is that it was entirely preventable. Under Gov. Strickland’s Executive Order, Terry Thompson’s dangerous wild animals would have been confiscated as of May 1, 2011, due to his prior convictions for animal cruelty. Such convictions would have disqualified him from the Order’s grandfather provisions for dangerous wild animals already in private possession at the time the Order was passed. As a Muskingum County Deputy Sheriff pointedly told reporters, “I feel like me and the other deputies were forced into this situation due to Ohio’s lax laws in reference to exotic animals.” The danger posed by Thompson’s private menagerie certainly was no secret to local law enforcement who had been called out to his property to investigate incidents related to the animals’ confinement and treatment on at least 27 occasions during just the previous 6 years: “16 times for reports of animals at large, 8 times for animal complaints, and 3 times for animal cruelty.”

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27 Id.
32 Rule 1501:31-19-05 §B(2), supra note 25 (stating that exemptions do not apply to any person who has "been convicted of an offense involving the abuse or neglect of any animal pursuant to any state, local, or federal law."
33 ABC News Nightline, supra note 30.
As a result of the Zanesville tragedy, the Ohio legislature eventually passed the Ohio Dangerous Wild Animals and Restricted Snakes Act—\textsuperscript{35} the type of comprehensive regulation of the private possession of dangerous wild animals recommended in this Report. On December 20, 2012, the U.S. District Court for the Southern District of Ohio, Eastern Division, upheld that Act’s restrictions, ruling that “animals subject to the Act are dangerous and the Act is necessary to protect the general public.”\textsuperscript{36} The court further held the plaintiffs had only “limited property interest in their exotic animals or dangerous wild animals (as described in the Act), such that a fundamental constitutional right is not implicated.”\textsuperscript{37}

\textit{Stamford, Connecticut}

Another recent high-profile calamity involved a 55-year old Connecticut woman, Charla Nash, who was brutally attacked by her neighbor’s pet chimpanzee. Nash’s face was almost entirely torn and bitten off. The victim was left permanently disfigured, had both of her hands amputated, and also contracted a virus from the chimpanzee that required her eyes to be removed. She currently resides in a nursing home. Prior to the attack, Connecticut prohibited private possession of certain species of dangerous wild animals, but did not restrict primates—an example of the pressing need for more comprehensive state laws. Nash settled a case against the chimpanzee owner’s estate for $4 million, but her claim against the State of Connecticut for failing to prohibit and protect the public from privately held dangerous primates was denied due to the state’s sovereign immunity law.\textsuperscript{38}

\textbf{Current Legal Regime}

\textbf{a) Federal Laws}

Congress and the U.S. Fish and Wildlife Service have attempted to partially regulate the possession of dangerous wild animals by prohibiting interstate trade in certain species.\textsuperscript{39} Although this approach has reduced the interstate movement of these animals it has not kept dangerous wild animals entirely out of private hands.\textsuperscript{40} Accordingly, in July of 2014, the U.S. Senate Committee on Environment & Public Works recently held a hearing on the Big Cats and Public Safety Protection Act (S.1381, 2013).\textsuperscript{41} Consistent with this Recommendation and Report, S.1381 would amend the Lacey Act to federally prohibit all future private possession and

\textsuperscript{35} Ohio Rev. Code §935.01-99, enacted June 6, 2012.
\textsuperscript{36} Wilkins v. Daniels, Slip Copy, 2012 WL 6644465 (S.D.Ohio, 2012).
\textsuperscript{37} Id. at 17.
\textsuperscript{40} The Wild Animal Sanctuary, supra note 10.
\textsuperscript{41} S.1381, “To amend the Lacey Act Amendments of 1981 to clarify provisions enacted by the Captive Wildlife Safety Act, to further the conservation of certain wildlife species, and for other purposes.” 113\textsuperscript{th} Congress, 1\textsuperscript{st} Session, introduced July 29, 2013.
breeding of lions, tigers, and other big cats nationwide. It also would require current big cat owners to register their animals. While this would be a positive step in the proper direction, it still only would apply to large cats and not any of the other categories of dangerous wild animals.

b) State Laws

With no federal laws directly addressing the private possession of dangerous wild animals in the U.S., the issue currently is governed by an inconsistent regulatory patchwork of state and local laws. Twenty-one states and Washington, D.C. already prohibit the possession of some wild animals (big cats, bears, wolves, non-human primates, and most dangerous reptiles). Another thirteen states ban some, but not all, of these species. Eleven other states allow private possession but regulate the keeping of these animals by requiring a permit. However, five U.S. states still have absolutely no laws regulating the possession of dangerous wild animals.

The following are the central elements of existing laws (legislation and/or regulations):

1) Degrees of regulation (from outright ban, to mere registration, to little or no regulation);
2) Animals covered by the law (big cats, wolves, bears, venomous reptiles, alligators and crocodiles, and non-human primates are the most common);
3) Exempted entities;
4) Grandfather clauses and their requirements;
5) Punishment for violations (this can range from imprisonment to fines as much as $2,000 per animal per day, as well as the mandatory seizure of animals and court-imposed financial responsibility for the cost of such seizure and care); and,
6) Requirements to carry mandatory liability insurance.

Public Safety Risks

Since 1990, there have been more than 1,200 dangerous incidents involving captive big cats, bears, primates, and large constrictor snakes nationwide, resulting in more than 40 human deaths (including eight children) and nearly 700 other persons injured.

Deaths from large constrictor snake incidents in the United States include one person who suffered a heart attack during a violent struggle with his python, and a woman who died from a

43 Arizona, Arkansas, Connecticut, Florida, Kansas, Louisiana, Maine, Michigan, Minnesota, Nebraska, Nevada, Texas.
44 Alabama, Nevada, North Carolina, South Carolina, and Wisconsin.
45 Delaware, Idaho, Indiana, Mississippi, Missouri, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, and Texas.
Salmonella infection (reptiles especially pose the threat of such infections as discussed below). Scores of adults and children have been injured in attacks by these deadly predators. Children, parents, and authorities are finding released or escaped pet pythons, boa constrictors, and anacondas all over the country, where they endanger communities, threaten ecosystems, and in many cases suffer tragic deaths.

Monkeys are the most common non-human primates to be privately held. After the age of two, though, monkeys tend to exhibit unpredictable behavior—the males can become aggressive, and both males and females often bite to defend themselves or establish dominance.

Just since January 2013, there have been over a dozen dangerous attacks involving big cats, including at least two incidents during which big cat handlers were killed. A few of these dangerous encounters from the past year include:

- October 25, 2013 (Wynnewood, OK), a tiger severed the arm of an employee at a roadside zoo.
- June 21, 2013 (Clay County, IN), a woman was severely mauled by a tiger while cleaning a cage. She was admitted to the intensive care unit at a local hospital where she was listed in critical condition.
- April 21, 2013 (Salina, KS), a woman found a tiger in a restroom after the cat had escaped handlers at a Shrine Circus.
- March 6, 2013 (Dunlap, CA), a woman was fatally mauled by a lion while cleaning its enclosure.

The legal liability and insurance issues related to such attacks are substantial.

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48 Washington Post, supra note 12.
50 Id.
Zoonotic Disease Risks

Another clear risk to humans posed by contact with dangerous wild animals is the transfer of animal diseases to humans. Examples include salmonella from reptiles, tuberculosis and Herpes B from primates, as well as polio, rabies, and parasites. The Centers for Disease Control estimates that every year 70,000 people contract salmonella from pet reptiles. Herpes B, also known as “monkey B” virus, can cause severe neurologic impairment or fatal encephalomyelitis if not treated. Due to the hazards posed by the transmission of such zoonotic diseases, the American Veterinary Medical Association, National Association of State Public Health Veterinarians, Association of Zoos and Aquariums, Centers for Disease Control and Prevention, and United States Department of Agriculture all have official policy statements condemning the private possession of certain species of dangerous wild animals.

Animal Welfare Concerns

It is difficult to ensure the basic welfare of dangerous wild animals in private possession even when that possession is regulated. Dangerous wild animals in private possession often are kept in poor conditions and subjected to de-fanging and de-clawing surgeries that leave them deformed and vulnerable to infections. In October 2003, officials even discovered a 400-pound pet tiger and a 3-foot pet caiman living within the confines of a single New York City public housing apartment.

Another related problem is the frequency of abandonment when such animals become too large or unmanageable for untrained and unprepared private individuals to handle. Financial costs also play a role in the quality of care an animal receives. For example, wildlife officials raid the home of one private dangerous wild animal breeder to discover 90 tiger carcasses, “including big cats that had been tied to car bumpers and starved cubs in a freezer.” Some estimates calculate that as many as 90 percent of reptiles die within their first 2 years of captivity.

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56 Marano et al, supra note 13.
59 AVMA, supra note 5.
61 AZA, supra note 4.
63 USDA, supra note 8.
66 Liebman, supra note 29.
Weak Laws, Loopholes, and Lack of Regulation

Weak laws fuel illegal trafficking. David Braun of National Geographic calls captive tigers a “ticking time bomb for the illegal wildlife trade.”68 He reports that it is estimated that there are more than 5,000 privately owned tigers in captivity, far more than remain in the wild. While the U.S. supports conservation of endangered species, the combination of weak federal regulations, delegation of responsibility to the states, and thousands of tigers being kept in captivity, all open the door to the international black market for tiger parts.69

The Captive Wildlife Safety Act, passed by the U.S. Congress in 2003, makes it “illegal to import, export, buy, sell, transport, receive or acquire certain live big cats across state lines or the U.S. border.”70 However, there are several loopholes that allow violators to circumvent this federal law—and at the state level there is little regulation at all of sales that do not involve interstate commerce. The issue of supplying dangerous wild animals to those who seek to possess them poses its own hazards for the welfare and existence of these creatures, as many die while being smuggled into the U.S. for sale.71

Wild and exotic animal auctions are a primary source of dangerous wild animals for individuals seeking to purchase them for private possession. Many of these auctions are completely unregulated, and only three U.S. states even require the mere collection of the names and addresses of those purchasing or selling dangerous wild animals at auctions.72

Revisiting the Zanesville tragedy, it is not coincidental that one of the largest auctions of dangerous wild animals regularly takes place in Ohio.73 The Mid-Ohio Alternative Animal and Bird Sale in Mt. Hope, Ohio typically offers more than 100 different species of wild animals for sale, which until 2010 included primates, bears, tigers, lions, wolves, bison, camels, zebras, and giraffes.74 These dangerous wild animals could be bought on a cash and carry basis, all with zero paperwork required to document the purchaser’s identity or the type of animal acquired.75

In Missouri, the Lolli Bros. Livestock Market continues to sell big cats and bears as long as they are under 6 months of age.76 Currently only 10 states have laws regulating wild and exotic

69 Id.
70 U.S. Fish & Wildlife Service, supra note 40.
71 Liebman, supra note 29.
animal auctions, and Alabama is the only state with an outright ban.\textsuperscript{77} These auctions provide an unregulated supply of animals that helps fuel the trade in dangerous wild animals.

The Internet is another unregulated source of dangerous wild animals.\textsuperscript{78} Virtually any type of animal can be purchased without any legal oversight or background checks. Beyond the many websites of breeders and retailers, such as www.buytigers.com, www.exoticcatsrus.com, and www.aplusexotics.com, there even is a large, eBay-style, peer-to-peer website where private individuals can trade in dangerous wild animals without any regulation, oversight, or records.

Any legislative or regulatory attempt to stem the proliferation of privately possessed dangerous wild animals must address the unregulated nature of auctions and online purchase sites.

**Factors to be considered in enacting laws** Legislative bodies or governmental agencies seeking to enact or revise regulations on private possession of dangerous wild animals should consider the following provisions:

- a. Define the dangerous wild animals to be covered in the legislation;
- b. Prohibit all new possession and breeding of dangerous wild animals as pets;
- c. Prohibit all sales and transfers of existing dangerous wild animals, except as otherwise authorized within the law;
- d. Define the list of entities to be exempted from coverage of the law;
- e. Prohibit continued possession of dangerous wild animals by individuals who have been convicted of abuse or neglect of any animal pursuant to any state, local, or federal law, or who have been convicted of a felony;
- f. Allow other current owners to keep the animals they currently possess (grandfather clauses), but protect those grandfathered animals by giving officials the authority to regulate possession and to inspect the animals' living conditions and care they receive;
- g. Require placement of seized animals at accredited institutions; and,
- h. Require adequate liability insurance to be carried by any individuals or entities allowed to maintain possession of dangerous wild animals.

\textsuperscript{77} Born Free USA supra note 73.
Conclusion

Dangerous wild animals do not make good pets. Only through thorough regulation can there exist a uniform U.S. legal regime that safeguards the public, protects animals, allocates legal liability and insurance risk properly, furthers a policy of respect for nature, and considers the interests of present and future generations in accordance with the goals of the American Bar Association.

Michael Drumke, Chair
Tort Trial and Insurance Practice Section
February 2015
APPENDIX A:

Key Provisions to Include in Any Policy Reform Regulating the Keeping of Dangerous Wild Animals

To access Appendix A online, please use this link:
http://www.americanbar.org/content/dam/aba/administrative/tips/ALCDWAAAppendix_HODTIPSalc2015.pdf

Dangerous wild animal generally refers to any native or non-native non-domesticated species capable of inflicting serious bodily injury, illness, or death to a person or domestic animal. Legislation and regulations should clearly define dangerous wild animal. At a minimum, “dangerous wild animal” (“DWA”) should be defined as the following types of animals that are held in captivity, and any or all hybrids of these species:

1. Class Mammalia
   a. Order Carnivora
      i. Family Canidae: captive-bred red wolves (*Canis rufus*) and gray wolves (*Canis lupus*).
      iii. Family Hyaenidae: all species of hyena and aardwolf.
   v. Family Procyonidae: all species, excluding raccoons (*Procyon lotor*).

   b. Order Primates: all species, excluding humans.

2. Class Reptilia
   a. Order Crocodylia: all species of alligators, crocodiles, caimans, gharials.
   b. Order Squamata –
      i. Family Atractaspidae: all species, such as mole vipers.
      iii. Family Colubridae: boomslangs (*Dispholidus typus*), twig snakes (Genus *Thelotornis*).
      iv. Family Elapidae: all species, such as cobras, mambas, and coral snakes.
v. Family Hydrophiidae: all species, such as sea snakes.
vi. Family Viperidae: all species, such as rattlesnakes, pit vipers, and puff adders.

Exemptions should be considered carefully, as they can defeat the purpose of an otherwise strong law. Reasonable exemptions make certain that only sufficiently qualified, professionally run facilities with sufficient knowledge, experience, and resources are allowed to possess dangerous wild animals. This ensures that dangerous wild animals with unique and complex needs are provided appropriate, humane, safe, and long-term care. Exemptions should be limited to:

1. Zoos and aquariums accredited by the Association of Zoos and Aquariums (AZA)
2. Sanctuaries accredited by the Global Federation of Sanctuaries or wildlife sanctuaries defined as a nonprofit organization that:
   - Operates a place of refuge where abused, neglected, unwanted, impounded, abandoned, orphaned, or displaced animals are provided care for the lifetime of the animal;
   - Does not conduct any commercial activity with respect to dangerous wild animals, including, sale, trade, auction, lease, or loan, and does not use dangerous wild animals in any manner in a for-profit business;
   - Does not use dangerous wild animals for entertainment purposes or in a traveling exhibit;
   - Does not breed any dangerous wild animals; and,
   - Does not allow members of the public the opportunity to come into physical contact with dangerous wild animals.
3. Law enforcement and animal control authorities
4. Licensed veterinary hospitals for the purpose of providing veterinary care
5. Humane societies and animal shelters temporarily housing a Dangerous Wild Animal at the written request of law enforcement officers
6. Research institutions
7. Circuses that possess a class C license under the federal Animal Welfare Act, that are temporarily in the state, and that offer performances by live animals, clowns, and acrobats for public entertainment
8. A person temporarily transporting a legally owned dangerous wild animal through the state if the transit time is not more than 24 hours

Existing dangerous wild animals should be grandfathered so that people who currently have these animals can keep them for the remainder of the owners' lives, but breeding and new acquisitions of dangerous wild animal species should be prohibited. Current owners may be required to obtain a license or permit, register the animals, and comply with certain containment, husbandry, veterinary care, handling, and other requirements. If budgetary constraints prevent inspections or comprehensive oversight, current owners may simply be required to retain proof of ownership prior to the effective date of the law.
GENERAL INFORMATION FORM

Submitting Entity: Tort Trial and Insurance Practice Section

Submitted By: Michael Drumke, Chair

1. **Summary of Resolution(s).**
   The Resolution urges all federal, state, territorial, and local legislative bodies and/or governmental agencies to enact comprehensive laws that prohibit the private possession, sale, breeding, import, or transfer of dangerous wild animals, such as big cats, bears, wolves, primates, and dangerous reptiles, in order to protect public safety and health, and to ensure the humane treatment and welfare of such animals.

2. **Approval by Submitting Entity.**
   TIPS Council voted to support the resolution and report on August 8, 2014.

3. **Has this or a similar resolution been submitted to the House or Board previously?**
   No

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**
   ABA Resolution 10B August, 1991 urges all nations to “adopt and implement appropriate measures to ensure that activities within its jurisdiction or control will be conducted with respect for Nature, and in a manner that accounts for the interests of present and future generations.”

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?**
   N/A

6. **Status of Legislation. (If applicable)**
   There is currently no legislation related to this resolution.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**
   The Resolution will be used to support legislative efforts to strengthen laws governing private possession of dangerous wild animals in those jurisdictions that still inadequately regulate such possession.

8. **Cost to the Association. (Both direct and indirect costs)**
   None.

9. **Disclosure of Interest. (If applicable)**
   N/A
10. **Referrals.**
   IR&R
   Real Property
   Admin Law
   Environment, Energy Resources
   Health Law
   International Law
   Science and Technology
   State and Local Government
   YLD

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   Cotati, CA 94931
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12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)
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   Hermes, Netburn, O’Connor & Spearing, P.C.
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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution urges all federal, state, territorial, and local legislative bodies and/or governmental agencies to enact comprehensive laws that prohibit the private possession, sale, breeding, import, or transfer of dangerous wild animals, such as big cats, bears, wolves, primates, and dangerous reptiles, in order to protect public safety and health, and to ensure the humane treatment and welfare of such animals.

2. Summary of the Issue that the Resolution Addresses

Since 1990, there have been more than 1,200 dangerous incidents involving captive big cats, bears, primates, and large constrictor snakes nationwide, resulting in more than 40 human deaths (including eight children) and nearly 700 injuries. With no federal laws directly addressing the private possession of dangerous wild animals in the U.S., the issue currently is governed by an inconsistent regulatory patchwork of state and local laws. Twenty-one states and Washington, D.C. already prohibit the possession of some wild animals (big cats, bears, wolves, non-human primates, and most dangerous reptiles). Another thirteen states ban some, but not all, of these species. Eleven other states allow private possession but regulate the keeping of these animals by requiring a permit. However, five U.S. states still have absolutely no laws regulating the possession of dangerous wild animals.

3. Please Explain How the Proposed Policy Position will address the issue

The proposed policy position urges all federal, state, territorial, and local legislative bodies and/or governmental agencies to enact comprehensive laws that prohibit the private possession, sale, breeding, import, or transfer of dangerous wild animals. By encouraging such legislative action the proposed policy position will assist implementation of a uniform U.S. legal regime that safeguards the public, protects animals, allocates legal liability and insurance risk properly, furthers a policy of respect for nature, and considers the interests of present and future generations in accordance with the goals of the American Bar Association.

4. Summary of Minority Views

It was asked that an exemption for assistance monkeys be included in the Report. However, the American Veterinary Medical Association (AVMA) has a formal policy position stating, “The AVMA does not support the use of nonhuman primates as assistance animals because of animal welfare concerns, the potential for serious injury, and zoonotic risks.” Furthermore, in 2011, the Department of Justice removed monkeys from the definition of service animals covered by the Americans with Disabilities Act (ADA). This was a deliberate move to close a loophole that many primate owners were exploiting to flout restrictions on owning dangerous wild animals.
Because assistance monkeys (trained or untrained) are no longer recognized as service animals by the Department of Justice under the ADA, and because the American Veterinary Medical Association also officially opposes the practice, we believe it would not be appropriate to recommend that these animals be exempted from future laws prohibiting private possession of dangerous wild animals.
AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association encourages law schools to offer comprehensive debt counseling and debt management education to all currently admitted and enrolled law students.

FURTHER RESOLVED, That the American Bar Association encourages bar associations to offer similar debt counseling and debt management education to young and newly admitted lawyers.
REPORT

I. Law School Debt Repayment

Graduating from law school no longer provides the financial and career security that was once taken for granted in the legal profession. Against the backdrop of a shrinking legal job market, many law students graduate with $150,000 to $200,000 in debt, with others carrying even more. Although federal law and the ABA Standards and Rules of Procedure for Approval of Law Schools require minimum entrance and exit counseling for all loan borrowers, the information provided through these sessions should represent a debt counseling floor, not a ceiling. In addition, even where some law students may take an introductory course in finance and accounting, and a few may have studied these subjects as undergraduates, law students may lack expertise (and sometimes even a basic understanding) of how to develop the best strategy for managing their debt. The internet offers a vast amount of information on acquiring student loans and paying them back, but without a working knowledge of different loan options and the differences between a standard repayment plan, income-contingent plan, and income-sensitive plan (and how the benefits of each may change over time), for example, new law school admittees and new law graduates are likely making uninformed decisions about their financial health.

II. The Problem

In recent years the federal government has enacted several laws in an attempt to facilitate more manageable student loan borrowing and debt repayment programs. While borrower assistance programs exist for the benefit of the borrower, it is often difficult to figure out what types of relief exist and how to qualify. One of the most borrower-friendly programs, the Income-Based Repayment Plan, is largely unknown to lawyers who graduated in the early 2000s (or before). Moreover, while borrowers may change their repayment program at any time, they may face varying degrees of helpfulness from for-profit loan servicers. The following table

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4 ISBA DEBT REPORT at 51.
illustrates the depth and complexity of the various repayment options currently available to federal borrowers.  

<table>
<thead>
<tr>
<th>Repayment Plan</th>
<th>Eligible Loans</th>
<th>Monthly Payment and Time Frame</th>
<th>Quick Comparison</th>
</tr>
</thead>
<tbody>
<tr>
<td>Standard Repayment Plan</td>
<td>Direct Subsidized and Unsubsidized Loans</td>
<td>Payments are a fixed amount of at least $50 per month. Up to 10 years</td>
<td>You'll pay less interest for your loan over time under this plan than you would under other plans.</td>
</tr>
<tr>
<td>Graduated Repayment Plan</td>
<td>Subsidized and Unsubsidized Federal Stafford Loans</td>
<td>Payments are lower at first and then increase, usually every two years. Up to 10 years</td>
<td>You'll pay more for your loan over time than under the 10-year standard plan.</td>
</tr>
<tr>
<td>Extended Repayment Plan</td>
<td>Subsidized and Unsubsidized Federal Stafford Loans</td>
<td>Payments may be fixed or graduated. Up to 25 years</td>
<td>Your monthly payments would be lower than the 10-year standard plan. If you are a Direct Loan borrower, you must have more than $30,000 in outstanding Direct Loans. FFEL borrower, you must have more than $30,000 in outstanding FFEL Program loans. For example, if you have $35,000 in outstanding FFEL Program loans, and...</td>
</tr>
</tbody>
</table>

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Income-Based Repayment Plan (IBR)

Direct Subsidized and Unsubsidized Loans

Subsidized and Unsubsidized Federal Stafford Loans

All PLUS loans made to students

Consolidation Loans (Direct or FFEL) that do not include Direct or FFEL PLUS loans made to parents

Pay As You Earn Repayment Plan

Direct Subsidized and Unsubsidized Loans

Direct PLUS loans made to students

Direct Consolidation Loans that do not include (Direct or FFEL)

PLUS loans made to parents

Your maximum monthly payments will be 15 percent of discretionary income, the difference between your adjusted gross income and 150 percent of the poverty guideline for your family size and state of residence (other conditions apply). Your payments change as your income changes. Up to 25 years

Your maximum monthly payments will be 10 percent of discretionary income, the difference between your adjusted gross income and 150 percent of the poverty guideline for your family size and state of residence (other conditions apply). Your payments change as your income changes. Up to 20 years

$10,000 in Direct Loans, you can use the extended repayment plan for your FFEL Program loans, but not for your Direct Loans. For both programs, you must also be a new borrower as of Oct. 7, 1998. You'll pay more for your loan over time than under the 10-year standard plan.

You must have a partial financial hardship. Your monthly payments will be lower than payments under the 10-year standard plan. You’ll pay more for your loan over time than you would under the 10-year standard plan. If you have not repaid your loan in full after making the equivalent of 25 years of qualifying monthly payments, any outstanding balance on your loan will be forgiven. You may have to pay income tax on any amount that is forgiven.

You must be a new borrower on or after Oct. 1, 2007, and must have received a disbursement of a Direct Loan on or after Oct. 1, 2011. You must have a partial financial hardship. Your monthly payments will be lower than payments under the 10-year standard plan. You'll pay more for your loan over time than you would under the 10-year standard plan. If you have not repaid your loan in full after you made the equivalent of 20
<table>
<thead>
<tr>
<th>Plan</th>
<th>Payments</th>
<th>Forgiveness</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Income-Contingent Repayment</strong></td>
<td>Payments are calculated each year and are based on your adjusted gross income, family size, and the total amount of your Direct Loans. Your payments change as your income changes. Up to 25 years.</td>
<td>You'll pay more for your loan over time than under the 10-year standard plan. If you do not repay your loan after making the equivalent of 25 years of qualifying monthly payments, the unpaid portion will be forgiven. You may have to pay income tax on the amount that is forgiven.</td>
</tr>
<tr>
<td>Plan</td>
<td></td>
<td></td>
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<tr>
<td><strong>Income-Sensitive Repayment</strong></td>
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<tr>
<td>Loans</td>
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<tr>
<td>Direct Subsidized and Unsubsidized Loans</td>
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<tr>
<td>Direct PLUS Loans made to students</td>
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<tr>
<td>Direct Consolidation Loans</td>
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<tr>
<td>Subsidized and Unsubsidized Federal Stafford Loans</td>
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<tr>
<td>FFEL PLUS Loans</td>
<td></td>
<td></td>
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<tr>
<td>FFEL Consolidation Loans</td>
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</tbody>
</table>

This snapshot of repayment options does not even mention the Public Service Loan Forgiveness Program, which will be invaluable to many new lawyers who wish to work for public interest or government entities. While law students and new lawyers may have heard about the possibility of loan forgiveness after ten years, unless they comply with certification and other requirements, any remaining balance will not be forgiven after ten years, regardless of whether the borrower paid on time.⁶

### III. The Solution

Law schools should expand their debt counseling programs to include (1) pre-enrollment counseling for new admittees who have received an offer of enrollment, including information regarding borrowing options and the true cost of a law school education; (2) post-enrollment periodic counseling to educate students on an ongoing basis (e.g., annual seminars); and (3) comprehensive pre-graduation counseling to help students implement the complex information

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transmitted in the required exit counseling. Such expanded debt counseling curriculum would help some law students understand their financial future. For example, understanding pre-enrollment loan options or choosing a post-graduation repayment plan are only two of the many complicated factors to consider before enrollment, during law school, and after graduation. In order to equip law graduates to become savvy borrowers who borrow smartly and repay their student loans in the most efficient and effective way possible, law schools should strive to educate students on a variety of financial topics beginning as early as the offer of admission. Such education and counseling should continue during all three years of law school. While in law school, students may not be thinking about how their borrowing needs may change year over year, the financial ramifications of bar study and registration expenses, filing their taxes (if previously claimed as a dependent), or staying on top of three years’ worth of student loan documents (e.g., federal, private, consolidation). Students also need to understand when the first payment is due for different types of loans and whether forbearance or hardship is a possibility (where needed). Although the minimum entrance and exit counseling required by the federal government and ABA accreditation standards may touch upon many of these topics, the current law school landscape—in which massive borrowing is often required alongside a shrinking job market—warrants a greater time investment in debt management education. Looking down the road, as previously mentioned, potential students and current students alike need to be aware of different repayment options and whether consolidation makes sense. One effective way law schools could deliver this type of advice would be to provide a timeline checklist to help guide students form a borrowing plan upon enrolling, and later develop a repayment plan before graduation.

Both pre-enrollment and pre-graduation counseling can be critical to helping borrowers succeed at repayment. Debt counseling, however, should not end at graduation. Acknowledging that law schools may not be able to keep tabs on each and every student as they change jobs and sometimes change geographic locations, bar associations should also play an important role in helping young lawyers succeed financially. Rather than assume that each graduate sorts out their student loans by the time they graduate, bar associations should also take a proactive role to offer the type of expanded debt counseling program described above. As the needs of borrowers and applicable laws change over time, bar associations can play an important role in keeping new lawyers above water with their loan repayment choices. Bar association involvement in debt counseling can also serve the dual purpose of strengthening the bar community through recruiting new members.

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7 For example, when law schools send to new admittees financial aid award letters, they could also provide information regarding the true cost of attendance, ways to minimize debt, repayment options, and who to contact with additional questions.

8 This resolution does not propose additional accreditation requirements on top of Standards 507 and 508, but it instead encourages law schools to exceed these requirements voluntarily.

9 See, e.g., Heather Jarvis, Student Loan Timeline for Graduating Students, STUDENT LAWYER Vol. 41 No. 7 (March 2013).
IV. Conclusion

In an uncertain climate, from pre-enrollment to post-graduation, law schools and bar associations should strive to help graduates and new lawyers take a proactive role in maintaining their financial health. Some entrance and exit debt counseling sessions are insufficient to keep pace with the current reality of staggering debt loads and a retracting legal job market. Ever-changing complex rules and programs make it even more important that law school admittees, current students, and new lawyers are not left to navigate these waters alone. Accordingly, comprehensive debt counseling and debt management education should be prioritized and adopted nationwide.

Respectfully submitted,

Andrew M. Schpak, Chair
Young Lawyers Division
February 2015
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Young Lawyers Division

Submitted By: Andrew M. Schpak, Chair, ABA Young Lawyers Division

1. **Summary of the Resolution.** Law schools are encouraged to offer comprehensive debt counseling and debt management education to all currently admitted and enrolled law students. Bar associations are encouraged to offer similar debt counseling and debt management education to young and newly admitted lawyers.

2. **Approval by Submitting Entity.** Approved August 8, 2014 by the Young Lawyers Division Assembly.

3. **Has this or a similar recommendation been submitted to the House or Board previously?** No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

   During the 2011 ABA Annual Meeting, the ABA House of Delegates passed Resolution 111B (the “Truth in Law School Education Resolution”), which was sponsored by the ABA Young Lawyers Division. Resolution 111B urged “all ABA-Approved Law Schools to report employment data that identifies whether graduates have obtained full-time or part-time employment within the legal profession, whether in the private or public sector, or whether in alternative professions and whether such employment is permanent or temporary.” Resolution 111B also urged “all ABA-Approved Law Schools to include the above-referenced employment data, data on the actual cost of law school education on a per credit basis, and data on the average cost of living expenditures incurred while attending law school on their websites, in their catalogues, and in their acceptance notices sent to applicants for admission; alternatively, to include in each of these locations a prominently displayed notice of where one can obtain such data.” Resolution 111B further urged “all ABA-Approved Law Schools to display data regarding graduates’ salaries on their websites that includes the median salaries for the state and region for graduates of all law schools, in a manner which protects the privacy of the graduates.” Resolution 111B also urged the “Section of Legal Education and Admissions to the Bar to consider revising the Standards for Approval of Law Schools to require law schools to provide on their websites, and in other reasonable methods of communication, more data on employment and placement of graduates.”

   Passage of this resolution furthers the policy contained in Resolution 111B, in that it would help law students and young lawyers navigate the impact of the crushing burden of student loan debt.
During the 2014 ABA Annual Meeting, the ABA House of Delegates passed Resolution 107, which opposed the "proposal, made in the administration's FY 2015 budget (or similar legislative proposals), that would limit forgiveness of student loans, after ten years of public service, to $57,500 (or such other cap that unreasonably limits the utility of the program), and that would require borrowers who are in public service and who have remaining balances exceeding that amount to repay them for fifteen more years, or until the debt was retired." Resolution 107 also urged "Congress and the Administration to support and continue public service student loan repayment and forgiveness programs, such as the current federal Public Service Loan Forgiveness Program, that enable law school graduates to embark upon less remunerative public service careers without having to make payments on their student loans for most of their working lives."

Passage of this resolution furthers the policy contained in Resolution 107, in that it would help law students and young lawyers better understand and take advantage of the Public Service Loan Forgiveness Program.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation (if applicable):

N/A

7. Brief explanation of plans for implementation of the policy, if adopted by the House of Delegates:

A copy of this resolution would be distributed to the deans of all ABA-accredited law schools and to the leadership of all state and local bar associations.

8. Cost to the Association:

None, other than the costs of distributing the resolution to the law school deans and bar association leadership.

9. Disclosure of Conflict of Interest (if applicable):

None.

10. Referrals:

At this time, the ABA Young Lawyers Division has referred this resolution to the ABA Law Student Division, the ABA Standing Committee on Legal Aid and Indigent Defendants ("SCLAID") and the ABA Section of Legal Education and Admissions to the Bar (the "Section"). Both SCLAID and the Section responded by stating that they will not take an official position on this resolution.
The ABA Young Lawyers Division intends to refer this resolution to all other relevant ABA entities, the Association of American Law Schools, the National Conference of Bar Presidents, and the National Association of Bar Executives.

11. **Contact Person (Prior to the meeting):**

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   chris.rogers@haynesboone.com  

12. **Contact Person (Who will present the report to the House):**

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   (214) 651-5480  
   Cell phone: (214) 862-5709  
   chris.rogers@haynesboone.com
EXECUTIVE SUMMARY

1. Summary of the Resolution.

The purpose of this resolution is to encourage law schools to offer and comprehensive debt counseling and debt management education to all currently admitted and enrolled law students. Bar associations are encouraged to offer similar debt counseling and debt management education to young and newly admitted lawyers.

2. Summary of the Issue(s) that the Resolution Addresses.

In recent years the federal government has enacted several laws in an attempt to facilitate more manageable student loan borrowing and debt repayment programs. While borrower assistance programs exist for the benefit of the borrower, it is rarely easy to figure out what types of relief exist and how to qualify. Moreover, while borrowers may change their repayment program at any time, they may face varying degrees of helpfulness from for-profit loan servicers.

3. Please Explain How the Proposed Policy will address the issue(s).

Instead of the current baseline approach where law schools provide the minimum amount of required loan counseling, law schools should expand their debt counseling programs to include (1) pre-enrollment counseling for new admittees who have received an offer of enrollment, including information regarding borrowing options and the true cost of a law school education; (2) post-enrollment periodic counseling to educate students on an ongoing basis (e.g., annual seminars); and (3) robust pre-graduation counseling to help students implement the complex information transmitted in the required exit counseling. Such expanded debt counseling curriculum would help all law students understand their financial future. Bar associations should also play an important role in helping young lawyers succeed financially. Rather than assume that each graduate sorts out their student loans by the time they graduate, bar associations should also take a proactive role to offer the type of expanded debt counseling program described above. As the needs of borrowers and applicable laws change over time, bar associations can play an important role in keeping new lawyers above water with their loan repayment choices.


The ABA Young Lawyers Division has not identified any minority views or opposition to this resolution.
RESOLVED, That the American Bar Association urges all federal, state, local, territorial and tribal governments to adopt a presumption against the use of restraints on juveniles in court and to permit a court to allow such use only after providing the juvenile with an in-person opportunity to be heard and finding that the restraints are the least restrictive means necessary to prevent flight or harm to the juvenile or others.
REPORT

Children in juvenile court should be restrained in only the rarest of circumstances. Yet youth who are in custody, whether for an initial appearance, adjudication of guilt, or post-conviction hearing, are routinely brought before the court in leg irons, handcuffs, and belly chains. Indeed, the indiscriminate shackling of youth in the nation’s juvenile courts has become widespread in recent years. Shackling interferes with the attorney-client relationship, chills notions of fairness and due process, undermines the presumption of innocence, and is contrary to the rehabilitative ideals of the juvenile court.¹

The overwhelming majority of juveniles are in court for non-violent offenses.² In 2011, the juvenile violent crime arrest index rate was the lowest in three decades.³ Yet in many courts across the country, all youth, regardless of their alleged offense, are shackled in juvenile proceedings. Some jurisdictions extend this to children charged with status offenses—non-criminal misbehavior.⁴

In response to the phenomenon of blanket policies shackling children and youth in court, a number of jurisdictions have sharply limited the practice, whether by judicial decision, legislation, or court rule-making.

North Carolina, Pennsylvania, and South Carolina have restricted the practice by statute.⁵ Florida, New Mexico, and Washington State have curtailed the practice through the rule-making authority of those states’ highest courts, and Massachusetts has done so through a statewide official court policy.⁶ In terms of court decisions, Illinois ended the

¹ The practice has been roundly criticized. See, Perlmutter, Unchain the Children: Gault, Therapeutic Jurisprudence and Shackling, 9 Barry Law Rev. 1 (2007) (arguing that blanket shackling policies stigmatize and harm children, violate due process norms and vitiate the aims of the juvenile justice system); Zeno, Shackling Children During Court Appearances: Fairness and Security in Juvenile Courtrooms, 12 J. Gender Race & Just. 257 (2009) (asserting that shackling juveniles is antithetical to the twin goals of rehabilitation and treatment in the juvenile court and harmful to children); Kim McLaurin, Children in Chains: Indiscriminate Shacking of Juveniles, 38 WASH. U. J. L. & POL’Y 213 (2012) (noting that U.S. Supreme Court jurisprudence distinguishes youthful offenders from their adult counterparts, intensifying the need for scrutiny of the practice and arguing the absence of individualized determinations of necessity is unconstitutional).
⁴ For example, in considering its rule prohibiting a blanket policy of shackling youth in the state’s juvenile courts, the administrative office of the courts there noted that juvenile offenders and status offenders were “routinely shackled” in juvenile court in a majority of the counties. Cover sheet, Proposed Rule JuCR 1.6, available at www.courts.wa.gov/ under “Rules.”
practice in 1977. Courts in Oregon, North Dakota and California have followed suit. Many localities are beginning to institute their own rules to curtail the practice.

These measures all employ a presumption against the use of restraints on young people in their courts. Generally, they provide that restraints should be employed as the least restrictive alternative means available to the court, and imposed only to prevent harm to the juvenile or others, or to prevent flight. The juvenile, through counsel, must be given an opportunity to challenge the imposition of restraints.

There are compelling reasons to end the automatic shackling of juveniles, and the American Bar Association should exercise leadership in bringing about needed reforms to halt this practice.

**The automatic shackling of children and adolescents is contrary to law.**

The automatic shackling of youth violates notions of fairness and due process. Under the United States Constitution, the use of visible restraints imposed on adult criminal defendants at trial and sentencing may only be employed “in the presence of a special need.” This requires the state to demonstrate a safety interest specific to a particular trial, such as potential security problems or a risk of flight from the courtroom. This principle dates at least as far back as British common law. The United States Supreme Court in *Deck v. Missouri* concluded that the common law history on shackling reflected “a basic element of ‘due process of law’ protected by the Federal Constitution.” Blackstone’s 1769 *Commentaries on the Laws of England* noted that “it is laid down in our ancient books” that a defendant “must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape.”

Indeed, the main rationale against shackling at common law holds constant today: “If felons come in judgment to answer,...they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will.”

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9 Localities include Boulder, Colorado; Maricopa and Pima Counties in Arizona; and Anchorage, Alaska.
10 For example, Florida requires that restraints be removed in the courtroom, unless they are necessary to prevent physical harm to the child or another person; the child has a recent history of disruptive behavior which is potentially harmful; or there is a founded belief of a substantial risk of flight. Fl. R. Proc. 8.100. Pennsylvania and South Carolina statutes are to the same effect. 42 Pa. Cons. Stat. § 6336.2; S.C. Code Ann. § 63-19-1435 (2014 Supp.).
12 *Id.* at 629. See also *Holbrook v. Flynn*, 475 U.S. 560, 568-569 (1986).
13 *Deck*, 544 U.S. at 626.
14 *Id.* Another contemporaneous source held similarly that “a defendant ‘ought not be brought to the Bar in a contumelious Manner; as with his Hands tied together, or any other Mark of Ignominy and Reproach ... unless there be some Danger of a Rescous [rescue] or Escape.” *Id.* at 630-31, quoting 2 W. Hawkins, Pleas of the Crown, ch. 28, § 1, p. 308 (1716–1721) (section on arraignments).
15 *Id.* at 626, quoting 3 E. Coke, Institutes of the Laws of England *34.
It is clear that adults at trial should be shackled only “as a last resort.” The same can be said for children in delinquency court. As the Supreme Court observed in In re Gault, “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”

The Gault Court highlighted the importance of “the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process” of juvenile court procedure. The anti-shackling principles espoused in Deck apply with equal—if not greater—force for juveniles.

Fairness at trial starts with the most fundamental tenet of American criminal jurisprudence—the presumption of innocence. Shackling undermines the presumption of innocence and denigrates the fact-finding process. As the Supreme Court held in Deck, “[i]t jeopardizes the presumption’s value and protection and deems our justice for an accused without clear cause to be required to stand in a courtroom in manacles or other restraints while he is being judged.” An accused juvenile also has “the right to stand trial ‘with the appearance, dignity and self-respect of a free and innocent man.’”

While Deck applies to jury trials, its underlying principles are fundamental across all proceedings, including those with judicial factfinders. “[J]udges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder.”

Judges themselves have rejected the argument that they are insulated from prejudice: “To make this assumption is to degrade a defendant’s right to be presumed innocent. Visible shackles give the impression to any trier of fact that a person is violent, a miscreant, and cannot be trusted,” wrote New York’s highest jurist. Moreover, other parties in court and members of the public are prejudiced by the sight of a defendant in shackles. Although the public does not determine a person’s guilt or innocence, courts cannot “ignore the way the image of a handcuffed or shackled defendant affects the public perception of that person.”

A youth who must defend himself in court should not also have to struggle with “a disheartening suspicion that he is presumed guilty.” One clinical law professor recounts the experience of a youth client whose request to be unchained was denied—“Our client has a difficult time believing that the presumption of innocence still cloaks him when all he can feel are chains.” Simply put, youth in juvenile court are entitled to a presumption of innocence, and indiscriminate shackling undermines this presumption.

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17 387 U.S. 1, 13 (1967).
18 Id. at 26.
20 Id. at 630.
21 Id.
24 Id. at 1190 (Lippman, J., dissenting) (agreeing with the majority’s rule but rejecting the majority’s finding of harmless error).
25 Id. at 1189 (majority opinion).
The clear implication of the practice is that the child is being punished through the use of shackles and other restraints prior to an adjudication of guilt. Almost universally, the decision to employ shackles or other restraints is made by court security staff—a law enforcement function. Using shackles as punishment prior to trial is a deprivation of due process of law.28 “Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”29

Shackling interferes with juveniles’ ability to participate in their own defense.

Shackling greatly impedes one’s ability to consult or confer with counsel, take notes, or even take the stand in one’s own defense. Deck recognizes this.30 Shackled children find it physically difficult—and oftentimes impossible—to hold papers they are asked to review in court, or provide counsel with notes. The inability to effectively communicate with counsel is a problem of constitutional significance. Gault guarantees juveniles the right to counsel. The Supreme Court recently acknowledged that communication between juveniles and counsel is often strained, even where shackles are not an issue.31

Difficulty interacting with counsel puts juveniles at a considerable disadvantage in adjudicatory proceedings. These relations are particularly strained because “[j]uveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it.”32 Furthermore, “[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel...all can lead to poor decisions by one charged with a juvenile offense.”33 Restraints can only exacerbate this already fragile relationship. As one shackled youngster has said:

It just made my attorney not like me. I felt like he wasn’t even trying to work with me or reduce my time. I felt like everybody was looking at me like I was a monster. I was so worried about how everyone was seeing me in shackles that I couldn’t concentrate because it made me feel like a monster. I felt unfairly treated. I was unable to focus.34

Discussing the impact of the psychological weight of the shackles, an Illinois appellate judge observed, “[a]nyone who can sit in chains with no diminution of courage and

33 Id.
34 Letter from C.O. to Washington State Supreme Court, Re: Proposed JuCR 1.6 – Physical Restraints in the Courtroom (on file with the Campaign Against Indiscriminate Juvenile Shackling (hereinafter CAIJS)).
confidence has a thicker hide than the common run of humanity.”

This is a lot to expect of a child in trouble with the law.

**The practice of automatically shackling children and adolescents is contrary to the purpose of the juvenile justice system.**

Our nation’s courts must communicate deliberation, decorum and dignity. Discussing the practice of shackling the accused, and limiting its use, at least as applied to adult offenders, the United States Supreme Court observed:

> The courtroom’s formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence and the gravity with which Americans consider any deprivation of an individual’s liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system’s power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve.  

These considerations are even more important in the state’s juvenile courts. Their purpose includes the goal of rehabilitation, recognized in *Gault.* Limiting the imposition of restraints on children only to those who truly present a risk of harm or flight will further ensure the dignity of the juvenile courts. Indeed, as one court recognized, “allowing a young person who poses no security hazard to appear before the court unshackled, with the dignity of a free and innocent person, may foster respect for the judicial process.”

In contrast, indiscriminate shackling diserves this purpose. After extensive hearings before the Florida Supreme Court conducting an inquiry into the practice as a part of its rule-making authority, the court said:

> We find the indiscriminate shackling of children in Florida courtrooms... repugnant, degrading, humiliating, and contrary to the stated primary purposes of the juvenile justice system and to the principles of therapeutic justice, a concept which this Court has previously acknowledged.

In the wake of the Kids for Cash scandal revealing the abhorrent treatment of court-involved children in Luzerne County, Pennsylvania, the Pennsylvania Supreme Court acted on recommendations for reform to enact a rule limiting the use of shackles. The court found shackling practices to be contrary to the philosophy of balanced and
restorative justice. The practices further undermined “the goals of providing treatment, supervision, and rehabilitation to juveniles.” The Chief Justice of the Massachusetts Juvenile Court similarly found juvenile shackling to be antithetical to these goals. The routine use of restraints in juvenile proceedings undermines the goals and objectives of family courts across the country.

The automatic shackling of children and adolescents is contrary to their interests.

Indiscriminate and routine shackling of youth in the juvenile court contradicts the central tenets of Gault, which reflect a modern understanding of therapeutic justice. It should be clear to even a casual observer in a courtroom that the use of shackles on children as young as nine or ten, or even those age fourteen to sixteen, is degrading. A psychologist with substantial experience working with children involved in the juvenile justice system warns that treating children in this way leads to shame and humiliation. Indeed, experts and medical professionals agree that “[p]ublic shackling is an inherently humiliating experience for children to endure.” Compounding this is the fact that “children and adolescents are more vulnerable to lasting harm from feeling humiliation and shame than adults.” The nature of shackling necessarily signals that child is dangerous, thereby increasing the likelihood that the child will be treated as dangerous by others.

A decade ago, the Supreme Court recognized in Roper v. Simmons that childhood is a thing apart from adulthood, informed not only by common sense but science. As well, science should inform the decision whether to shackle children in court.

The latest research indicates that the teenage years are crucial to identity development and self-esteem. A stable sense of self is critical to the development of moral and ethical values and the achievement of long-term goals. “Shackling is inherently shame producing.” Feelings of shame and humiliation may inhibit positive

41 Adoption of New Rule 139 of the Rules of Juvenile Court Procedure, Pennsylvania Supreme Court, No. 527, April 26, 2011.
42 Id.
43 Id. at 3.
45 Affidavit of Dr. Donald L. Rosenblitt, in the Matter of Rebecca C., No. 04-JB-000370, Motion to Prohibit Shackling of Minor Child, Ex. 1 (2007).
48 See, e.g., Laurence Steinberg & Robert G. Schwartz, Developmental Psychology Goes to Court, in Youth on Trial 9, 27 (Thomas Grisso & Robert G. Schwartz eds., 2000); Elisabeth Scott & Laurence Steinberg, Rethinking Juvenile Justice 52 (2008); Affidavit of Dr. Laura Vanderbeck, Jan. 8, 2007 (on file with CAIJS).
49 See Adolescent Development, Module 1 of Toward Developmentally Appropriate Practice: A Juvenile Court Training Curriculum 11-17 (National Juvenile Defender Center & Juvenile Law Center eds., 2009).
50 Email from Dr. Rosenblitt to David A. Shapiro, (Sept. 12, 2014, 13:06 EDT) (on file with CAIJS).
self-development and productive community participation. 51 Shackling doesn’t protect communities. It harms them.

At Midyear 2014, in resolution 109B, the American Bar Association passed a resolution calling for “the development and adoption of trauma-informed, evidence-based approaches and practices on behalf of justice system-involved children.” Ending the indiscriminate imposition of restraints on children alleviates the impact of trauma and its legal ramifications on children and their families.

The automatic shackling of children and adolescents is unnecessary.

The most common argument in favor of indiscriminate shackling focuses on courtroom safety and order. 52 Shackles are not necessary, however, to maintain either safety or order—both of which can be achieved with less restrictive means. These include, for instance, the presence of court personnel, law enforcement officers, and bailiffs, or locking the courtroom door to deter flight. 53

Florida courts have successfully relied on shackling alternatives to ensure courtroom safety and order. In the two years after Florida’s rule took effect, only one instance of disorderly behavior was reported in the entire state: a boy struck his stepfather, a registered sex offender who had been convicted three times for lewd and lascivious acts on the boy. 54 Before the Florida Supreme Court eliminated indiscriminate shackling statewide in 2009, Miami-Dade County halted the practice in 2006. 55 Five years later, a study revealed that “[s]ince then, more than 20,000 detained children have appeared before the court unbound…. In that time, no child has harmed anyone or escaped from court.” 56 This success has been replicated in many other jurisdictions across the country. 57

Nor is the requirement of an opportunity of the juvenile to be heard on the decision to impose restraints burdensome or impractical. To begin with, the opportunity for the juvenile to be heard is satisfied in practice by giving counsel for the youngster to object whether or not the child is present in court. In Massachusetts, where the imposition of restraints is regulated by administrative rule, court security staff is required to notify the presiding judge of any “security concerns,” and counsel for the juvenile is given an

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51 Affidavit of Dr. Laura Vanderbeck, Jan. 8, 2007 (on file with CAJS).
56 Martinez, supra note 54, at 1.
57 Advocates in Arizona, Colorado, Massachusetts, Nevada, Utah, and numerous other locales report a lack of escape attempts and physical violence perpetuated by unshackled youth in courtrooms.
opportunity to challenge the decision at a sidebar prior to the call of the case. In Florida, if the trial court is considering the imposition of restraints, counsel for the juvenile may be heard before the youngster is brought to the courtroom, or the juvenile may enter the courtroom in restraints when the motion to remove them is taken up.

Nothing in this resolution is meant to prohibit the reasonable use of restraints or other security measures in the transport of children to and from the courtroom by security personnel. Moreover, the resolution does not mean that a juvenile may never be restrained with the use of hardware. Instead, the resolution intends that such instances in the nation’s courts be rare. The trend in courts around the country facing this question insists on the exercise of fact-specific discretion in determining when to require restraints on juveniles, taking into account:

[T]he accused’s record, temperament, and the desperateness of his situation; the security situation at the courtroom and the courthouse; the accused’s physical condition; and whether there was an adequate means of providing security that was less prejudicial.

Thus, this resolution adequately and accurately reflects this trend, and leaves intact effective measures to ensure the security of our nation’s courts. Shackling of youth need and should not play a major role in this pursuit.

CONCLUSION

This resolution promotes fairness and the rule of law in juvenile proceedings, provides for the imposition of restraints when needed for safety, protects the due process rights and well-being of youth, and upholds the rehabilitative principles of juvenile courts. Shackling of children in the courtroom without compelling justification is an inherently stigmatizing and traumatic practice that compromises the presumption of innocence. Wholesale reliance on shackles in the juvenile court without an individualized determination that they are actually necessary is contrary to law, undermines the purpose of the juvenile court, and is inimical to the interests of children and youth in conflict with the law.

58 See note 5, supra.
60 In re R.W.S., 728 N.W.2d 326, 331 (N.D. 2007).
Responsible for improving the administration of justice in across the country, the American Bar Association is uniquely positioned to advocate the reform of this egregious practice, in favor of a rule which promotes the integrity of the courts and the dignity of citizens before them—including the youngest.

Respectfully submitted,

Jim Felman and Cynthia Orr, Chairs
Criminal Justice Section
February 2015
1. **Summary of Resolution**

The resolution urges federal, state and local governments and agencies to restrict the use of restraints on juveniles in court to those juveniles who present a risk of harm or flight, to employ a presumption against the use of restraints in court, and to give the juvenile an opportunity to be heard on whether restraints are the least restrictive alternative. The resolution does not seek to impose limitations on security measures for transporting juveniles to and from the courtroom.

2. **Approval by Submitting Entity.**

This resolution was approved by the Criminal Justice Section Council at its Fall Meeting on October 25, 2014.

3. **Has this or a similar resolution been presented to the House or Board previously?**

No similar resolution has been submitted previously to the House of Delegates or Board of Governors.

4. **What existing Association policies are relevant to this resolution and how would they be affected by its adoption?**

ABA Criminal Justice Standard 6-3.2 relating to Special Functions of the Trial Judge requires the court maintain security in the courtroom with due deference to dignity and decorum, accomplished in the least obtrusive and disruptive manner, minimizing any adverse impact. ABA Criminal Justice Section Standard 23-5.9 relating to Treatment of Prisoners allows for the use of restraints as a security precaution during transfer or transport, using the least restrictive form of restraint appropriate and only as long as the need exists. These standards would be unaffected. There is no relevant ABA Juvenile Justice Standard. One principle of those standards, however, is that the least restrictive alternative should be the choice of decision makers for intervention in the lives of juveniles. Flicker, *A Summary and Analysis* (Ballinger Publishing Co. 1982) p. 23.

5. **What urgency exists which requires action at this meeting of the House?**

Many jurisdictions are now considering limitations on the use of restraints in court proceedings involving juveniles, and the ABA is uniquely positioned to provide guidance to federal, state and local jurisdictions on the use of such restraints.
6. **Status of Legislation**

This resolution does not support a specific piece of legislation.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

Adoption of the policy will allow the ABA to support legislation or rule making at the federal, state and local levels to impose restrictions on the use of restraints on juveniles in court, and members will work with national and local groups seeking to reform the practice of the indiscriminate use of restraints on juveniles in the courts.

8. **Cost to the Association (Both direct and indirect costs)**

Adoption of the resolution will not result in expenditures by the Association.

9. **Disclosure of Interest**

We are not aware of potential conflicts of interest related to this resolution.

10. **Referrals.**

At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2015 Midyear Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

    **Standing Committees**
    American Judicial System Standing Committee
    Ethics and Professional Responsibility
    Federal Judiciary
    Legal Aid and Indigent Defendants
    Professionalism

    **Special Committees and Commissions**
    Children and the Law
    Coalition on Racial and Ethnic Justice
    Commission on Domestic and Sexual Violence
    Commission on Youth at Risk
    Death Penalty Representation Project
    Hispanic Legal Rights and Responsibilities
    Sexual Orientation and Gender Identity
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges federal, state and local governments and agencies to restrict the use of restraints on juveniles in court to those juveniles who present a risk of harm or flight, employing a presumption against the use of restraints in court, and giving the juvenile an opportunity to be heard on whether restraints are the least restrictive alternative. The resolution does not seek to impose limitations on security measures for transporting juveniles to and from the courtroom.

2. Summary of the Issue that the Resolution Addresses

The overwhelming majority of juveniles are in court for non-violent offenses. In 2011, the juvenile violent crime arrest index rate was the lowest in three decades. Yet in many courts across the country, all youth, regardless of their alleged offense, are shackled in juvenile proceedings. Some jurisdictions extend this to children charged with status offenses – non-criminal misbehavior.

3. Please Explain How the Proposed Policy Position will address the issue

This resolution promotes fairness and the rule of law in juvenile proceedings, provides for the imposition of restraints when needed for safety, protects the due process rights and well-being of youth, and upholds the rehabilitative principles of juvenile courts. Shackling of children in the courtroom without compelling justification is an inherently stigmatizing and traumatic practice that compromises the presumption of innocence. Wholesale reliance on shackles in the juvenile court without an individualized determination that they are actually necessary is contrary to law, undermines the purpose of the juvenile court, and is inimical to the interests of children and youth in conflict with the law.

4. Summary of Minority Views

None are known.
RESOLVED, That the American Bar Association urges federal, state, local and tribal governments to protect the integrity of criminal proceedings, in its truth seeking function, by (1) seeking to hold accountable those who unlawfully intimidate or tamper with victims and prosecution and defense witnesses by any source or means, including the use of social media; and (2) examining practices, procedures, and training, and revising them as needed to assure that victims and witnesses are not improperly intimidated or tampered with by lawyers or law enforcement personnel, and that they receive adequate protection against intimidation and tampering by any person.
REPORT

Introduction

The resolution addresses the corrupting influence that unlawful and improper intimidation can have on the testimony of witnesses, including victims, in criminal trials and the reality that intimidation undermines the rule of law and the credibility of the judicial process. The possibility that victims and witnesses will be targeted by individuals who seek to influence their testimony is not new. It has been present since the founding of the Nation. In 1789, intimidation usually required personal contact or delivery of written threats. With the development of the telephone, intimidation from a distance became a new threat. In the current digital age, communication with victims and witnesses is possible in an ever-expanding array of ways. And many victims and witnesses have wittingly or unwittingly exposed a vast array of information about themselves on social media, making it easier for anyone seeking to find them and influence them, to attempt to do so.

Prosecutors and law enforcement have consistently reported that the highest rates of witness intimidation exist in cases involving domestic violence, gangs and drug dealing.\(^1\) However, witness intimidation can occur in any type of case, from white collar crimes to petty offenses. Domestic and intimate partner violence cases arise from the complex web of family and intimate relationships.

Witness intimidation comes most often directly from close family and friends who are personally known to all parties. Ensuring the safety and cooperation of these victims and witnesses present specific types of challenges. In cases of domestic abuse, law enforcement officials have long observed a tragic pattern: a battered woman will report abuse by her partner to authorities, only to later refuse to cooperate in the prosecution of the abuser. The most common reasons given for withdrawing cooperation include “safety, a desire to save the relationship and economic pressures.”\(^2\)\(^\text{2}\) Between 25 and 75 percent of women seeking help in shelters return to their partners shortly after leaving.\(^3\)\(^\text{3}\) Unfortunately, women who drop charges against their abuser “are four times more likely to suffer future violence than those who do not.”\(^4\)\(^\text{4}\)

Gang and drug trafficking cases present a different dynamic and set of dangers to victims and witnesses.\(^5\) Intimidation is a key feature of gang and drug-related violence.

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4 Id. at 414.
Gangs, like other criminal enterprises, exist to accumulate power and profit. The prosecution of any member, particularly for a serious offense, threatens all members. Gang associates can be instructed to carry out orders of intimidation and retaliation against witnesses, including orders of execution. In one example in Baltimore, a convicted murderer ordered the execution of a trial witness as well as the witness’s daughter and the daughter’s boyfriend.6

Victims and witnesses who live near offenders are at a greater risk of intimidation than those who live elsewhere.7 When gang members make a credible threat of violence, including against the witness’s family, friends and loved ones, the threat becomes an effective tool to wield against any potential witness. Additionally, in inter-gang violence, the roles of offender, victim and witness are often interchangeable and revolving; the same individual may, at different times, be a victim, a witness and an offender, and rather than cooperate with law enforcement, he/she may choose to retaliate.

In recognition of the realities that prosecutors, defense counsel and courts face as criminal cases are processed, the resolution calls upon governments at every level to hold accountable those who unlawfully intimidate witnesses by any source or means, including the use of social media. The resolution also urges these governments to examine practices, procedures and training to determine whether they are doing all that is necessary and desirable to protect against victim and witness intimidation and to revise practices, procedures and training as needed to assure that the protections are adequate.

A Long-Standing Obligation

In 1895, the United States Supreme Court articulated the rights and obligations of a crime witness. The Court wrote that “it is the duty and the right ... of every citizen, to assist in prosecuting, and in securing the punishment of any breach of the peace of the U.S.” The court recognized that it is the duty of government to see that a witness may pursue this right and duty freely, and “to protect him from violence while so doing, or on account of so doing.”8 Thus, it is well established that a crime witness has both a right and a duty to participate in the criminal justice system and should feel free to come forward and to present evidence of criminal behavior without fear of harm or retribution.

Its has been and remains the duty of government to protect witnesses, including victims from intimidation that generates the kind of fear that discourages participation in the criminal process or distorts the truth-finding goal of that process.

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6 MaryAnn Spoto, Killers Ordered Execution of Witness, Ocean Prosecutor Charges, NJ.com (Nov. 19, 2008), http://www.nj.com/news/index.ssf/2008/11/killers_ordered_execution_of_w.html (stating that two gang members convicted of murder ordered the execution of a trial witness as well as the witness’s daughter and the daughter’s boyfriend). APPVideo, Witness Tampering Murder Sentence (12/1/09), YouTube (Dec. 1, 2009), https://www.youtube.com/watch?v=rY1XIBaXRHE (stating that the gang members were convicted of witness tampering).


8 In re Quarles, 158 U.S. 532, 536.
Overview of Witness Intimidation

There are incentives to engage in victim and witness intimidation in every type of criminal case: homicide, gang crime, drug trafficking, sexual abuse and domestic/intimate partner violence, as well as public corruption and white collar criminal cases. The goal of intimidation is to affect investigations and trials, frustrating a party’s access to relevant evidence. Those who seek to intimidate have reason to want to discourage witnesses and victims from cooperating with investigators and attorneys in the hope that the truth will not be found out. When a case is brought, everyone involved in the case could be tempted to seek an advantage in order to increase the possibility of a conviction or acquittal.

Prosecutors, law enforcement officials and defense counsel have good reason to be concerned about witness intimidation. Where successful, witness intimidation results in the frustration of a party’s search for the truth. Intimidation can lead to a variety of outcomes. Persons known to have been present during a crime may refuse to speak with investigators, claim to have seen nothing or deny having been present at a crime scene. When forced to testify, they may “forget” everything about the crime, claim a Fifth Amendment privilege or actually testify falsely. They may simply disappear prior to trial, or never come forward at all. In the most extreme cases, witnesses and at times, their families, are executed — usually publicly and violently. In all instances, justice is not served and the integrity of the judicial process is undermined.

Experience has shown that there are various kinds of intimidation. Threats of harm or retaliation are perhaps the most obvious and egregious. They are also unlawful and prohibited in every jurisdiction, as they should be. But there are instances in which lawyers (both prosecutors and defense counsel) and their investigators may act in ways that intentionally or unintentionally may improperly influence victim and witness testimony. Law enforcement officers and prosecutors have authority entrusted to them that defense counsel and defendants do not share. Prosecutors have the grand jury and subpoena power. They have the right to confer immunity upon witnesses, the right to offer plea deals in exchange for cooperation, and the right to increase the exposure of uncooperative witnesses. All members of the bar share an interest in seeing that such authority is exercised justly.

The vast majority of lawyers and investigators who work within the criminal justice system do so with respect for victims and witnesses. Unfortunately, there are a few who do not. The desire to make or defeat cases and the desire to win cases that are tried may cause some attorneys and their investigators to use tactics that threaten the integrity of witness testimony. Some conduct is unlawful, and some is

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egregious. For example, in 2013, a high-profile defense attorney and former federal prosecutor, Paul Bergrin, was convicted in federal court in New Jersey of conspiring to kill a key government witness in his client’s drug-dealing case.11

Law enforcement can also be involved in witness tampering. In Santa Ana, California, a trial court judge reprimanded prosecutors for “contemptible conduct toward witnesses” and dismissed the securities violation case after the prosecutors called a witness’s employer and “spread innuendo” that resulted in the witness losing her job.12 Afterward, the prosecutors “pressured her into pleading guilty” to an offense that occurred seven years earlier, and conditioned the guilty plea on her “changing her story to support the prosecution” in the securities violation case.87 In his reprimand, the judge said he had “absolutely no confidence that any portion of [the witness’s] testimony was based upon her own independent recollection of events as opposed to what the government thought her recollection should be on these events.”13

Such examples are surely the exception rather than the rule. But, there are more subtle ways in which lawyers and investigators can seek to affect what victims and witnesses say. Lawyers are well advised to pay careful attention to the ABA Standards on the Prosecution and Defense Function as well as the rules of professional conduct that apply in their jurisdictions.

The undeniable fact is that lawyers, through their professional skill and status, and investigators, through their skill and persuasiveness, may be able to affect victim and witness testimony in worrisome ways, even without realizing that they are doing so. This explains in large measure why lawyers cannot contact represented opposing parties without permission of their counsel. One of the ways that prosecutors and defense counsel and their investigators can protect against intimidating victims and witnesses is to adopt a policy of telling them all the following: “You may be speaking to lawyers and investigators as a case progresses. If anyone, including me, does or says anything that causes you to think that that person is trying to get you to change testimony or to say something that is not entirely truthful, tell that person, including me, that you believe you are being pressured improperly. If it is a prosecutor or law enforcement officer you feel has improperly pressured you, do not hesitate to report that to defense counsel or to the prosecutor’s or law enforcement officer’s superiors. And if it is defense counsel or a representative of the defense who has done so, do not hesitate to report that to the prosecutor.”

Social Media and Intimidation

Social media has become a fundamental part of modern life. The most commonly used social media websites – Facebook, YouTube, Instagram, Twitter, Snapchat, and

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13 Id.
dozens of other multi-media social networking sites -- have become a primary method for information sharing and self-expression. Unfortunately, social media also has a dark side, having become a simple and effective way to intimidate witnesses.14

Social media has been used by defendants, their families, friends and associates to attack potential witnesses in every imaginable way: publishing “tweets” aimed at a named witness; lining up a series of cartoon ‘emoji[s]’ (i.e. a rat, a gunshot, and a gun) to deliver a readily understood threat; and posting witnesses’ names and personal information, some of which are accompanied by images of secret grand jury testimony and police reports, and denouncing them as “snitches” deserving of general disdain and retribution.15

Also, due to the public nature of social media, the threatening postings contribute significantly to the chilling effect among other potential witnesses who can fully expect similar treatment if exposed.16

Social media makes it easy to intimidate a witness. Individuals who might not participate in physical attacks or deliver personal threats can now intimidate a witness from the comfort of their own homes. Cellular networks provide Internet connectivity virtually everywhere, enabling users to easily post threatening content instantly. User accounts can be established under any name, real or fictitious, and within minutes, posts are added and others can join in on the abuse with the click of a button. Cell phones and smartphones that can convey threats or take pictures have become so problematic inside courtrooms that a number of courts have adopted new, more restrictive cell and wireless policies. The problem extends to prisons, where smuggled cell phones and smart phones make it easy for inmates to harass their victims or accusers using e-mail, text and social networks.17

Technology and social media has effectively nurtured and spread the anti-snitch culture. The number of websites promoting the anti-snitch culture and the ferocity of its

14 See generally Kevin Davis, Witness Harassment has Gone Digital, and the Justice System is Playing Catch-Up, ABA Journal (Aug. 1, 2013).
message is a good indicator of just how dangerous this phenomenon has become. Anti-snitch music videos and videos exposing snitches have proliferated on YouTube, amassing hundreds of thousands of views.\textsuperscript{18} YouTube videos of so-called snitches being jumped and beaten are easily accessible. Facebook groups with names like “Snitches get stitches,” “The snitch list,” and “Snitches R Us” are made with the dual purpose of tampering with specific witness testimony and denouncing snitching in general.

Blogs such as “SnitchWire,” databases and other websites are gathering spaces for users to post anonymous, threatening messages to expose anyone the users consider “snitches.”\textsuperscript{19}

As social media grows and the loss of privacy becomes more apparent, all participants in the criminal justice system, including judges, attorneys, court personnel and jurors as well as victims and witnesses, have become more concerned for their safety. Identifying the source of illegally disseminated court documents and police reports alone raises a number of difficult issues, including: access to, and security of, court records and documents; the responsibility of attorneys and others when discovery documents are posted on social media or copied and used to intimidate witnesses; the responsibility of social media companies when their venues are used to commit a crime; and many more.

\textbf{Conclusion}

The Resolution highlights the threat to the integrity of the criminal justice system as a result of victim and witness intimidation. Meaningful participation in the criminal justice system cannot exist when victims and witnesses are too fearful to come forward or are afraid to tell the truth about what they know. When victims and witnesses are too fearful to participate in the judicial process, the system of justice no longer retains credibility within society and the rule of law as a great arbiter, withers and dies. The Internet has created an explosion of new methods by which a victim or witness can be intimidated with ease, thus making witness intimidation a graver problem than ever before. The prevention of witness intimidation requires renewed, dedicated focus and should be a high priority for all members of the criminal justice system. Legislatures must assure that laws are updated and adequate to deal with new challenges, prosecutors and defense counsel must be alert to the new dangers associated with social media. And all participants in the criminal justice system must be aware of the various ways in which victims and witnesses can feel that they are being improperly pressured. The most egregious forms of intimidation must be investigated and prosecuted, but the more subtle forms must not be ignored.


\textsuperscript{19} See, e.g., Mission Statement, SnitchWire, http://snitchwire.blogspot.com/ (stating the blog’s Mission Statement: “SnitchWire exists solely for the purpose of investigating and objectively reporting on the existence and actions of known informants, infiltrators, rats, snitches, and provocateurs. This blog is to be used as a tool for people wishing to associate with such unsavory, treacherous scum. Individuals pursuing a ‘snitches get stitches’ policy do so on their own accord and are in no way affiliated with this publication”).
Respectfully submitted,

Jim Felman and Cynthia Orr, Chairs
Criminal Justice Section
February 2015
1. **Summary of Resolution(s).**
   The resolution addresses the corrupting influence that unlawful and improper intimidation can have on the testimony of witnesses, including victims, in criminal trials and the reality that intimidation undermines the rule of law and the credibility of the judicial process. The possibility that victims and witnesses will be targeted by individuals who seek to influence their testimony is not new. It has been present since the founding of the Nation. In 1789, intimidation usually required personal contact or delivery of written threats. With the development of the telephone, intimidation from a distance became a new threat. In the current digital age, communication with victims and witnesses is possible in an ever expanding array of ways. And many victims and witnesses have wittingly or unwittingly exposed a vast array of information about themselves on social media, making it easier for anyone seeking to find them and influence them, to attempt to do so.

2. **Approval by Submitting Entity.** This resolution was approved by the Criminal Justice Section Council at its Fall Meeting on October 25, 2014.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No similar resolution has been previously submitted.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** Approval of this resolution would expand the topics covered in resolution 107B from the Annual Meeting 2012 by covering social media and other topics.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** Not applicable.

6. **Status of Legislation.** (If applicable) Not applicable.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The policy will be distributed to various criminal justice stakeholders as a tool to offer guidance on the role of the prosecutor and defense counsel. The policy will also be featured on the Criminal Justice Section website and in Section publications.

8. **Cost to the Association.** (Both direct and indirect costs) No cost to the Association is anticipated.
9. **Disclosure of Interest.** (If applicable) None

10. **Referrals.**
    At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2015 Midyear Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

    **Standing Committees**
    American Judicial System Standing Committee
    Ethics and Professional Responsibility
    Federal Judiciary
    Legal Aid and Indigent Defendants
    Professionalism

    **Special Committees and Commissions**
    Children and the Law
    Coalition on Racial and Ethnic Justice
    Commission on Domestic and Sexual Violence
    Commission on Youth at Risk
    Death Penalty Representation Project
    Hispanic Legal Rights and Responsibilities
    Sexual Orientation and Gender Identity

    **Sections, Divisions**
    Government and Public Sector Lawyers Division
    Individual Rights and Responsibilities
    Family Law
    Judicial Division
    Litigation
    State and Local Government Law
    Young Lawyers Division

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution addresses the corrupting influence that unlawful and improper intimidation can have on the testimony of witnesses, including victims, in criminal trials and the reality that intimidation undermines the rule of law and the credibility of the judicial process. The possibility that victims and witnesses will be targeted by individuals who seek to influence their testimony is not new. It has been present since the founding of the Nation. In 1789, intimidation usually required personal contact or delivery of written threats. With the development of the telephone, intimidation from a distance became a new threat. In the current digital age, communication with victims and witnesses is possible in an ever expanding array of ways. And many victims and witnesses have wittingly or unwittingly exposed a vast array of information about themselves on social media, making it easier for any one seeking to find them and influence them, to attempt to do so.

2. Summary of the Issue that the Resolution Addresses

Prosecutors and law enforcement have consistently reported that the highest rates of witness intimidation exist in cases involving domestic violence, gangs and drug dealing. However, witness intimidation can occur in any type of case, from white collar crimes to petty offenses. Domestic and intimate partner violence cases arise from the complex web of family and intimate relationships.

3. Please Explain How the Proposed Policy Position will address the issue

The Resolution highlights the threat to the integrity of the criminal justice system as a result of victim and witness intimidation. Meaningful participation in the criminal justice system cannot exist when victims and witnesses are too fearful to come forward or are afraid to tell the truth about what they know. When victims and witnesses are too fearful to participate in the judicial process, the system of justice no longer retains credibility within society and the rule of law as a great arbiter, withers and dies. The Internet has created an explosion of new methods by which a victim or witness can be intimidated with ease, thus making witness intimidation a graver problem than ever before. The prevention of witness intimidation requires renewed, dedicated focus and should be a high priority for all members of the criminal justice system. Legislatures must assure that laws are updated and adequate to deal with new challenges, prosecutors and defense counsel must be alert to the new dangers associated with social media. And all participants in the criminal justice system must be aware of the various ways in which victims and witnesses can feel that they are being improperly pressured. The most egregious forms of intimidation must be investigated and prosecuted, but the more subtle forms must not be ignored.

4. Summary of Minority Views

None are known.
RESOLVED, That the American Bar Association urges federal, state, local, tribal, and territorial, governments to adopt sentencing laws and procedures that both protect public safety and appropriately recognize the mitigating considerations of age and maturity of youthful offenders i.e., those under age 18 at the time of their offense who are subject to adult penalties upon conviction, by enacting sentencing laws and rules of procedure that will:

1. Eliminate life without the possibility of release or parole for youthful offenders both prospectively and retroactively;

2. Provide youthful offenders with meaningful periodic opportunities for release based on demonstrated maturity and rehabilitation beginning at a reasonable point into their incarceration, considering the needs of the victims.
REPORT

I. INTRODUCTION

In 2008, the American Bar Association (ABA) approved Resolution 105C (see the conclusion of this report), urging governments to authorize and implement sentences for youthful offenders that are generally less punitive than comparable sentences for older offenders, and by requiring that such offenders generally be eligible for parole consideration at a reasonable point during their sentences and, if parole is denied, be reconsidered for parole periodically thereafter. This resolution was based on the considerations endorsed by the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005). Subsequent to the passage of Resolution 105C, the Supreme Court issued two additional decisions addressing sentencing for youthful offenders. The purpose of this resolution is to build on the prior work of the ABA by recognizing the further developments in law set forth by the United States Supreme Court in *Graham v. Florida*, 130 S.Ct. 2011 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012). It should be noted that this resolution defines youthful offenders as those under 18 at the time of the offense. The Criminal Justice Section Council discussed the fact that there is movement in some states to raise the age at which offenders are considered adults. But the Council determined that it was appropriate to continue to define youthful offenders as those under 18 because it is reflective of the current state of the law and maintains consistency with the definition used in Resolution 105C.

II. DEVELOPING CASE LAW

The United States Supreme Court, drawing on brain and behavioral development research, has ruled three times within the last decade that children are constitutionally different from adults and should not be subject to our nation's harshest penalties. In *Roper* the Court struck down the death penalty for children, finding it to be a violation of the Eighth Amendment’s prohibition on cruel and unusual punishment.\(^1\) In that opinion, the Court emphasized the brain and behavioral development science showing that children are fundamentally different than adults in their development and that they have a unique capacity to grow and change as they mature.\(^2\) ABA Resolution 105C was approved in light of the holding in this opinion. Subsequently, the Supreme Court issued two additional opinions declaring certain sentences as applied to juveniles to violate the Eighth Amendment of the U.S. Constitution except in certain circumstances.

In *Graham* the Court struck down life without parole sentences for non-homicide offenses, holding that states must give children a “realistic opportunity to obtain release.”\(^3\) In that case, Graham was sentenced to a life sentence for a robbery and assault

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\(^2\) *Id.*
committed with several other boys when he was 16. Although the sentence was technically life rather than life without parole, because the state of Florida abolished its parole system and there was no mechanism for release consideration other than clemency, the sentence was de facto life without parole. The court analyzed the sentence under the four theories of punishment — retribution, deterrence, incapacitation, and rehabilitation — and found that none justified life without parole for juvenile nonhomicide offenders. The court went on to make it clear that its holding does not require a state to guarantee eventual freedom to juvenile nonhomicide offenders. Rather, it “forbid[s] States from making the judgment at the outset that those offenders never will be fit to reenter society.” Thus, Graham requires the states to provide “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”

Two years later, in Miller the Court struck down mandatory life without parole sentences for homicide offenses. Miller addressed sentencing in two murder cases: one involving a 14-year-old who participated in a robbery during which another individual shot and killed a store clerk, and one involving a 14-year-old who directly participated in the beating and murder of a neighbor while under the influence of drugs. Both received sentences of life without parole. In discussing the cases, the court stated:

So Graham and Roper and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

Although the court did not foreclose the possibility that life without parole might be appropriate in some instances, the court explained that because children have diminished

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4 Id. at 2018.
5 Id. at 2020.
6 Id. at 2028-30.
7 Id. at 2030.
8 Id.
9 Id.
11 Id. at 2461-63.
12 Id.
13 Id. at 2468.
culpability and greater prospects for reform, the court’s expectations were that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”\textsuperscript{14} The court held that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.\textsuperscript{15}

The effect of \textit{Graham} and \textit{Miller} has been to invalidate mandatory sentencing schemes in 28 states and require consideration of the mitigating considerations of age and maturity at the time of sentencing any time a juvenile faces a possible life sentence in the U.S.

\textbf{III. \hspace{1em} LEGISLATIVE RESPONSES TO GRAHAM AND MILLER}

In the wake of \textit{Roper}, \textit{Graham}, and \textit{Miller}, several state legislatures have taken action to reform their juvenile sentencing policies. Recently, states such as Texas, Wyoming, West Virginia, Delaware, Massachusetts, and Hawaii have all passed legislation eliminating life without the possibility of release or parole as a sentencing option for children.\textsuperscript{16} These states joined others such as Kentucky, Kansas, and Montana, which had previously banned its use.\textsuperscript{17}

Despite positive movement in recent years, some states, such as Minnesota, still authorize the use of life without the possibility of release or parole as a sentencing option for juveniles.\textsuperscript{18} Some states have passed legislation to comply with the U.S. Supreme Court decisions by enacting measures that build in consideration of the factors iterated in \textit{Miller}, but that still presume that a sentence of life or life without parole will be imposed absent a strong showing of mitigation.\textsuperscript{19}

There also remains uncertainty about the retroactivity of the Court’s rulings. States that have considered this issue are split. Michigan, Pennsylvania, Louisiana, and Minnesota have ruled that \textit{Miller} is not a substantive rule and therefore people who were previously sentenced to life without parole are not entitled to re-sentencing hearings.\textsuperscript{20} Texas, Mississippi, Nebraska, Iowa, and Massachusetts have found \textit{Miller} to apply retroactively.\textsuperscript{21} This split results in two kinds of lack of uniformity. In states that have decided \textit{Miller} is not retroactive, offenders convicted in the past continue to serve life sentences without the possibility of review while offenders who commit offenses going

\textsuperscript{14} \textit{Id.} at 2469.
\textsuperscript{15} \textit{Id.} at 2475.
\textsuperscript{18} See, e.g., Minn. Stat. §§ 609.106, subd. 2 and 609.3455, subd. 2.
\textsuperscript{19} See, e.g., 18 Pa. C.S.A. § 1102.1 (2014).
forward are permitted opportunities for review. Between and among the states, states that have determined *Miller* must be applied retroactively are instituting procedures to provide opportunities for review for offenders currently serving life without parole sentences, while in states that have decided *Miller* is not retroactive, offenders are continuing to serve the remainder of their life sentences with no opportunity for review.

In addition to the lack of uniformity with regard to retroactivity, there also is uncertainty regarding the scope of the Court’s decisions in *Graham* and *Miller*. The Sixth Circuit, for example, has held that *Graham* does not apply to multiple non-homicide offenses, extremely long fixed-term sentences, or consecutive sentences that run together. Rather, the Sixth Circuit has decided to read *Graham* narrowly and adopt the approach of some courts that have said that “if the Supreme Court has more in mind [beyond “life without parole” for a single non-homicide offense], it will have to say what it is.” However, other courts have held that long fixed-term or consecutive sentences constitute a de facto life sentence and “violate the spirit, if not the letter, of Graham.”

**IV. CONCLUSION**

The *Miller* Court did not specifically foreclose the possibility of imposing a life without the possibility of release or parole after the consideration of the child’s age. However, it did express that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” The United States stands alone in permitting life without parole for juveniles. It is the only country other than Somalia that has not yet ratified the Convention on the Rights of the Child, which prohibits life without parole sentences for youth. The legal developments in *Graham* and *Miller*, along with the advances in brain and behavioral development science showing how children are fundamentally different from adults, as explained in *Roper* and in the report accompanying ABA Approved Resolution 105C, support a conclusion that it is inappropriate to decide at the time of sentencing that life without parole is an appropriate sentence for a juvenile offender. This resolution encourages jurisdictions to go one step further than *Miller* and to join the policy position of the rest of the world by eliminating mandatory life without parole sentences for youthful offenders.

Instead, juvenile offenders should be given a periodic and meaningful opportunity to demonstrate maturity and rehabilitation, even in jurisdictions where such processes are not available for adults. The resolution does not specify a time frame within which the first review must occur. The most current draft of the Model Penal Code suggests that the first review should occur at 10 years for juveniles. But many states have recently

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23 *Id.*


25 *Miller*, 132 S.Ct. at 2469.


enacted legislation that sets the minimum time to serve prior to review at 20 to 25 years. 28 Given the potential range of possibility, the Council chose not to take a specific position other than to suggest that review should occur at a “reasonable point” into the juvenile’s incarceration. Additionally, it should be noted that periodic review does not mean frequent review. It is recognized that the parole process – especially when applied retroactively to juveniles originally sentenced to life without parole – can be a source of continuing distress for the victims of the offense and/or their families and can make it difficult for these individuals to find closure with regard to the crime. As such, it is not intended for this “periodic review” to be a frequent event, and it is recommended that governmental bodies exercise restraint in establishing the frequency with which it occurs.

**Midyear 2008 105C**

RESOLVED, That the American Bar Association urges federal, state, tribal, local and territorial governments to authorize and implement sentencing laws and procedures that both protect public safety and appropriately recognize the mitigating considerations of age and maturity of youthful offenders (i.e., those under age 18 at the time of their offense who are subject to adult penalties upon conviction) based on the following principles:

1. Sentences for youthful offenders should generally be less punitive than sentences for those age 18 and older who have committed comparable offenses;

2. Sentences for youthful offenders should recognize key mitigating considerations particularly relevant to their youthful status, including those found by the United States Supreme Court in Roper v. Simmons, 543 U.S. 551, 567-570 (2005), as well as the seriousness of the offense and the delinquent and criminal history of the offender; and

3. Youthful offenders should generally be eligible for parole or other early release consideration at a reasonable point during their sentence; and, if denied, should be reconsidered for parole or early release periodically thereafter.

Respectfully submitted,

**James Felman and Cynthia Orr**

Chairs, Criminal Justice Section

February 2015

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107C

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Jim Felman and Cynthia Orr, Chairs

1. Summary of Resolution(s).
   This resolution urges elimination of life without the possibility of release or parole sentences for youthful offenders both prospectively and retroactively and provides youthful offenders with meaningful periodic opportunities for release based on demonstrated maturity and rehabilitation beginning at a reasonable point into their incarceration, considering the needs of the victims.

2. Approval by Submitting Entity. This resolution was approved by the Criminal Justice Section Council at its Fall Meeting on October 25, 2014.

3. Has this or a similar resolution been submitted to the House or Board previously? No similar resolution has been previously submitted.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? In 2008, the American Bar Association (ABA) approved Resolution 105C (see conclusion of the report), urging governments to authorize and implement sentences for youthful offenders that are generally less punitive than comparable sentences for older offenders, and by requiring that such offenders generally be eligible for parole consideration at a reasonable point during their sentences and, if parole is denied, be reconsidered for parole periodically thereafter. This resolution was based on the considerations endorsed by the United States Supreme Court in Roper v. Simmons, 543 U.S. 551 (2005). Subsequent to the passage of Resolution 105C, the Supreme Court issued two additional decisions addressing sentencing for youthful offenders. The purpose of this resolution is to build on the prior work of the ABA by recognizing the further developments in law set forth by the United States Supreme Court in Graham v. Florida, 130 S.Ct. 2011 (2010) and Miller v. Alabama, 132 S.Ct. 2455 (2012).

5. If this is a late report, what urgency exists which requires action at this meeting of the House? Not applicable.


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The policy will be distributed to various criminal justice stakeholders as a tool to offer guidance on the role of the prosecutor and defense counsel. The policy will also be featured on the Criminal Justice Section website and in Section publications.
8. Cost to the Association. (Both direct and indirect costs) No cost to the Association is anticipated.

9. Disclosure of Interest. (If applicable) None

10. Referrals.
    At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2015 Midyear Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

   **Standing Committees**
   American Judicial System Standing Committee
   Ethics and Professional Responsibility
   Federal Judiciary
   Legal Aid and Indigent Defendants
   Professionalism

   **Special Committees and Commissions**
   Children and the Law
   Coalition on Racial and Ethnic Justice
   Commission on Domestic and Sexual Violence
   Commission on Youth at Risk
   Death Penalty Representation Project
   Hispanic Legal Rights and Responsibilities
   Sexual Orientation and Gender Identity

   **Sections, Divisions**
   Government and Public Sector Lawyers Division
   Individual Rights and Responsibilities
   Family Law
   Judicial Division
   Litigation
   State and Local Government Law
   Young Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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Stephen A. Saltzburg, Section Delegate  
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Neal R. Sonnett, Section Delegate  
2 S. Biscayne Boulevard, Suite 2600  
Miami, FL 33131-1819  
Phone: (305) 358-2000  
Email: nrslaw@sonnett.com
1. **Summary of the Resolution**
   This resolution urges elimination of life without the possibility of release or parole sentences for youthful offenders both prospectively and retroactively and provides youthful offenders with meaningful periodic opportunities for release based on demonstrated maturity and rehabilitation beginning at a reasonable point into their incarceration, considering the needs of the victims.

2. **Summary of the Issue that the Resolution Addresses**
   In 2008, the American Bar Association (ABA) approved Resolution 105C (see conclusion of the report), urging governments to authorize and implement sentences for youthful offenders that are generally less punitive than comparable sentences for older offenders, and by requiring that such offenders generally be eligible for parole consideration at a reasonable point during their sentences and, if parole is denied, be reconsidered for parole periodically thereafter. This resolution was based on the considerations endorsed by the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005). Subsequent to the passage of Resolution 105C, the Supreme Court issued two additional decisions addressing sentencing for youthful offenders.

3. **Please Explain How the Proposed Policy Position will address the issue**
   The purpose of this resolution is to build on the prior work of the ABA by recognizing the further developments in law set forth by the United States Supreme Court in *Graham v. Florida*, 130 S.Ct. 2011 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

4. **Summary of Minority Views**
   None are known.
AMERICAN BAR ASSOCIATION

Fourth Edition of the
CRIMINAL JUSTICE STANDARDS
for the
PROSECUTION and DEFENSE FUNCTIONS
(encompassing proposed revisions to the
Third Edition approved in 1993)

Presented by the
CRIMINAL JUSTICE SECTION
for Adoption by the House of Delegates
Midyear Meeting, Houston, TX
February 2015

CRIMINAL JUSTICE STANDARDS
for the

PROSECUTION FUNCTION

Co-Chairs, Criminal Justice Section Council: Cynthia Orr and Jim Felman, Chairs.
Standards Committee Chair: John Cline.
Reporter: Professor Rory K. Little, U.C. Hastings College of the Law, San Francisco
littler@uchastings.edu

Reporter’s Notes
1. Each Standard begins on a separate page. There are 57 proposed Prosecution Function Standards here, up from 42 Standards in the 1993 Edition. Where there is no 1993 equivalent Standard (or a subsection of a 1993 Standards is now made into a separate Standard), the proposed revision is designated a “New” Standard.

2. This draft reflects final revisions approved by the Council of the Criminal Justice Section at its April 2014 meeting.
Proposed Revisions to the
Criminal Justice Standards for the
Prosecution Function

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PART I.

GENERAL STANDARDS

Standard 3-1.1 The Scope and Function of These Standards

(a) As used in these standards, “prosecutor” means any attorney, regardless of agency, title, or full or part-time assignment, who acts as an attorney to investigate or prosecute criminal cases or who provides legal advice regarding a criminal matter to government lawyers, agents, or offices participating in the investigation or prosecution of criminal cases. These Standards are intended to apply in any context in which a lawyer would reasonably understand that a criminal prosecution could result.

(b) These Standards are intended to provide guidance for the professional conduct and performance of prosecutors. They are written and intended to be entirely consistent with the ABA’s Model Rules of Professional Conduct, and are not intended to modify a prosecutor's obligations under applicable rules, statutes, or the constitution. They are aspirational or describe “best practices,” and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge. For purposes of consistency, these Standards sometimes include language taken from the Model Rules of Professional Conduct; but the Standards often address conduct or provide details beyond that governed by the Model Rules of Professional Conduct. No inconsistency is ever intended; and in any case a lawyer should always read and comply with the rules of professional conduct and other authorities that are binding in the specific jurisdiction or matter, including choice of law principles that may regulate the lawyer’s ethical conduct.

(c) Because the Standards for Criminal Justice are aspirational, the words “should” or “should not” are used in these Standards, rather than mandatory phrases such as “shall” or “shall not,” to describe the conduct of lawyers that is expected or recommended under these Standards. The Standards are not intended to suggest any lesser standard of conduct than may be required by applicable mandatory rules, statutes, or other binding authorities.

(d) These Standards are intended to address the performance of prosecutors in all stages of their professional work. Other ABA Criminal Justice Standards should also be consulted for more detailed consideration of the performance of prosecutors in specific areas.
Standard 3-1.2   Functions and Duties of the Prosecutor

(a) The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. The prosecutor’s office should exercise sound discretion and independent judgment in the performance of the prosecution function.

(b) The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

(c) The prosecutor should know and abide by the standards of professional conduct as expressed in applicable law and ethical codes and opinions in the applicable jurisdiction. The prosecutor should avoid an appearance of impropriety in performing the prosecution function. A prosecutor should seek out, and the prosecutor’s office should provide, supervisory advice and ethical guidance when the proper course of prosecutorial conduct seems unclear. A prosecutor who disagrees with a governing ethical rule should seek its change if appropriate, and directly challenge it if necessary, but should comply with it unless relieved by court order.

(d) The prosecutor should make use of ethical guidance offered by existing organizations, and should seek to establish and make use of an ethics advisory group akin to that described in Defense Function Standard 4-1.11.

(e) The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases. The prosecutor’s office should be available to assist community efforts addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

(f) The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, the prosecutor should stimulate and support efforts for remedial action. The prosecutor should provide service to the community, including involvement in public service and Bar activities, public education, community service activities, and Bar leadership positions. A prosecutorial office should support such activities, and the office’s budget should include funding and paid release time for such activities.
The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor’s clients. The public’s interests and views are should be determined by the chief prosecutor and designated assistants in the jurisdiction.
Standard 3-1.4 The Prosecutor’s Heightened Duty of Candor

(a) In light of the prosecutor’s public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations. However, the prosecutor should be circumspect in publicly commenting on specific cases or aspects of the business of the office.

(b) The prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes. In addition, while seeking to accommodate legitimate confidentiality, safety or security concerns, a prosecutor should correct a prosecutor’s representation of material fact or law that the prosecutor reasonably believes is, or later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder.

(c) The prosecutor should disclose to a court legal authority in the controlling jurisdiction known to the prosecutor to be directly adverse to the prosecution’s position and not disclosed by others.
At every stage of representation, the prosecutor should take steps necessary to make a clear and complete record for potential review. Such steps may include: filing motions including motions for reconsideration, and exhibits; making objections and placing explanations on the record; requesting evidentiary hearings; requesting or objecting to jury instructions; and making offers of proof and proffers of excluded evidence.
(a) The prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion. A prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor’s authority.

(b) A prosecutor’s office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work. A prosecutor’s office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the prosecutor’s jurisdiction, and eliminate those impacts that cannot be properly justified.
Standard 3-1.7  Conflicts of Interest

(a) The prosecutor should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a conflict requiring recusal exists and is non-waivable, or informed consent has not been obtained, the prosecutor should recuse from further participation in the matter. The office should not go forward until a non-conflicted prosecutor, or an adequate waiver, is in place.

(b) The prosecutor should not represent a defendant in criminal proceedings in the prosecutor’s jurisdiction.

(c) The prosecutor should not participate in a matter in which the prosecutor previously participated, personally and substantially, as a non-prosecutor, unless the appropriate government office, and when necessary a former client, gives informed consent confirmed in writing.

(d) The prosecutor should not be involved in the prosecution of a former client. A prosecutor who has formerly represented a client should not use information obtained from that representation to the disadvantage of the former client.

(e) The prosecutor should not negotiate for private employment with an accused or the target of an investigation, in a matter in which the prosecutor is participating personally and substantially, or with an attorney or agent for such accused or target.

(f) The prosecutor should not permit the prosecutor’s professional judgment or obligations to be affected by the prosecutor’s personal, political, financial, professional, business, property, or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case.

(g) The prosecutor should disclose to appropriate supervisory personnel any facts or interests that could reasonably be viewed as raising a potential conflict of interest. If it is determined that the prosecutor should nevertheless continue to act in the matter, the prosecutor and supervisors should consider whether any disclosure to a court or defense counsel should be made, and make such disclosure if appropriate. Close cases should be resolved in favor of disclosure to the court and the defense.

(h) The prosecutor whose current relationship to another lawyer is parent, child, sibling, spouse or sexual partner should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer. A prosecutor who has a significant personal, political, financial, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer, unless the relationship is disclosed to the prosecutor’s supervisor and supervisory approval is given, or unless there is no other prosecutor who can be authorized to act in the prosecutor’s stead. In the latter rare case, full disclosure should be made to the defense and to the court.

(i) The prosecutor should not recommend the services of particular defense counsel to accused persons or witnesses in cases being handled by the prosecutor’s office. If requested to make such a recommendation, the prosecutor should consider instead referring the person to the
public defender, or to a panel of available criminal defense attorneys such as a bar association lawyer-referral service, or to the court. In the rare case where a specific recommendation is made by the prosecutor, the recommendation should be to an independent and competent attorney, and the prosecutor should not make a referral that embodies, creates or is likely to create a conflict of interest. A prosecutor should not comment negatively upon the reputation or abilities of a defense counsel to an accused person or witness who is seeking counsel in a case being handled by the prosecutor’s office.

(j) The prosecutor should promptly report to a supervisor all but the most obviously frivolous misconduct allegations made, publicly or privately, against the prosecutor. If a supervisor or judge initially determines that an allegation is serious enough to warrant official investigation, reasonable measures, including possible recusal, should be instituted to ensure that the prosecution function is fairly and effectively carried out. A mere allegation of misconduct is not a sufficient basis for prosecutorial recusal, and should not deter a prosecutor from attending to the prosecutor’s duties.
[New] Standard 3-1.8  Appropriate Workload  [from current 3-2.9(e)]

(a) The prosecutor should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers the interests of justice in fairness, accuracy, or the timely disposition of charges, or has a significant potential to lead to the breach of professional obligations. A prosecutor whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in existing matters. A prosecutor within a supervisory structure should notify supervisors when counsel’s workload is approaching or exceeds professionally appropriate levels.

(b) The prosecutor’s office should regularly review the workload of individual prosecutors, as well as the workload of the entire office, and adjust workloads (including intake) when necessary to ensure the effective and ethical conduct of the prosecution function.

(c) The chief prosecutor for a jurisdiction should inform governmental officials of the workload of the prosecutor’s office, and request funding and personnel that are adequate to meet the criminal caseload. The prosecutor should consider seeking such funding from all appropriate sources. If workload exceeds the appropriate professional capacity of a prosecutor or prosecutor’s office, that office or counsel should also alert the court(s) in its jurisdiction and seek judicial relief.
Standard 3-1.9  Diligence, Promptness and Punctuality

(a) The prosecutor should act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the defendant, victims, and witnesses. The prosecutor’s office should be organized and supported with adequate staff and facilities to enable it to process and resolve criminal charges with fairness and efficiency.

(b) When providing reasons for seeking delay, the prosecutor should not knowingly misrepresent facts or otherwise mislead. The prosecutor should use procedures that will cause delay only when there is a legitimate basis for such use, and not to secure an unfair tactical advantage.

(c) The prosecutor should not unreasonably oppose requests for continuances from defense counsel.

(d) The prosecutor should know and comply with timing requirements applicable to a criminal investigation and prosecution, so as to not prejudice a criminal matter.

(e) The prosecutor should be punctual in attendance in court, in the submission of motions, briefs, and other papers, and in dealings with opposing counsel, witnesses and others. The prosecutor should emphasize to assistants and prosecution witnesses the importance of punctuality in court attendance.
Relationship with the Media

(a) For purposes of this Standard, a “public statement” is any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication or media, including social media. An extrajudicial statement is any oral, written, or visual presentation not made either in a courtroom during criminal proceedings or in court filings or correspondence with the court or counsel regarding criminal proceedings.

(b) The prosecutor’s public statements about the judiciary, jurors, other lawyers, or the criminal justice system should be respectful even if expressing disagreement.

(c) The prosecutor should not make, cause to be made, or authorize or condone the making of, a public statement that the prosecutor knows or reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding or heightening public condemnation of the accused, but the prosecutor may make statements that inform the public of the nature and extent of the prosecutor’s or law enforcement actions and serve a legitimate law enforcement purpose. The prosecutor may make a public statement explaining why criminal charges have been declined or dismissed, but must take care not to imply guilt or otherwise prejudice the interests of victims, witnesses or subjects of an investigation. A prosecutor’s public statements should otherwise be consistent with the ABA Standards on Fair Trial and Public Discourse.

(d) A prosecutor should not place statements or evidence into the court record to circumvent this Standard.

(e) The prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement or providing non-public information that the prosecutor would be prohibited from making or providing under this Standard or other applicable rules or law.

(f) The prosecutor may respond to public statements from any source in order to protect the prosecution’s legitimate official interests, unless there is a substantial likelihood of materially prejudicing a criminal proceeding, in which case the prosecutor should approach defense counsel or a court for relief. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(g) The prosecutor has duties of confidentiality and loyalty, and should not secretly or anonymously provide non-public information to the media, on or off the record, without appropriate authorization.

(h) The prosecutor should not allow prosecutorial judgment to be influenced by a personal interest in potential media contacts or attention.

(i) A prosecutor uninvolved in a matter who is commenting as a media source may offer generalized commentary concerning a specific criminal matter that serves to educate the public about the criminal justice system and does not risk prejudicing a specific criminal proceeding. A prosecutor acting as such a media commentator should make reasonable efforts to be well-informed about the facts of the matter and the governing law. The prosecutor should not offer commentary
regarding the specific merits of an ongoing criminal prosecution or investigation, except in a rare

case to address a manifest injustice and the prosecutor is reasonably well-informed about the

relevant facts and law.

(j) During the pendency of a criminal matter, the prosecutor should not re-enact, or assist

law enforcement in re-enacting, law enforcement events for the media. Absent a legitimate law

enforcement purpose, the prosecutor should not display the accused for the media, nor should the

prosecutor invite media presence during investigative actions without careful consideration of the

interests of all involved, including suspects, defendants, and the public. However, a prosecutor may

reasonably accommodate media requests for access to public information and events.
Standard 3-1.11 Literary or Media Rights Agreements Prohibited

(a) Before the conclusion of all aspects of a matter in which a prosecutor participates, the prosecutor should not enter into any agreement or informal understanding by which the prosecutor acquires an interest in a literary or media portrayal or account based on or arising out of the prosecutor’s involvement in the matter.

(b) The prosecutor should not allow prosecutorial judgment to be influenced by the possibility of future personal literary or other media rights.

(c) In creating or participating in any literary or other media account of a matter in which the prosecutor was involved, the prosecutor’s duty of confidentiality must be respected even after government service is concluded. When protected confidences are involved, a prosecutor or former prosecutor should not make disclosure without consent from the prosecutor’s office. Such consent should not be unreasonably withheld, and the public’s interest in accurate historical accounts of significant events after a lengthy passage of time should be considered.
Standard 3-1.12 Duty to Report and Respond to Prosecutorial Misconduct

(a) The prosecutor's office should adopt policies to address allegations of professional misconduct, including violations of law, by prosecutors. At a minimum such policies should require internal reporting of reasonably suspected misconduct to supervisory staff within the office, and authorize supervisory staff to quickly address the allegations. Investigations of allegations of professional misconduct within the prosecutor's office should be handled in an independent and conflict-free manner.

(b) When a prosecutor reasonably believes that another person associated with the prosecutor's office intends or is about to engage in misconduct, the prosecutor should attempt to dissuade the person. If such attempt fails or is not possible, and the prosecutor reasonably believes that misconduct is ongoing, will occur, or has occurred, the prosecutor should promptly refer the matter to higher authority in the prosecutor's office including, if warranted by the seriousness of the matter, to the chief prosecutor.

(c) If, despite the prosecutor's efforts in accordance with sections (a) and (b) above, the chief prosecutor permits, fails to address, or insists upon an action or omission that is clearly a violation of law, the prosecutor should take further remedial action, including revealing information necessary to address, remedy, or prevent the violation to appropriate judicial, regulatory, or other government officials not in the prosecutor's office.
Standard 3-1.13  Training Programs

(a) The prosecutor’s office should develop and maintain programs of training and continuing education for both new and experienced prosecutors and staff. The prosecutor’s office, as well as the organized Bar or courts, should require that current and aspiring prosecutors attend a reasonable number of hours of such training and education.

(b) In addition to knowledge of substantive legal doctrine and courtroom procedures, a prosecutor’s core training curriculum should address the overall mission of the criminal justice system. A core training curriculum should also seek to address: investigation, negotiation, and litigation skills; compliance with applicable discovery procedures; knowledge of the development, use, and testing of forensic evidence; available conviction and sentencing alternatives, reentry, effective conditions of probation, and collateral consequences; civility, and a commitment to professionalism; relevant office, court, and defense policies and procedures and their proper application; exercises in the use of prosecutorial discretion; civility and professionalism; appreciation of diversity and elimination of improper bias; and available technology and the ability to use it. Some training programs might usefully be open to, and taught by, persons outside the prosecutor’s office such as defense counsel, court staff, and members of the judiciary.

(c) A prosecution office’s training program should include periodic review of the office’s policies and procedures, which should be amended when necessary. Specialized prosecutors should receive training in their specialized areas. Individuals who will supervise attorneys or staff should receive training in how effectively to supervise.

(d) The prosecutor’s office should also make available opportunities for training and continuing education programs outside the office, including training for non-attorney staff.

(e) Adequate funding for continuing training and education, within and outside the office, should be requested and provided by funding sources.
PART II.

ORGANIZATION OF THE PROSECUTION FUNCTION

Standard 3-2.1 Prosecution Authority to be Vested in Full-time, Public-Official Attorneys

(a) The prosecution function should be performed by a lawyer who is

(i) a public official,

(ii) authorized to practice law in the jurisdiction, and

(iii) subject to rules of attorney professional conduct and discipline.

Prosecutors whose professional obligations are devoted full-time and exclusively to the prosecution function are preferable to part-time prosecutors who have other potentially conflicting professional responsibilities.

(b) A prosecutor’s office should have open, effective, and well-publicized methods for communicating with, and receiving communications from, the public in the jurisdiction that it serves.

(c) If a particular matter requires the appointment of a special prosecutor from outside the office, adequate funding for this purpose should be made available. Such special prosecutors should know and are governed by applicable conflict of interest standards for prosecutors. A private attorney who is paid by, or who has an attorney-client relationship with, an individual or entity that is a victim of the charged crime, or who has a personal or financial interest in the prosecution of particular charges, or who has demonstrated any impermissible bias relevant to the particular matter, should not be permitted to serve as prosecutor in that matter.

(d) Unless impractical or unlawful, the prosecutor’s office should implement a system for allowing qualified law students, cross-designated prosecutors from other offices, and private attorneys temporarily assigned to the prosecutor's office, to learn about and assist with the prosecution function.
Standard 3.2.2 Assuring Excellence and Diversity in the Hiring, Retention, and Compensation of Prosecutors

(a) Strong professional qualifications and performance should be the basis for selection and retention for prosecutor positions. Effective measures to retain excellent prosecutors should be encouraged, while recognizing the benefits of some turnover. Supervisory prosecutors should select and promote personnel based on merit and expertise, without regard to partisan, personal or political factors or influence.

(b) In selecting personnel, the prosecutor’s office should also consider the diverse interests and makeup of the community it serves, and seek to recruit, hire, promote and retain a diverse group of prosecutors and staff that reflect that community.

(c) The function of public prosecution requires highly developed professional skills and a variety of backgrounds, talents and experience. The prosecutor’s office should promote continuing professional development and continuity of service, while providing prosecutors the opportunity to gain experience in all aspects of the prosecution function.

(d) Compensation and benefits for prosecutors and their staffs should be commensurate with the high responsibilities of the office, sufficient to compete with the private sector, and regularly adjusted to attract and retain well-qualified personnel. Compensation for prosecutors should be adequate and also comparable to that of public defense counsel in the jurisdiction.
Standard 3-2.3 Investigative Resources and Experts

The prosecutor should be provided with funds for qualified experts as needed for particular matters. When warranted by the responsibilities of the office, funds should be available to the prosecutor’s office to employ professional investigators and other necessary support personnel, as well as to secure access to forensic and other experts.
Standard 3-2.4 Office Policies and Procedures

(a) Each prosecutor’s office should seek to develop general policies to guide the exercise of prosecutorial discretion, and standard operating procedures for the office. The objectives of such policies and procedures should be to achieve fair, efficient, and effective enforcement of the criminal law within the prosecutor’s jurisdiction.

(b) In the interest of continuity and clarity, the prosecution office’s policies and procedures should be memorialized and accessible to relevant staff. The office policies and procedures should be regularly reviewed and revised. The office policies and procedures should be augmented by instruction and training, and are not a substitute for regular training programs.

(c) Prosecution office policies and procedures whose disclosure would not adversely affect the prosecution function should be made available to the public.

(d) The prosecutor’s office should have a system in place to regularly review compliance with office policies.
Standard 3-2.5  Removal or Suspension and Substitution of Chief Prosecutor

(a) Fair and objective procedures should be established by appropriate legislation that empowers the governor or other public official or body to suspend or remove, and supersede, a chief prosecutor for a jurisdiction and designate a replacement, upon making a public finding after reasonable notice and hearing that the prosecutor is incapable of fulfilling the duties of office due to physical or mental incapacity or for gross deviation from professional norms.

(b) The governor or other public official or body should be similarly empowered by law to substitute, in a particular matter or category of cases, special counsel in the place of the chief prosecutor, by consent or upon making a finding after fair process that substitution is required due to a serious conflict of interest or a gross deviation from professional norms.

(c) Removal, suspension or substitution of a prosecutor should not be permitted for improper or irrelevant partisan or personal reasons.
PART III

PROSECUTORIAL RELATIONSHIPS

Standard 3-3.1 Structure of, and Relationships Among, Prosecution Offices

(a) When possible, the geographic jurisdiction of a prosecution office should be determined on the basis of population, caseload, and other relevant factors sufficient to warrant at least one full-time prosecutor and necessary support staff.

(b) In all States, there should be coordination of the prosecution policies of local prosecution offices to improve the administration and consistency of justice throughout the State. To the extent needed, a central pool of supporting resources, forensic laboratories, and personnel such as investigators, additional prosecutors, accountants and other experts, should be maintained by the state government and should be available to assist local prosecutors. A coordinated forum for prosecutors to discuss issues of professional responsibility should also be available. In some jurisdictions, it may be appropriate to create a unified statewide system of prosecution, in which the state attorney general is the chief prosecutor and district or county or other local prosecutors are the attorney general’s deputies.

(c) Regardless of the statewide structure of prosecution offices, a state-wide association of prosecutors should be established. When questions or issues arise that could create important state-wide precedents, local prosecutors should advise and consult with the attorney general, the state-wide association, and the prosecutors in other local prosecution offices.

(d) Federal, state, and local prosecution offices should develop practices and procedures that encourage useful coordination with prosecutors within the jurisdiction and in other jurisdictions. Prosecutors should work to identify potential issues of conflict, coordinate with other prosecution offices in advance, and resolve inter-office disputes amicably and in the public interest.
Standard 3-3.2  Relationships With Law Enforcement

(a) The prosecutor should maintain respectful yet independent judgment when interacting with law enforcement personnel.

(b) The prosecutor may provide independent legal advice to law enforcement about actions in specific criminal matters and about law enforcement practices in general.

(c) The prosecutor should become familiar with and respect the experience and specialized expertise of law enforcement personnel. The prosecutor should promote compliance by law enforcement personnel with applicable legal rules, including rules against improper bias. The prosecutor's office should keep law enforcement personnel informed of relevant legal and legal ethics issues and developments as they relate to prosecution matters, and advise law enforcement personnel of relevant prosecution policies and procedures. Prosecutors may exercise supervision over law enforcement personnel involved in particular prosecutions when in the best interests of justice and the public.

(d) Representatives of the prosecutor's office should meet and confer regularly with law enforcement agencies regarding prosecution as well as law enforcement policies. The prosecutor's office should assist in developing and administering training programs for law enforcement personnel regarding matters and cases being investigated, matters submitted for charging, and the law related to law enforcement activities.
Standard 3-3.3 Relationship With Courts, Defense Counsel and Others

(a) In all contacts with judges, the prosecutor should maintain a professional and independent relationship. A prosecutor should not engage in unauthorized ex parte discussions with, or submission of material to, a judge relating to a particular matter which is, or is likely to be, before the judge. With regard to generalized matters requiring judicial discussion (for example, case-management or administrative matters), the prosecutor should invite a representative defense counsel to join in the discussion to the extent practicable.

(b) When ex parte communications or submissions are authorized, the prosecutor should inform the court of material facts known to the prosecutor, including facts that are adverse, sufficient to enable the court to make a fair and informed decision. Except when non-disclosure is authorized, counsel should notify opposing counsel that an ex parte contact has occurred, without disclosing its content unless permitted.

(c) In written filings, the prosecutor should respectfully evaluate and respond as appropriate to opposing counsel’s arguments and representations, and avoid unnecessary personalized disparagement.

(d) The prosecutor should develop and maintain courteous and civil working relationships with judges and defense counsel, and should cooperate with them in developing solutions to address ethical, scheduling, or other issues that may arise in particular cases or generally in the criminal justice system. Prosecutors should cooperate with courts and organized bar associations in developing codes of professionalism and civility, and should abide by such codes that apply in their jurisdiction.
Standard 3-3.4 Relationship With Victims and Witnesses

(a) "Witness" in this Standard means any person who has or might have information about a matter, including victims.

(b) The prosecutor should know and follow the law and rules of the jurisdiction regarding victims and witnesses. In communicating with witnesses, the prosecutor should know and abide by law and ethics rules regarding the use of deceit and engaging in communications with represented, unrepresented, and organizational persons.

(c) The prosecutor or the prosecutor’s agents should seek to interview all witnesses, and should not act to intimidate or unduly influence any witness.

(d) The prosecutor should not use means that have no substantial purpose other than to embarrass, delay, or burden, and not use methods of obtaining evidence that violate legal rights. The prosecutor and prosecution agents should not misrepresent their status, identity or interests when communicating with a witness.

(e) The prosecutor should be permitted to compensate a witness for reasonable expenses such as costs of attending court, depositions pursuant to statute or court rule, and pretrial interviews, including transportation and loss of income. No other benefits should be provided to witnesses unless authorized by law, regulation, or well-accepted practice. All benefits provided to witnesses should be documented and disclosed to the defense. A prosecutor should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance or truthfulness of the witness’s testimony.

(f) A prosecutor should avoid the prospect of having to testify personally about the content of a witness interview. The prosecutor’s interview of most routine or government witnesses (for example, custodians of records or law enforcement agents) should not require a third-party observer. But when the need for corroboration of an interview is reasonably anticipated, the prosecutor should be accompanied by another trusted and credible person during the interview. The prosecutor should avoid being alone with any witness who the prosecutor reasonably believes has potential or actual criminal liability, or foreseeably hostile witnesses.

(g) The prosecutor should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to independent counsel when the law so requires. Even if the law does not require it, a prosecutor should consider so advising a witness if the prosecutor reasonably believes the witness may provide self-incriminating information and the witness appears not to know his or her rights. However, a prosecutor should not so advise, or discuss or exaggerate the potential criminal liability of, a witness with a purpose, or in a manner likely, to intimidate the witness, to influence the truthfulness or completeness of the witness’s testimony, or to change the witness’s decision about whether to provide information.

(h) The prosecutor should not discourage or obstruct communication between witnesses and the defense counsel, other than the government’s employees or agents if consistent with applicable ethical rules. The prosecutor should not advise any person, or cause any person to be advised, to decline to provide defense counsel with information which such person has a right to give. The
prosecutor may, however, fairly and accurately advise witnesses as to the likely consequences of their providing information, but only if done in a manner that does not discourage communication.

(i) Consistent with any specific laws or rules governing victims, the prosecutor should provide victims of serious crimes, or their representatives, an opportunity to consult with and to provide information to the prosecutor, prior to making significant decisions such as whether or not to prosecute, to pursue a disposition by plea, or to dismiss charges. The prosecutor should seek to ensure that victims of serious crimes, or their representatives, are given timely notice of:

   (i) judicial proceedings relating to the victims’ case;
   (ii) proposed dispositions of the case;
   (iii) sentencing proceedings; and
   (iv) any decision or action in the case that could result in the defendant’s provisional or final release from custody, or change of sentence.

(j) The prosecutor should ensure that victims and witnesses who may need protections against intimidation or retaliation are advised of and afforded protections where feasible.

(k) Subject to ethical rules and the confidentiality that criminal matters sometimes require, and unless prohibited by law or court order, the prosecutor should information about the status of matters in which they are involved to victims and witnesses who request it.

(l) The prosecutor should give witnesses reasonable notice of when their testimony at a proceeding is expected, and should not require witnesses to attend judicial proceedings unless their testimony is reasonably expected at that time, or their presence is required by law. When witnesses’ attendance is required, the prosecutor should seek to reduce to a minimum the time witnesses must spend waiting at the proceedings. The prosecutor should ensure that witnesses are given notice as soon as practicable of scheduling changes which will affect their required attendance at judicial proceedings.

(m) The prosecutor should not engage in any inappropriate personal relationship with any victim or other witness.
Standard 3-3.5 Relationship with Expert Witnesses

(a) An expert may be engaged for consultation only, or to prepare an evidentiary report or testimony. The prosecutor should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only.

(b) A prosecutor should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of a government or other expert based on employer, affiliation or prominence alone.

(c) Before engaging an expert, the prosecutor should investigate the expert's credentials, relevant professional experience, and reputation in the field. The prosecutor should also examine a testifying expert's background and credentials for potential impeachment issues. Before offering an expert as a witness, the prosecutor should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.

(d) A prosecutor who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert's opinion on the relevant subject.

(e) Before offering an expert as a witness, the prosecutor should seek to learn enough about the substantive area of the expert's expertise, including ethical rules that may be applicable in the expert's field, to enable effective preparation of the expert, as well as effective cross-examination of any defense expert on the same topic. The prosecutor should explain to the expert that the expert's role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.

(f) The prosecutor should not pay or withhold any fee or provide or withhold a benefit for the purpose of influencing the substance of an expert's testimony. The prosecutor should not fix the amount of the fee contingent upon the expert's testimony or the result in the case. Nor should the prosecutor promise or imply the prospect of future work for the expert based on the expert's testimony.

(g) The prosecutor should provide the expert with all information reasonably necessary to support a full and fair opinion. The prosecutor should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. The prosecutor should be aware of expert discovery rules and act to protect confidentiality and the public interest, for example by not sharing with the expert confidences and work product that the prosecutor does not want disclosed.

(h) The prosecutor should timely disclose to the defense all evidence or information learned from an expert that tends to negate the guilt of the accused or mitigate the offense, even if the prosecutor does not intend to call the expert as a witness.
When physical evidence is delivered to the prosecutor consistent with Defense Function Standard 4-4.7, the prosecutor should not offer the fact of delivery as evidence before a fact-finder for purposes of establishing the culpability of defense counsel’s client. The prosecutor may, however, offer evidence of the fact of such delivery in response to a foundational objection to the evidence based on chain-of-custody concerns, or in a subsequent proceeding for the purpose of proving a crime or fraud regarding the evidence.
PART IV

INVESTIGATION; DECISIONS TO CHARGE, NOT CHARGE, OR DISMISS; AND GRAND JURY

Standard 3-4.1 Investigative Function of the Prosecutor

(a) When performing an investigative function, prosecutors should be familiar with and follow the ABA Standards on Prosecutorial Investigations.

(b) A prosecutor should not use illegal or unethical means to obtain evidence or information, or employ, instruct, or encourage others to do so. Prosecutors should research and know the law in this regard before acting, understanding that in some circumstances a prosecutor’s ethical obligations may be different from those of other lawyers.
Standard 3-4.2 Decisions to Charge Are the Prosecutor’s

(a) While the decision to arrest is often the responsibility of law enforcement personnel, the
decision to institute formal criminal proceedings is the responsibility of the prosecutor. Where the
law permits a law enforcement officer or other person to initiate proceedings by complaining
directly to a judicial officer or the grand jury, the complainant should be required to present the
complaint for prior review by the prosecutor, and the prosecutor’s recommendation regarding the
complaint should be communicated to the judicial officer or grand jury.

(b) The prosecutor’s office should establish standards and procedures for evaluating
complaints to determine whether formal criminal proceedings should be instituted.

(c) In determining whether formal criminal charges should be filed, prosecutors should
consider whether further investigation should be undertaken. After charges are filed the prosecutor
should oversee law enforcement investigative activity related to the case.

(d) If the defendant is not in custody when charged, the prosecutor should consider whether
a voluntary appearance rather than a custodial arrest would suffice to protect the public and ensure
the defendant’s presence at court proceedings.
Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges

(a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.

(b) After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.

(c) If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor’s office should then determine whether it is appropriate to proceed with the case.

(d) A prosecutor’s office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence.
Discretion in Filing, Declining, Maintaining, and Dismissing

(a) In order to fully implement the prosecutor’s functions and duties, including the obligation to enforce the law while exercising sound discretion, the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support. Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets the requirements of Standard 3-4.3, are:

(i) the strength of the case;
(ii) the prosecutor’s doubt that the accused is in fact guilty;
(iii) the extent or absence of harm caused by the offense;
(iv) the impact of prosecution or non-prosecution on the public welfare;
(v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;
(vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
(vii) the views and motives of the victim or complainant;
(viii) any improper conduct by law enforcement;
(ix) unwarranted disparate treatment of similarly situated persons;
(x) potential collateral impact on third parties, including witnesses or victims;
(xi) cooperation of the offender in the apprehension or conviction of others;
(xii) the possible influence of any cultural, ethnic, socioeconomic or other improper biases;
(xiii) changes in law or policy;
(xiv) the fair and efficient distribution of limited prosecutorial resources;
(xv) the likelihood of prosecution by another jurisdiction; and
(xvi) whether the public’s interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.

(b) In exercising discretion to file and maintain charges, the prosecutor should not consider:

(i) partisan or other improper political or personal considerations;
(ii) hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor; or
(iii) the impermissible criteria described in Standard 1.6 above.

(c) A prosecutor may file and maintain charges even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question.

(d) The prosecutor should not file or maintain charges greater in number or degree than can reasonably be supported with evidence at trial and are necessary to fairly reflect the gravity of the offense or deter similar conduct.

(e) A prosecutor may condition a dismissal of charges, "nolle prosequi," or similar action on the accused's relinquishment of a right to seek civil redress only if the accused has given informed consent, and such consent is disclosed to the court. A prosecutor should not use a civil waiver to
avoid a bona fide claim of improper law enforcement actions, and a decision not to file criminal charges should be made on its merits and not for the purpose of obtaining a civil waiver.

(f) The prosecutor should consider the possibility of a noncriminal disposition, formal or informal, or a deferred prosecution or other diversionary disposition, when deciding whether to initiate or prosecute criminal charges. The prosecutor should be familiar with the services and resources of other agencies, public or private, that might assist in the evaluation of cases for diversion or deferral from the criminal process.
Standard 3-4.5  Relationship with a Grand Jury

(a) In presenting a matter to a criminal grand jury, and in light of its ex parte character, the prosecutor should respect the independence of the grand jury and should not preempt a function of the grand jury, mislead the grand jury, or abuse the processes of the grand jury.

(b) Where the prosecutor is authorized to act as a legal advisor to the grand jury, the prosecutor should appropriately explain the law and may, if permitted by law, express an opinion on the legal significance of the evidence, but should give due deference to the grand jury as an independent legal body.

(c) The prosecutor should not make statements or arguments to a grand jury in an effort to influence grand jury action in a manner that would be impermissible in a trial.

(d) The entirety of the proceedings occurring before a grand jury, including the prosecutor’s communications with and presentations and instructions to the grand jury, should be recorded in some manner, and that record should be preserved. The prosecutor should avoid off-the-record communications with the grand jury and with individual grand jurors.
(a) A prosecutor should not seek an indictment unless the prosecutor reasonably believes the charges are supported by probable cause and that there will be admissible evidence sufficient to support the charges beyond reasonable doubt at trial. A prosecutor should advise a grand jury of the prosecutor’s opinion that it should not indict if the prosecutor believes the evidence presented does not warrant an indictment.

(b) In addition to determining what criminal charges to file, a grand jury may properly be used to investigate potential criminal conduct, and also to determine the sense of the community regarding potential charges.

(c) A prosecutor should present to a grand jury only evidence which the prosecutor believes is appropriate and authorized by law for presentation to a grand jury. The prosecutor should be familiar with the law of the jurisdiction regarding grand juries, and may present witnesses to summarize relevant evidence to the extent the law permits.

(d) When a new grand jury is empanelled, a prosecutor should ensure that the grand jurors are appropriately instructed, consistent with the law of the jurisdiction, on the grand jury’s right and ability to seek evidence, ask questions, and hear directly from any available witnesses, including eyewitnesses.

(e) A prosecutor with personal knowledge of evidence that directly negates the guilt of a subject of the investigation should present or otherwise disclose that evidence to the grand jury. The prosecutor should relay to the grand jury any request by the subject or target of an investigation to testify before the grand jury, or present other non-frivolous evidence claimed to be exculpatory.

(f) If the prosecutor concludes that a witness is a target of a criminal investigation, the prosecutor should not seek to compel the witness’s testimony before the grand jury absent immunity. The prosecutor should honor, however, a reasonable request from a target or subject who wishes to testify before the grand jury.

(g) Unless there is a reasonable possibility that it will facilitate flight of the target, endanger other persons, interfere with an ongoing investigation, or obstruct justice, the prosecutor should give notice to a target of a grand jury investigation, and offer the target an opportunity to testify before the grand jury. Prior to taking a target’s testimony, the prosecutor should advise the target of the privilege against self-incrimination and obtain a voluntary waiver of that right.

(h) The prosecutor should not seek to compel the appearance of a witness whose activities are the subject of the grand jury’s inquiry, if the witness states in advance that if called the witness will claim the constitutional privilege not to testify, and provides a reasonable basis for such claim. If warranted, the prosecutor may judicially challenge such a claim of privilege or seek a grant of immunity according to the law.

(i) The prosecutor should not issue a grand jury subpoena to a criminal defense attorney or defense team member, or other witness whose testimony reasonably might be protected by a
recognized privilege, without considering the applicable law and rules of professional responsibility in the jurisdiction.

(j) Except where permitted by law, a prosecutor should not use the grand jury in order to obtain evidence to assist the prosecution’s preparation for trial of a defendant who has already been charged. A prosecutor may, however, use the grand jury to investigate additional or new charges against a defendant who has already been charged.

(k) Except where permitted by law, a prosecutor should not use a criminal grand jury solely or primarily for the purpose of aiding or assisting in an administrative or civil inquiry.
PART V

PRETRIAL ACTIVITIES and NEGOTIATED DISPOSITIONS

Standard 3-5.1 Role in First Appearance and Preliminary Hearing

(a) A prosecutor should be present at any first appearance of the accused before a judicial officer, and at any preliminary hearing.

(b) At or before the first appearance, the prosecutor should consider:
   (i) whether the accused has counsel, and if not, whether and when counsel will be made available or waived;
   (ii) whether the accused appears to be mentally competent, and if not, whether to seek an evaluation;
   (iii) whether the accused should be released or detained pending further proceedings
        And, if released, whether supervisory conditions should be imposed; and
   (iv) what further proceedings should be scheduled to move the matter toward timely resolution.

(c) The prosecutor handling the first appearance should ensure that the charges are consistent with the conduct described in the available law enforcement reports and any other information the prosecutor possesses.

(d) If the accused does not yet have counsel and has not waived counsel, the prosecutor should ask the court not to engage in substantive proceedings, other than a decision to release the accused. The prosecutor should not obtain a waiver of other important pretrial rights, such as the right to a preliminary hearing, from an unrepresented accused unless that person has been judicially authorized to proceed pro se.

(e) The prosecutor should not approach or communicate with an accused unless a voluntary waiver of counsel has been entered or the accused’s counsel consents. If the accused does not have counsel, the prosecutor should make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel, and is given reasonable opportunity to obtain counsel.

(f) If the prosecutor believes pretrial release is appropriate, or it is ordered, the prosecutor should cooperate in arrangements for release under the prevailing pretrial release system.

(g) If the prosecutor has reasonable concerns about the accused’s mental competence, the prosecutor should bring those concerns to the attention of defense counsel and, if necessary, the judicial officer.

(h) The prosecutor should not seek to delay a prompt judicial determination of probable cause for criminal charges without good cause, particularly if the accused is in custody.
Standard 3-5.2 The Decision to Recommend Release or Seek Detention

(a) The prosecutor should favor pretrial release of a criminally accused, unless detention is necessary to protect individuals or the community or to ensure the return of the defendant for future proceedings.

(b) The prosecutor’s decision to recommend pretrial release or seek detention should be based on the facts and circumstances of the defendant and the offense, rather than made categorically. The prosecutor should consider information relevant to these decisions from all sources, including the defendant.

(c) The prosecutor should cooperate with pretrial services or other personnel who review or assemble information to be provided to the court regarding pretrial release determinations.

(d) The prosecutor should be open to reconsideration of pretrial detention or release decisions based on changed circumstances, including an unexpectedly lengthy period of detention.
Standard 3-5.3 Preparation for Court Proceedings, and Recording and Transmitting Information

(a) The prosecutor should prepare in advance for court proceedings unless that is impossible. Adequate preparation depends on the nature of the proceeding and the time available, and will often include: reviewing available documents; considering what issues are likely to arise and the prosecution’s position regarding those issues; how best to present the issues and what solutions might be offered; relevant legal research and factual investigation; and contacting other persons who might be of assistance in addressing the anticipated issues. If the prosecutor has not had adequate time to prepare and is unsure of the relevant facts or law, the prosecutor should communicate to the court the limits of the prosecutor’s knowledge or preparation.

(b) The prosecutor should make effort to appear at all hearings in cases assigned to the prosecutor. A prosecutor who substitutes at a court proceeding for another prosecutor assigned to the case should make reasonable efforts to be adequately informed about the case and issues likely to come up at the proceeding, and to adequately prepare.

(c) The prosecutor handling any court appearance should document what happens at the proceeding, to aid the prosecutor’s later memory and so that necessary information will be available to other prosecutors who may handle the case in the future.

(d) The prosecutor should take steps to ensure that any court order issued to the prosecution is transmitted to the appropriate persons necessary to effectuate the order.

(e) The prosecutor’s office should be provided sufficient resources and be organized to permit adequate preparation for court proceedings.
Standard 3-5.4 Identification and Disclosure of Information and Evidence

(a) After charges are filed if not before, the prosecutor should diligently seek to identify all information in the possession of the prosecution or its agents that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government’s witnesses or evidence, or reduce the likely punishment of the accused if convicted.

(b) The prosecutor should diligently advise other governmental agencies involved in the case of their continuing duty to identify, preserve, and disclose to the prosecutor information described in (a) above.

(c) Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information described in (a) above that is known to the prosecutor, regardless of whether the prosecutor believes it is likely to change the result of the proceeding, unless relieved of this responsibility by a court’s protective order. (Regarding discovery prior to a guilty plea, see Standard 3-5.6(f) below.) A prosecutor should not intentionally attempt to obscure information disclosed pursuant to this standard by including it without identification within a larger volume of materials.

(d) The obligations to identify and disclose such information continue throughout the prosecution of a criminal case.

(e) A prosecutor should timely respond to legally proper discovery requests, and make a diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by a court. When the defense makes requests for specific information, the prosecutor should provide specific responses rather than merely a general acknowledgement of discovery obligations. Requests and responses should be tailored to the case and “boilerplate” requests and responses should be disfavored.

(f) The prosecutor should make prompt efforts to identify and disclose to the defense any physical evidence that has been gathered in the investigation, and provide the defense a reasonable opportunity to examine it.

(g) A prosecutor should not avoid pursuit of information or evidence because the prosecutor believes it will damage the prosecution's case or aid the accused.

(h) A prosecutor should determine whether additional statutes, rules or caselaw may govern or restrict the disclosure of information, and comply with these authorities absent court order.
Standard 3-5.5 Preservation of Information and Evidence

(a) The prosecutor should make reasonable efforts to preserve, and direct the prosecutor’s agents to preserve, relevant materials during and after a criminal case, including:

(i) evidence relevant to investigations as well as prosecutions, whether or not admitted at trial;

(ii) information identified pursuant to Standard 3-5.4(a); and

(iii) other materials necessary to support significant decisions made and conclusions reached by the prosecution in the course of an investigation and prosecution.

(b) The prosecutor’s office should develop policies regarding the method and duration of preservation of such materials. Such policies should be consistent with applicable rules and laws (such as public records laws) in the jurisdiction. These policies, and individual preservation decisions, should consider the character and seriousness of each case, the character of the particular evidence or information, the likelihood of further challenges to judgments following conviction, and the resources available for preservation. Physical evidence should be preserved so as to reasonably preserve its forensic characteristics and utility.

(c) Materials should be preserved at least until a criminal case is finally resolved or is final on appeal and the time for further appeal has expired. In felony cases, materials should be preserved until post-conviction litigation is concluded or time-limits have expired. In death penalty cases, information should be preserved until the penalty is carried out or is precluded.

(d) The prosecutor should comply with additional statutes, rules or caselaw that may govern the preservation of evidence.
(a) The prosecutor should be open, at every stage of a criminal matter, to discussions with defense counsel concerning disposition of charges by guilty plea or other negotiated disposition.

(b) A prosecutor should not engage in disposition discussions directly with a represented defendant, except with defense counsel's approval. Where a defendant has properly waived counsel, the prosecutor may engage in disposition discussions with the defendant, and should make and preserve a record of such discussions.

(c) The prosecutor should not enter into a disposition agreement before having information sufficient to assess the defendant's actual culpability. The prosecutor should consider collateral consequences of a conviction before entering into a disposition agreement. The prosecutor should consider factors listed in Standard 3-4.4(a), and not be influenced in disposition discussions by inappropriate factors such as those listed in Standards 3-1.6 and 3-4.4(b).

(d) The prosecutor should not set unreasonably short deadlines, or demand conditions for a disposition, that are so coercive that the voluntariness of a plea or the effectiveness of defense counsel is put into question. A prosecutor may, however, set a reasonable deadline before trial or hearing for acceptance of a disposition offer.

(e) A prosecutor should not knowingly make false statements of fact or law in the course of disposition discussions.

(f) Before entering into a disposition agreement, the prosecutor should disclose to the defense a factual basis sufficient to support the charges in the proposed agreement, and information currently known to the prosecutor that tends to negate guilt, mitigates the offense or is likely to reduce punishment.

(g) A prosecutor should not agree to a guilty plea if the prosecutor reasonably believes that sufficient admissible evidence to support conviction beyond reasonable doubt would be lacking if the matter went to trial.
Standard 3-5.7 Establishing and Fulfilling Conditions of Negotiated Dispositions

(a) A prosecutor should not demand terms in a negotiated disposition agreement that are unlawful or in violation of public policy.

(b) The prosecutor may properly promise the defense that the prosecutor will or will not take a particular position concerning sentence and conditions. The prosecutor should not, however, imply a greater power to influence the disposition of a case than is actually possessed.

(c) The prosecutor should memorialize all promises and conditions that are part of the agreement, and ensure that any written disposition agreement accurately and completely reflects the precise terms of the agreement including the prosecutor’s promises and the defendant’s obligations. At any court hearing to finalize a negotiated disposition, the prosecutor should ensure that all relevant details of the agreement have been placed on the record. The presumption is that the hearing and record will be public, but in some cases the hearing or record (or a portion) may be sealed for good cause.

(d) Once a disposition agreement is final and accepted by the court, the prosecutor should comply with, and make good faith efforts to have carried out, the government’s obligations. The prosecutor should construe agreement conditions, and evaluate the defendant’s performance including any cooperation, in a good-faith and reasonable manner.

(e) If the prosecutor believes that a defendant has breached an agreement that has been accepted by the court, the prosecutor should notify the defense regarding the prosecutor’s belief and any intended adverse action. If the defense presents a good-faith disagreement and the parties cannot quickly resolve it, the prosecutor should not act before judicial resolution.

(f) If the prosecutor reasonably believes that a court is acting inconsistently with any term of a negotiated disposition, the prosecutor should raise the matter with the court.
Standard 3-5.8 Waiver of Rights as Condition of Disposition Agreements

(a) A prosecutor should not condition a disposition agreement on a waiver of the right to appeal the terms of a sentence which exceeds an agreed-upon or reasonably anticipated sentence. Any waiver of appeal of sentence should be comparably binding on the defendant and the prosecution.

(b) A prosecutor should not suggest or require, as a condition of a disposition agreement, any waiver of post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence, unless such claims are based on past instances of such conduct that are specifically identified in the agreement or in the transcript of proceedings that address the agreement. If a proposed disposition agreement contains such a waiver regarding ineffective assistance of counsel, the prosecutor should ensure that the defendant has been provided the opportunity to consult with independent counsel regarding the waiver before agreeing to the disposition.

(c) A prosecutor may propose or require other sorts of waivers on an individualized basis if the defendant’s agreement is knowing and voluntary. No waivers of any kind should be accepted without an exception for manifest injustice based on newly-discovered evidence, or actual innocence.

(d) Although certain claims may have been waived, a prosecutor should not condition a disposition agreement on a complete waiver of the right to file a habeas corpus or other comparable post-conviction petition.

(e) A prosecutor should not request or rely on waivers to hide an injustice or material flaw in the case which is undisclosed to the defense.
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Standard 3-5.9  Record of Reasons for Dismissal of Charges

When criminal charges are dismissed on the prosecution’s motion, including by plea of *nolle prosequi* or its equivalent, the prosecutor should make and retain an appropriate record of the reasons for the dismissal, and indicate on the record whether the dismissal was with or without prejudice.
PART VI

COURT HEARINGS AND TRIAL

Standard 3-6.1  Scheduling Court Hearings

Final control over the scheduling of court appearances, hearings and trials in criminal matters should rest with the court rather than the parties. When the prosecutor is aware of facts that would affect scheduling, the prosecutor should advise the court and, if the facts are case-specific, defense counsel.
Standard 3-6.2  Civility With Courts, Opposing Counsel, and Others

(a) As an officer of the court, the prosecutor should support the authority of the court and the dignity of the courtroom by adherence to codes of professionalism and civility, and by manifesting a professional and courteous attitude toward the judge, opposing counsel, witnesses, defendants, jurors, court staff and others. In court as elsewhere, the prosecutor should not display or act out of any improper or unlawful bias.

(b) When court is in session, unless otherwise permitted by the court, the prosecutor should address the court and not address other counsel or the defendant directly on any matter related to the case.

(c) The prosecutor should comply promptly and civilly with a court’s orders or seek appropriate relief from such orders. If the prosecutor considers an order to be significantly erroneous or prejudicial, the prosecutor should ensure that the record adequately reflects the events. The prosecutor has a right to make respectful objections and reasonable requests for reconsideration, and to seek other relief as the law permits. If a judge prohibits making an adequate objection, proffer, or record, the prosecutor may take other lawful steps to protect the public interest.
Standard 3-6.3 Selection of Jurors

(a) The prosecutor’s office should be aware of legal standards that govern the selection of jurors, and train prosecutors to comply. The prosecutor should prepare to effectively discharge the prosecution function in the selection of the jury, including exercising challenges for cause and peremptory challenges. The prosecutor’s office should also be aware of the process used to select and summon the jury pool and bring legal deficiencies to the attention of the court.

(b) The prosecutor should not strike jurors based on any criteria rendered impermissible by the constitution, statutes, applicable rules of the jurisdiction, or these standards, including race, sex, religion, national origin, disability, sexual orientation or gender identity. The prosecutor should consider contesting a defense counsel’s peremptory challenges that appear to be based upon such criteria.

(c) In cases in which the prosecutor conducts a pretrial investigation of the background of potential jurors, the investigative methods used should not harass, intimidate, or unduly embarrass or invade the privacy of potential jurors. Absent special circumstances, such investigation should be restricted to review of records and sources of information already in existence and to which access is lawfully allowed. If the prosecutor uses record searches that are unavailable to the defense, such as criminal record databases, the prosecutor should share the results with defense counsel or seek a judicial protective order.

(d) The opportunity to question jurors personally should be used solely to obtain information relevant to the well-informed exercise of challenges. The prosecutor should not seek to commit jurors on factual issues likely to arise in the case, and should not intentionally present arguments, facts or evidence which the prosecutor reasonably should know will not be admissible at trial. Voir dire should not be used to argue the prosecutor’s case to the jury, or to unduly ingratiate counsel with the jurors.

(e) During voir dire, the prosecutor should seek to minimize any undue embarrassment or invasion of privacy of potential jurors, for example by seeking to inquire into sensitive matters outside the presence of other potential jurors, while still enabling fair and efficient juror selection.

(f) If the court does not permit voir dire by counsel, the prosecutor should provide the court with suggested questions in advance, and request specific follow-up questions during the selection process when necessary to ensure fair juror selection.

(g) If the prosecutor has reliable information that conflicts with a potential juror’s responses, or that reasonably would support a “for cause” challenge by any party, the prosecutor should inform the court and, unless the court orders otherwise, defense counsel.
Standard 3-6.4 Relationship With Jurors

(a) The prosecutor should not communicate with persons the prosecutor knows to be summoned for jury duty or impaneled as jurors, before or during trial, other than in the lawful conduct of courtroom proceedings. The prosecutor should avoid even the appearance of improper communications with jurors, and minimize any out-of-court proximity to or contact with jurors. Where out-of-court contact cannot be avoided, the prosecutor should not communicate about or refer to the specific case.

(b) The prosecutor should treat jurors with courtesy and respect, while avoiding a show of undue solicitude for their comfort or convenience.

(c) After discharge of a juror, a prosecutor should avoid contacts that may harass or embarrass the juror, that criticize the jury’s actions or verdict, or that express views that could otherwise adversely influence the juror’s future jury service. The prosecutor should know and comply with applicable rules and law governing the subject.

(d) After a jury is discharged, the prosecutor may, if no statute, rule, or order prohibits such action, communicate with jurors to investigate whether a verdict may be subject to legal challenge, or to evaluate the prosecution’s performance for improvement in the future. The prosecutor should consider requesting the court to instruct the jury that, if it is not prohibited by law, it is not improper for jurors to discuss the case with the lawyers, although they are not required to do so. Any post-discharge communication with a juror should not disparage the criminal justice system and the jury trial process, and should not express criticism of the jury’s actions or verdict.

(e) A prosecutor who learns reasonably reliable information that there was a problem with jury deliberations or conduct that could support an attack on a judgment of conviction and that is recognized as potentially valid in the jurisdiction, should promptly report that information to the appropriate judicial officer and, unless the court orders otherwise, defense counsel.
Standard 3-6.5 Opening Statement at Trial

(a) The prosecutor should give an opening statement before the presentation of evidence begins.

(b) The prosecutor’s opening statement at trial should be confined to a fair statement of the case from the prosecutor’s perspective, and discussion of evidence that the prosecutor reasonably believes will be available, offered and admitted to support the prosecution case. The prosecutor’s opening should avoid speculating about what defenses might be raised by the defense unless the prosecutor knows they will be raised.

(c) The prosecutor’s opening statement should be made without expressions of personal opinion, vouching for witnesses, inappropriate appeals to emotion or personal attacks on opposing counsel. The prosecutor should scrupulously avoid any comment on a defendant’s right to remain silent.

(d) When the prosecutor has reason to believe that a portion of the opening statement may be objectionable, the prosecutor should raise that point with defense counsel and, if necessary, the court, in advance. Similarly, visual aids or exhibits that the prosecutor intends to use during opening statement should be shown to defense counsel in advance.
Standard 3-6.6  Presentation of Evidence

(a) The prosecutor should not offer evidence that the prosecutor does not reasonably believe to be true, whether by documents, tangible evidence, or the testimony of witnesses. When a prosecutor has reason to doubt the truth or accuracy of particular evidence, the prosecutor should take reasonable steps to determine that the evidence is reliable, or not present it.

(b) If the prosecutor reasonably believes there has been misconduct by opposing counsel, a witness, the court or other persons that affects the fair presentation of the evidence, the prosecutor should challenge the perceived misconduct by appealing or objecting to the court or through other appropriate avenues, and not by engaging in retaliatory conduct that the prosecutor knows to be improper.

(c) During the trial, if the prosecutor discovers that false evidence or testimony has been introduced by the prosecution, the prosecutor should take reasonable remedial steps. If the witness is still on the stand, the prosecutor should attempt to correct the error through further examination. If the falsity remains uncorrected or is not discovered until the witness is off the stand, the prosecutor should notify the court and opposing counsel for determination of an appropriate remedy.

(d) The prosecutor should not bring to the attention of the trier of fact matters that the prosecutor knows to be inadmissible, whether by offering or displaying inadmissible evidence, asking legally objectionable questions, or making impermissible comments or arguments. If the prosecutor is uncertain about the admissibility of evidence, the prosecutor should seek and obtain resolution from the court before the hearing or trial if possible, and reasonably in advance of the time for proffering the evidence before a jury.

(e) The prosecutor should exercise strategic judgment regarding whether to object or take exception to evidentiary rulings that are materially adverse to the prosecution, and not make every possible objection. The prosecutor should not make objections without a reasonable basis, or for improper reasons such as to harass or to break the flow of opposing counsel's presentation. The prosecutor should make an adequate record for appeal, and consider the possibility of an interlocutory appeal regarding significant adverse rulings if available.

(f) The prosecutor should not display tangible evidence (and should object to such display by the defense) until it is admitted into evidence, except insofar as its display is necessarily incidental to its tender, although the prosecutor may seek permission to display admissible evidence during opening statement. The prosecutor should avoid displaying even admitted evidence in a manner that is unduly prejudicial.
Standard 3-6.7 Examination of Witnesses in Court

(a) The prosecutor should conduct the examination of witnesses fairly and with due regard for dignity and legitimate privacy concerns, and without seeking to intimidate or humiliate a witness unnecessarily.

(b) The prosecutor should not use cross-examination to discredit or undermine a witness’s testimony, if the prosecutor knows the testimony to be truthful and accurate.

(c) The prosecutor should not call a witness to testify in the presence of the jury, or require the defense to do so, when the prosecutor knows the witness will claim a valid privilege not to testify. If the prosecutor is unsure whether a particular witness will claim a privilege to not testify, the prosecutor should alert the court and defense counsel in advance and outside the presence of the jury.

(d) The prosecutor should not ask a question that implies the existence of a factual predicate for which a good faith belief is lacking.
Standard 3-6.8 Closing Arguments to the Trier of Fact

(a) In closing argument to a jury (or to a judge sitting as trier of fact), the prosecutor should present arguments and a fair summary of the evidence that proves the defendant guilty beyond reasonable doubt. The prosecutor may argue all reasonable inferences from the evidence in the record, unless the prosecutor knows an inference to be false. The prosecutor should, to the extent time permits, review the evidence in the record before presenting closing argument. The prosecutor should not knowingly misstate the evidence in the record, or argue inferences that the prosecutor knows have no good-faith support in the record. The prosecutor should scrupulously avoid any reference to a defendant’s decision not to testify.

(b) The prosecutor should not argue in terms of counsel’s personal opinion, and should not imply special or secret knowledge of the truth or of witness credibility.

(c) The prosecutor should not make arguments calculated to appeal to improper prejudices of the trier of fact. The prosecutor should make only those arguments that are consistent with the trier’s duty to decide the case on the evidence, and should not seek to divert the trier from that duty.

(d) If the prosecutor presents rebuttal argument, the prosecutor may respond fairly to arguments made in the defense closing argument, but should not present or raise new issues. If the prosecutor believes the defense closing argument is or was improper, the prosecutor should timely object and request relief from the court, rather than respond with arguments that the prosecutor knows are improper.
Standard 3-6.9    Facts Outside the Record

When before a jury, the prosecutor should not knowingly refer to, or argue on the basis of, facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience, or are matters of which a court clearly may take judicial notice, or are facts the prosecutor reasonably believes will be entered into the record at that proceeding. In a nonjury context the prosecutor may refer to extra-record facts relevant to issues about which the court specifically inquires, but should note that they are outside the record.
Standard 3-6.10   Comments by Prosecutor After Verdict or Ruling

(a) The prosecutor should respectfully accept acquittals. Regarding other adverse rulings (including the rare acquittal by a judge that is appealable), while the prosecutor may publicly express respectful disagreement and an intention to pursue lawful options for review, the prosecutor should refrain from public criticism of any participant. Public comments after a verdict or ruling should be respectful of the legal system and process.

(b) The prosecutor may publicly praise a jury verdict or court ruling, compliment government agents or others who aided in the matter, and note the social value of the ruling or event. The prosecutor should not publicly gloat or seek personal aggrandizement regarding a verdict or ruling.
PART VII
POST-TRIAL MOTIONS AND SENTENCING

(New) Standard 3-7.1 Post-trial Motions (New)

The prosecutor should conduct a fair evaluation of post-trial motions, determine their merit, and respond accordingly and respectfully. The prosecutor should not oppose motions at any stage without a reasonable basis for doing so.
Standard 3-7.2  

(a) The severity of sentences imposed should not be used as a measure of a prosecutor’s effectiveness.

(b) The prosecutor should be familiar with relevant sentencing laws, rules, consequences and options, including alternative non-imprisonment sentences. Before or soon after charges are filed, and throughout the pendency of the case, the prosecutor should evaluate potential consequences of the prosecution and available sentencing options, such as forfeiture, restitution, and immigration effects, and be prepared to actively advise the court in sentencing.

(c) The prosecutor should seek to assure that a fair and informed sentencing judgment is made, and to avoid unfair sentences and disparities.

(d) In the interests of uniformity, the prosecutor’s office should develop consistent policies for evaluating and making sentencing recommendations, and not leave complete discretion for sentencing policy to individual prosecutors.

(e) The prosecutor should know the relevant laws and rules regarding victims’ rights, and facilitate victim participation in the sentencing process as the law requires or permits.
Standard 3-7.3  Information Relevant to Sentencing

(a) The prosecutor should assist the court in obtaining complete and accurate information for use in sentencing, and should cooperate fully with the court’s and staff’s presentence investigations. The prosecutor should provide any information that the prosecution believes is relevant to the sentencing to the court and to defense counsel. A record of such information provided to the court and counsel should be made, so that it may be reviewed later if necessary. If material incompleteness or inaccuracy in a presentence report comes to the prosecutor’s attention, the prosecutor should take steps to present the complete and correct information to the court and defense counsel.

(b) The prosecutor should disclose to the defense and to the court, at or before the sentencing proceeding, all information that tends to mitigate the sentence and is known to the prosecutor, unless the prosecutor is relieved of this responsibility by a court order.

(c) Prior to sentencing, the prosecutor should disclose to the defense any evidence or information it provides, whether by document or orally, to the court or presentence investigator in aid of sentencing, unless contrary to law or rule in the jurisdiction or a protective order has been sought.
PART VIII

APPEALS AND OTHER CONVICTION CHALLENGES  [NEW]

[New] Standard 3-8.1  Duty To Defend Conviction Not Absolute [New]

The prosecutor has a duty to defend convictions obtained after fair process. This duty is not absolute, however, and the prosecutor should temper the duty to defend with independent professional judgment and discretion. The prosecutor should not defend a conviction if the prosecutor believes the defendant is innocent or was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred.
(a) All prosecutors should be sufficiently knowledgeable about appellate practice to be able to make a record sufficient to preserve issues and arguments for appeal, and should make such a record at the trial court level.

(b) When the prosecutor receives an adverse ruling, the prosecutor should consider whether it may be appealed. If the ruling may be appealed, the prosecutor should consider whether an appeal should be filed, and refer it to an appellate prosecutor if appropriate for decision.

(c) When considering whether an adverse ruling should be appealed, the prosecutor should evaluate not only the legal merits, but also whether it is in the interests of justice to pursue such an appeal, taking into account the benefits to the prosecution, the judicial system, and the public, as well as the costs of the appellate process and of delay to the prosecution, defendant, victims and witnesses.

(d) A prosecutor handling a criminal appeal should know the specific rules, practices and procedures that govern appeals in the jurisdiction.

(e) The prosecutor's office should designate one or more prosecutors in the office to develop expertise regarding appellate law and procedure, and should develop contacts with other offices' prosecutors who have such expertise. The prosecutor's office should develop consistent policies and positions regarding issues that are common or recurring in the appellate process or court. The prosecutor's office should regularly notify its prosecutors and law enforcement agents about new developments in the law or judicial decisions, and should provide regular training to such personnel on such topics.

(f) A prosecutor handling a criminal appeal who was not counsel in the trial court should consult with the trial prosecutor, but should exercise independent judgment in reviewing the record and the defense arguments. The appellate prosecutor should not make or oppose arguments in an appeal without a reasonable legal basis.
Standard 3-8.3 Responses to New or Newly-Discovered Evidence or Law

If a prosecutor learns of credible and material information creating a reasonable likelihood that a defendant was wrongfully convicted or sentenced or is actually innocent, the prosecutor should comply with ABA Model Rules of Professional Conduct 3.8(g) and (h). The prosecutor’s office should develop policies and procedures to address such information, and take actions that are consistent with applicable law, rules, and the duty to pursue justice.
Standard 3-8.4 Challenges to the Effectiveness of Defense Counsel

(a) In any post-conviction challenge to the effectiveness of defense counsel, the prosecutor should be cognizant of the defendant’s potential attorney-client privilege with former defense counsel as well as former defense counsel’s other ethical or legal obligations, and not seek to abrogate such privileges or obligations without an unambiguous legal basis, or court order.

(b) If a prosecutor observes, at any stage of a criminal proceeding, defense counsel conduct or omission that might reasonably constitute ineffective assistance of counsel, the prosecutor should take reasonable steps to preserve the defendant’s right to effective assistance as well as the public’s interest in obtaining a valid conviction, while not intruding on a defendant’s constitutional right to counsel. During an ongoing defense representation, the prosecutor should not express concerns regarding possible ineffective assistance on the public record without an unambiguous legal basis or court order, and should not communicate any such concerns directly to the defendant.
If required to respond to a collateral attack on a conviction, the prosecutor should consider all lawful responses, including applicable procedural or other defenses. The prosecutor need not, however, invoke every possible defense to a collateral attack, and should consider potential negotiated dispositions or other remedies, if the prosecutor and the prosecutor’s office reasonably conclude that the interests of justice are thereby served.

-- END of Proposed Revisions to the PROSECUTION FUNCTION Standards --
AMERICAN BAR ASSOCIATION

Proposed Fourth Edition of the
CRIMINAL JUSTICE STANDARDS
for the
PROSECUTION and DEFENSE FUNCTIONS
(encompassing proposed revisions to the
Third Edition approved in 1993)

Presented by the
CRIMINAL JUSTICE SECTION
for Adoption by the House of Delegates
Midyear Meeting, Houston, TX

February 2015

CRIMINAL JUSTICE STANDARDS
for the
DEFENSE FUNCTION

Chair, Criminal Justice Section Council: Mathias H. Heck, Jr., Montgomery County Prosecuting
Attorney, Dayton, Ohio..

Standards Committee Chair: The Hon. Mark R. Dwyer, New York Court of Claims.
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1. Each Standard begins on a separate page. There are 65 proposed Defense Function
Standards here, up from 43 Standards in the 1993 Edition. Where there is no 1993 equivalent
Standard (or a subsection of a 1993 Standards is now made into a separate Standard), the proposed
revision is designated a “New” Standard.

2. This draft reflects final revisions approved by the Council of the Criminal Justice Section
at its April 2014 meeting.
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PART I

GENERAL STANDARDS

Standard 4-1.1 The Scope and Function of these Standards

(a) As used in these Standards, “defense counsel” means any attorney – including
privately retained, assigned by the court, acting pro bono or serving indigent defendants
in a legal aid or public defender’s office – who acts as an attorney on behalf of a client
being investigated or prosecuted for alleged criminal conduct, or a client seeking legal
advice regarding a potential, ongoing or past criminal matter or subpoena, including as a
witness. These Standards are intended to apply in any context in which a lawyer would
reasonably understand that a criminal prosecution could result. The Standards are
intended to serve the best interests of clients, and should not be relied upon to justify any
decision that is counter to the client’s best interests. The burden to justify any exception
should rest with the lawyer seeking it.

(b) These Standards are intended to provide guidance for the professional conduct and
performance of defense counsel. They are not intended to modify a defense attorney’s
obligations under applicable rules, statutes or the constitution. They are aspirational or
describe “best practices,” and are not intended to serve as the basis for the imposition of
professional discipline, to create substantive or procedural rights for clients, or to create a
standard of care for civil liability. They may be relevant in judicial evaluation of
constitutional claims regarding the right to counsel. For purposes of consistency, these
Standards sometimes include language taken from the Model Rules of Professional
Conduct; but the Standards often address conduct or provide details beyond that governed
by the Model Rules of Professional Conduct. No inconsistency is ever intended; and in
any case a lawyer should always read and comply with the rules of professional conduct
and other authorities that are binding in the specific jurisdiction or matter, including
choice of law principles that may regulate the lawyer’s ethical conduct.

(c) Because the Standards for Criminal Justice are aspirational, the words
“should” or “should not” are used in these Standards, rather than mandatory phrases such
as “shall” or “shall not,” to describe the conduct of lawyers that is expected or
recommended under these Standards. The Standards are not intended to suggest any
lesser standard of conduct than may be required by applicable mandatory rules, statutes,
or other binding authorities.

(d) These Standards are intended to address the performance of criminal defense
counsel in all stages of their professional work. Other ABA Criminal Justice Standards
should also be consulted for more detailed consideration of the performance of criminal
defense counsel in specific areas.
Standard 4-1.2 Functions and Duties of Defense Counsel

(a) Defense counsel is essential to the administration of criminal justice. A court properly constituted to hear a criminal case should be viewed as an entity consisting of the court (including judge, jury, and other court personnel), counsel for the prosecution, and counsel for the defense.

(b) Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.

(c) Defense counsel should know and abide by the standards of professional conduct as expressed in applicable law and ethical codes and opinions in the applicable jurisdiction. Defense counsel should seek out supervisory advice when available, and defense counsel organizations as well as others should provide ethical guidance when the proper course of conduct seems unclear. Defense counsel who disagrees with a governing ethical rule should seek its change if appropriate, and directly challenge it if necessary, but should comply with it unless relieved by court order.

(d) Defense counsel is the client’s professional representative, not the client’s alter-ego. Defense counsel should act zealously within the bounds of the law and standards on behalf of their clients, but have no duty to, and may not, execute any directive of the client which violates the law or such standards. In representing a client, defense counsel may engage in a good faith challenge to the validity of such laws or standards if done openly.

(e) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel’s attention, counsel should stimulate and support efforts for remedial action. Defense counsel should provide services to the community, including involvement in public service and Bar activities, public education, community service activities, and Bar leadership positions. A public defense organization should support such activities, and the office’s budget should include funding and paid release time for such activities.

(f) Defense counsel should be knowledgeable about, and consider, alternatives to prosecution or conviction that may be applicable in individual cases, and communicate them to the client. Defense counsel should be available to assist other groups in the community in addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

(g) Because the death penalty differs from other criminal penalties, defense counsel in a capital case should make extraordinary efforts on behalf of the accused and,
more specifically, review and comply with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.
[New] Standard 4-1.3 Continuing Duties of Defense Counsel [New]

Some duties of defense counsel run throughout the period of representation, and even beyond. Defense counsel should consider the impact of these duties at all stages of a criminal representation and on all decisions and actions that arise in the course of performing the defense function. These duties include:

(a) a duty of confidentiality regarding information relevant to the client’s representation which duty continues after the representation ends;
(b) a duty of loyalty toward the client;
(c) a duty of candor toward the court and others, tempered by the duties of confidentiality and loyalty;
(d) a duty to communicate and keep the client informed and advised of significant developments and potential options and outcomes;
(e) a duty to be well-informed regarding the legal options and developments that can affect a client’s interests during a criminal representation;
(f) a duty to continually evaluate the impact that each decision or action may have at later stages, including trial, sentencing, and post-conviction review;
(g) a duty to be open to possible negotiated dispositions of the matter, including the possible benefits and disadvantages of cooperating with the prosecution;
(h) a duty to consider the collateral consequences of decisions and actions, including but not limited to the collateral consequences of conviction.
<table>
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<tr>
<th>Standard 4-1.4</th>
<th>Defense Counsel’s Tempered Duty of Candor</th>
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(a) In light of criminal defense counsel’s constitutionally recognized role in the criminal process, defense counsel’s duty of candor may be tempered by competing ethical and constitutional obligations. Defense counsel must act zealously within the bounds of the law and applicable rules to protect the client’s confidences and the unique liberty interests that are at stake in criminal prosecution.

(b) Defense counsel should not knowingly make a false statement of fact or law or offer false evidence, to a court, lawyer, witnesses, or third party. It is not a false statement for defense counsel to suggest inferences that may reasonably be drawn from the evidence. In addition, while acting to accommodate legitimate confidentiality, privilege, or other defense concerns, defense counsel should correct a defense representation of material fact or law that defense counsel knows is, or later learns was, false.

(c) Defense counsel should disclose to a court legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the client and not disclosed by others.
At every stage of representation, defense counsel should take steps necessary to make a clear and complete record for potential review. Such steps may include: filing motions, including motions for reconsideration, and exhibits; making objections and placing explanations on the record; requesting evidentiary hearings; requesting or objecting to jury instructions; and making offers of proof and proffers of excluded evidence.
Standard 4-1.6 Improper Bias Prohibited

(a) Defense counsel should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. Defense counsel should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of defense counsel’s authority.

(b) Defense counsel should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of counsel’s work. A public defense office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the defense office’s jurisdiction, and eliminate those impacts that cannot be properly justified.
Standard 4-1.7 Conflicts of Interest

(a) Defense counsel should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a conflict requiring withdrawal exists and is non-waivable, or informed consent has not been obtained, defense counsel should decline to proceed further, or take only minimal actions necessary to protect the client’s interests, until an adequate waiver or new counsel is in place, or a court orders continued representation.

(b) Defense counsel should not permit their professional judgment or obligations regarding the representation of a client to be adversely affected by loyalties or obligations to other, former, or potential clients; by client obligations of their law partners; or by their personal political, financial, business, property, or other interests or relationships.

(c) Defense counsel should disclose to the client at the earliest feasible opportunity any information, including any interest in or connection to the matter or to other persons involved in the matter, that would reasonably be relevant to the client’s selection of unconflicted counsel or decision to continue counsel’s representation. The disclosure of conflicts of interest that would otherwise be prohibited by applicable rules or law should be in writing, and should be disclosed on the record to any court that the matter comes before. Disclosures to the client should include communication of information sufficient to permit the client to appreciate the material risks involved and available alternatives. Defense counsel should obtain informed consent from a client before proceeding with any representation where an actual or realistically potential conflict is present.

(d) Except where necessary to secure counsel for preliminary matters such as initial hearings or applications for bail, a defense counsel (or multiple counsel associated in practice) should not undertake to represent more than one client in the same criminal case. When there is not yet a criminal case, such multiple representation should be engaged in only when, after careful investigation and consideration, it is clear either that no conflict is likely to develop at any stage of the matter, or that multiple representation will be advantageous to each of the clients represented and that foreseeable conflicts can be waived.

(e) In instances of permissible multiple representation:
   (i) the clients should be fully advised that the lawyer may be unable to continue if a conflict develops, and that confidentiality may not exist between the clients;
   (ii) informed written consent should be obtained from each of the clients, and
   (iii) if the matter is before a tribunal, such consent should be made on the record with appropriate inquiries by counsel and the court.

(f) Defense counsel who has formerly represented a client should not thereafter use information related to the former representation to the disadvantage of the former client, unless the information has become generally known or the ethical obligations of
1814 confidentiality and loyalty otherwise do not apply, and should not take legal positions
1815 that are substantially adverse to a former client.
1816
1817 (g) In accepting payment of fees by one person for the representation of another,
1818 defense counsel should explain to the payor that counsel’s loyalty and confidentiality
1819 obligations are owed entirely to the person being represented and not to the payor, and
1820 that counsel may not release client information to the payor unless applicable ethics rules
1821 allow. Defense counsel should not permit a person who recommends, employs, or pays
1822 defense counsel to render legal services for another to direct or regulate counsel’s
1823 professional judgment in rendering such legal services. In addition, defense counsel
1824 should not accept such third-party compensation unless:
1825 (i) the client gives informed consent after full disclosure and explanation;
1826 (ii) defense counsel is confident there will be no interference with defense
1827 counsel’s independence or professional judgment or with the client-lawyer relationship;
1828 and
1829 (iii) defense counsel is reasonably confident that information relating to the
1830 representation of the client will be protected from disclosure as required by counsel’s
1831 ethical duty of confidentiality.
1832
1833 (h) Defense counsel should not represent a client in a criminal matter in which
1834 counsel, or counsel’s partner or other lawyer in counsel’s law office or firm, is the
1835 prosecutor in the same or a substantially related matter, or is a prosecutor in the same
1836 jurisdiction.
1837
1838 (i) If defense counsel’s partner or other lawyer in counsel’s law office was
1839 formerly a prosecutor in the same or substantially related matter or was a prosecutor in
1840 the same jurisdiction, defense counsel should not take on representation in that matter
1841 unless appropriate screening and consent measures under applicable ethics rules are
1842 undertaken, and no confidential information of the client or of the government has
1843 actually been exchanged between defense counsel and the former prosecutor.
1844
1845 (j) If defense counsel is a candidate for a position, or seeking employment, as a
1846 prosecutor or judge, this should be promptly disclosed to the client, and informed consent
1847 to continue be obtained.
1848
1849 (k) Defense counsel who formerly participated personally and substantially in the
1850 prosecution or criminal investigation of a defendant should not thereafter represent any
1851 person in the same or a substantially related matter, unless waiver is obtained from both
1852 the client and the government. Defense counsel who acquired confidential information
1853 about a person when counsel was formerly a prosecutor should not use such information
1854 in the representation of a client whose interests are adverse to that other person, unless
1855 the information has become generally known or the ethical obligations of confidentiality
1856 and loyalty otherwise do not apply.
1857
1858 (l) Defense counsel whose current relationship to a prosecutor is parent, child,
1859 sibling, spouse, or sexual partner should not represent a client in a criminal matter in
which defense counsel knows the government is represented by that prosecutor. Nor
should defense counsel who has a significant personal or financial relationship with a
prosecutor represent a client in a criminal matter in which defense counsel knows the
government is represented in the matter by such prosecutor, except upon informed
consent by the client regarding the relationship.

(m) Defense counsel should not act as surety on a bond either for a client whom
counsel represents or for any other client in the same or a related case, unless it is
required by law or it is clear that there is no risk that counsel’s judgment could be
materially limited by counsel’s interest in recovering the amount ensured.

(n) Except as law may otherwise permit, defense counsel should not negotiate to
employ any person who is significantly involved as an attorney, employee, or agent of the
prosecution in a matter in which defense counsel is participating personally and
substantially.
Standard 4-1.8 Appropriate Workload

(a) Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client’s interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in counsel’s existing matters. Defense counsel within a supervisory structure should notify supervisors when counsel’s workload is approaching or exceeds professionally appropriate levels.

(b) Defense organizations and offices should regularly review the workload of individual attorneys, as well as the workload of the entire office, and adjust workloads (including intake) when necessary and as permitted by law to ensure the effective and ethical conduct of the defense function.

(c) Publicly-funded defense entities should inform governmental officials of the workload of their offices, and request funding and personnel that are adequate to meet the defense caseload. Defense counsel should consider seeking such funding from all appropriate sources. If workload exceeds the appropriate professional capacity of a publicly-funded defense office or other defense counsel, that office or counsel should also alert the court(s) in its jurisdiction and seek judicial relief.
1898 Standard 4-1.9    Diligence, Promptness and Punctuality
1899
1900 (a) Defense counsel should act with diligence and promptness in representing a
1901 client, and should avoid unnecessary delay in the disposition of cases. But defense
1902 counsel should not act with such haste that quality representation is compromised.
1903 Defense counsel and publically-funded defense entities should be organized and
1904 supported with adequate staff and facilities to enable them to represent clients effectively
1905 and efficiently.
1906
1907 (b) When providing reasons for seeking delay, defense counsel should not
1908 knowingly misrepresent facts or otherwise mislead. Defense counsel should use
1909 procedural devices that will cause delay only when there is a legitimate basis for their
1910 use. Defense counsel should not accept a representation for the purpose of delaying a
1911 trial or hearing.
1912
1913 (c) Defense counsel should not unreasonably oppose requests for continuances
1914 from the prosecutor.
1915
1916 (d) Defense counsel should know and comply with timing requirements
1917 applicable to a criminal representation so as to not prejudice the client’s rights.
1918
1919 (e) Defense counsel should be punctual in attendance at court, in the submission
1920 of motions, briefs, and other papers, and in dealings with opposing counsel, witnesses
1921 and others. Defense counsel should emphasize to the client, assistants, and defense
1922 witnesses the importance of punctuality in court attendance.
Standard 4-1.10  Relationship With Media

(a) For purposes of this Standard, a “public statement” is any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication or media, including social media. An extrajudicial statement is any oral, written, or visual presentation not made either in a courtroom during the criminal proceedings or in court filings or correspondence with the court or counsel regarding the criminal proceedings.

(b) Defense counsel’s public statements about the judiciary, jurors, other lawyers, or the criminal justice system should be respectful even if expressing disagreement.

(c) Defense counsel should not make, cause to be made, or authorize or condone the making of, a public statement that counsel knows or reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding. Defense counsel’s public statements should otherwise be consistent with the ABA Standards on Fair Trial and Public Discourse.

(d) Defense counsel should not place statements or evidence into the court record to circumvent this Standard.

(e) Defense counsel should exercise reasonable care to prevent investigators, employees, or other persons assisting or associated with the defense from making an extrajudicial statement or providing non-public information that defense counsel would be prohibited from making or providing under this Standard or other applicable rules or law.

(f) Defense counsel may respond to public statements from any source in order to protect a client's legitimate interests, unless there is a substantial likelihood of materially prejudicing a criminal proceeding, in which case defense counsel should approach the prosecutor or the Court for relief. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(g) In making any public statement regarding a representation, defense counsel should comply with ethical rules governing client confidentiality and loyalty, and should not provide confidential information to the media, on or off the record, without authorization from the client.

(h) Defense counsel should not allow the client's representation to be adversely affected by counsel's personal interest in potential media contacts or attention.

(i) A defense attorney uninvolved in a matter who is commenting as a media source may offer generalized media commentary concerning a specific criminal matter that serves to educate the public about the criminal justice system and does not risk prejudicing a specific criminal proceeding. Counsel acting as such a media commentator should make reasonable efforts to be well-informed about the facts of the matter and the
1970 governing law. Counsel should not offer commentary regarding the specific merits of an
1971 ongoing prosecution or investigation, except in a rare case to address a manifest injustice
1972 and counsel is reasonably well-informed about the relevant facts and law.
Standard 4-1.11 Advisory Groups and Communications for Guidance on Issues of Professional Conduct

(a) In every jurisdiction, a group of lawyers with recognized experience, integrity, and standing in the criminal defense bar should be established to consider issues of professional conduct for defense attorneys in criminal matters. Members of this group should provide prompt and confidential guidance and advice to defense counsel seeking assistance in the application of standards of professional conduct in criminal representations.

(b) Defense counsel should initially take steps to ensure that the member from whom advice is sought does not have any conflicting interests, and the advisory group should establish procedures to avoid such conflicts.

(c) Communications between a defense lawyer and an advisory group member, and the seeking of advice itself, should be treated as confidential, and such communications should be afforded the same attorney-client privilege and other protections of the client's confidences as exists between any other lawyer and client. A group member should be bound by statute or rule of court in the same manner as a lawyer is otherwise bound in that jurisdiction not to reveal confidences of the client of the consulting lawyer.

(d) In seeking advice from a group member, defense counsel should take steps to protect the client's confidences (for example, by the use of anonymous hypotheticals), and reveal only such confidential information as may be necessary.

(e) Defense counsel should employ the foregoing confidentiality measures even when informally seeking advice from any other lawyer, and such informal consultations should be afforded confidentiality to the extent the law permits. Defense counsel should be cautious and protect confidences when seeking advice outside the advisory group context.

(f) Confidences regarding a consultation may later be revealed to the extent necessary if:

(i) defense counsel's client challenges the effectiveness of counsel's conduct of the matter and counsel has relied on the guidance received from an advisory group member, and the information is subpoenaed or otherwise judicially supervised; or

(ii) the defense counsel's conduct is called into question in a disciplinary inquiry or other proceeding against which counsel must defend.
Standard 4-1.12 Training Programs

(a) The community of criminal defense attorneys, including public defense offices and State and local Bar Associations, should develop and maintain programs of training and continuing education for both new and experienced defense counsel. Defense offices, as well as the organized Bar or courts, should require that current and aspiring criminal defense counsel attend a reasonable number of hours of such training and education.

(b) In addition to knowledge of substantive legal doctrine and courtroom procedures, a core training curriculum for criminal defense counsel should seek to address: investigation, negotiation and litigation skills; knowledge of the development, use, and testing of forensic evidence; available sentencing structures including non-conviction and non-imprisonment alternatives and collateral consequences; professional responsibility, civility, and a commitment to professionalism; relevant office, court, and prosecution policies and procedures and their proper application; appreciation of diversity and elimination of improper bias; and available technology and the ability to use it. Some training programs might usefully be open to, and taught by, persons outside the criminal defense community, such as prosecutors, law enforcement agencies, court staff, and members of the judiciary.

(c) A public defense office’s training program should include periodic review of the office’s policies and procedures, which should be amended when necessary. Counsel defending in specialized subject areas should receive training in those specialized areas. Individuals who will supervise attorneys or staff should receive training in how effectively to supervise.

(d) A public criminal defense organization should also make available opportunities for training and continuing education programs outside the office, including training for non-attorney staff.

(e) Adequate funding for continuing training and education programs, within and outside of public defense offices, should be requested and provided by funding sources.
Standard 4-1.13  Assuring Excellence and Diversity in the Hiring, Retention, and Compensation of Public Defense Counsel

(a) Strong professional qualifications and performance should be the basis for selection and retention for public defense positions. Effective measures to retain excellent defenders should be encouraged, while recognizing the benefits of some turnover. Supervisory defenders should select and promote personnel based on merit and expertise, without regard to partisan, personal or political factors or influence.

(b) In selecting personnel, a public defense office should also consider the diverse interests and makeup of the community it serves, and seek to recruit, hire, promote and retain a diverse group of defenders and staff that reflect that community.

(c) The function of public criminal defense requires highly developed professional skills and a variety of backgrounds, talents and experience. A defender's office should promote continuing professional development and continuity of service, while providing defenders the opportunity to gain experience in all aspects of the defense function.

(d) Compensation and benefits for public defense counsel and their staffs should be commensurate with the high responsibilities of the office, sufficient to compete with the private sector, and regularly adjusted to attract and retain well-qualified personnel. Compensation for public defense counsel should be adequate and also comparable to that of prosecutors in the same jurisdiction.
PART II

ACCESS TO DEFENSE COUNSEL

Standard 4-2.1 Duty to Make Qualified Criminal Defense Representation

(a) The government has an obligation to provide, and fully fund, services of qualified defense counsel for indigent criminal defendants. In addition, the organized Bar of all lawyers in a jurisdiction has a duty to make qualified criminal defense counsel available, including for the indigent, and to make lawyers’ expertise available in support of a fair and effective criminal justice system.

(b) The Bar should encourage the widest possible participation in the defense of criminal cases by qualified lawyers. Unqualified lawyers should not be assigned the primary role in criminal representation, but interested lawyers should be encouraged to qualify themselves for participation in criminal cases by formal training and by experience as associate counsel. Law firms should encourage and support efforts by their interested attorneys to become qualified and then take on criminal representations.

(c) Qualified defense counsel should be willing and ready to undertake the defense of a suspect or an accused regardless of public hostility or personal distaste for the offense or the client.

(d) Qualified defense counsel should not seek to avoid appointment by a tribunal to represent an accused except for good cause, such as: representing the accused is likely to result in violation of applicable ethical codes or other law; representing the accused is likely to result in an unreasonable financial burden on the lawyer; or the client or crime is so repugnant to the lawyer that it will likely prejudicially impair the lawyer’s ability to provide quality representation.

(e) Lawyers who are not qualified to serve as criminal defense counsel should

(i) be encouraged to seek qualification;

(ii) make their legal skills and expertise available to assist qualified counsel in providing indigent criminal defense; and

(iii) provide or assist in obtaining financial assistance and political support for indigent criminal defense budgets and resources.
Standard 4-2.2 Confidential Defense Communication with Detained Persons

[(c) and (d) are New]

(a) Every jurisdiction should guarantee by statute or rule the right of a criminally-detained or confined person to prompt, confidential, affordable and effective communication with a defense lawyer throughout a criminal investigation, prosecution, appeal, or other quasi-criminal proceedings such as habeas corpus.

(b) All detention or imprisonment institutions should provide reasonable, affordable access to confidential and unmonitored telephonic and other communication facilities to allow effective confidential communication between defense counsel and their detained clients. This should include providing or allowing access to language translation or other communication services when necessary.

(c) All detention or imprisonment institutions should provide adequate facilities for private, unmonitored meetings between defense counsel and an accused. Private facilities should also be provided for the review of evidence and discovery materials by counsel together with their detained clients.

(d) Absent a credible threat of immediate danger or violence, or advance judicial authorization, persons working in detention or imprisonment institutions should be prohibited from examining, monitoring, recording, or interfering with confidential communications between defense counsel and their detained clients.
Standard 4-2.3 Right to Counsel at First and Subsequent Judicial
Appearances /New/

A defense counsel should be made available in person to a criminally-accused person for consultation at or before any appearance before a judicial officer, including the first appearance.
Standard 4-2.4  Referral Service for Criminal Cases

(a) To assist persons who wish to retain defense counsel, every jurisdiction should have a referral service for qualified criminal defense counsel. The referral service should maintain a list of qualified counsel willing to undertake the defense of a criminal case, for a fee as well as pro bono, and should be organized so that it can provide prompt service at all times.

(b) A defense referral service should employ an objective set of standards for defense attorneys to qualify for placement on the referral list, and should employ fair and neutral criteria for admitting qualified attorneys to the list, making referrals, and striking counsel from the list. Such standards, criteria, and procedures concerning referral lists should be published and readily available.

(c) The availability of the referral service should be publicized, and information regarding fees should be included. Notices containing the essential information about the referral service and how to contact it should be posted in police stations, jails, and wherever else it is likely to give effective notice to criminally-accused persons, including the internet.
**Standard 4-2.5  Referrals for Representation**

(a) Defense counsel should not give anything of more than nominal value to a person for recommending the lawyer’s services, except that:

(i) counsel may pay reasonable costs of advertisements, or the usual charges for a legal services plan or qualified lawyer referral service, as described in ABA Model Rule 7.2; and

(ii) counsel may maintain nonexclusive reciprocal referral arrangements with other lawyers, if the client is fully informed of the arrangement and the arrangement does not constrain defense counsel’s independent professional judgment regarding the client’s best interests.

(b) Defense counsel should not have an ongoing or regular referral relationship with any source (such as prosecutors, public defender programs, law enforcement personnel, bondsmen, or court personnel) when such an ongoing relationship is likely to create conflicting loyalties for the lawyers involved or an appearance of impropriety. Defense counsel’s relationship with a referral source should be disclosed to the client.

(c) Referrals by one defense counsel to another should be based on merit, experience, competence for the particular matter, and other appropriate considerations.
PART III

LAWYER-CLIENT RELATIONSHIP

Standard 4-3.1 Establishing and Maintaining An Effective Client Relationship

(a) Immediately upon appointment or retention, defense counsel should work to establish a relationship of trust and confidence with each client. Defense counsel should explain, at an appropriate time, the necessity for frank and honest discussion of all facts known to the client in order to provide an effective defense. Defense counsel should explain that the attorney-client privilege protects the confidentiality of communications with counsel except in exceptional and well-defined circumstances, and explain what the client can do to help preserve confidentiality.

(b) At an early stage, counsel should discuss with the client the objectives of the representation and through what stages of a criminal matter the defense counsel will continue to represent the accused. An engagement letter as described in Standard 4-3.5 should also be provided.

(c) Counsel should consider whether the client appears to have a mental impairment or other disability that could adversely affect the representation. Even if a client appears to have such a condition, this does not diminish defense counsel’s obligations to the client, including maintaining a normal attorney-client relationship insofar as possible. In such an instance, defense counsel should also consider whether a mental examination or other protective measures are in the client’s best interest.

(d) In communicating with a client, defense counsel should use language and means that the client is able to understand, which may require special attention when the client is a minor, elderly, or suffering from a mental impairment or other disability.

(e) Defense counsel should ensure that space is available and adequate for confidential client consultations.

(f) Defense counsel should actively work to maintain an effective and regular relationship with all clients. The obligation to maintain an effective client relationship is not diminished by the fact that the client is in custody.
Standard 4-3.2  Seeking a Detained Client's Release from Custody, or
Reduction in Custodial Conditions [New]

(a) In every case where the client is detained, defense counsel should discuss
with the client, as promptly as possible, the client’s custodial or release status and
determine whether release, a change in release conditions, or less restrictive custodial
conditions, should be sought. Counsel should be aware of applicable statutes and rules,
and all alternatives less restrictive than full institutional detention. Counsel should
investigate community and family resources that might be available to assist in
implementing such alternatives.

(b) Counsel should investigate the factual predicate that has been advanced to
support detention and custodial conditions, and not assume its accuracy.

(c) Once counsel has sufficient command of the facts, counsel should approach
the prosecutor to see if agreement to release or a change in release or custodial conditions
can be negotiated and submitted for approval by the court.

(d) If the prosecutor does not agree, counsel should submit to the court a
statement of facts, legal argument, and proposed conditions if necessary, to support the
client’s release or a reduction in release or custodial conditions.

(e) If a court orders release, counsel should fully explain all conditions of release
to the client, as well as the consequences of their violation. Counsel should assist the
client and others acting for the client in properly implementing the release conditions.

(f) If counsel is unable to secure the client’s release, counsel should, after
discussion with the client and with due regard to any relevant confidentiality concerns,
alert the court and institutional personnel to any special medical, psychiatric, religious,
dietary, or security needs of the client while in government custody, and request that the
court order the appropriate officials to take steps to meet such special needs.

(g) Counsel should reevaluate the client’s eligibility for release, or for reduced
release or custodial conditions, at all significant stages of a criminal matter and when
there is any relevant change in facts or circumstances. Counsel should request
reconsideration of detention or modification of conditions whenever it is in the client’s
best interests.
Standard 4-3.3  Interviewing the Client

(a) In the initial meeting with a client, defense counsel should begin the process of establishing an effective attorney-client relationship. This includes assuring the client of confidentiality, establishing trust, explaining the posture of the matter, discussing fees if applicable, and inquiring about the client's objectives for the representation. Counsel may also discuss available evidentiary materials with the client, seek information from the client as to the facts and other potential sources of information, and ask what the client's immediate objectives and needs are and how to fulfill them.

(b) Counsel should interview the client as many times as necessary for effective representation, which in all but the most simple and routine cases will mean more than once. Defense counsel should make every reasonable effort to meet in person with the client. Consultation with the client regarding available options, immediately necessary decisions, and next steps, should be a part of every meeting.

(c) As early as practicable in the representation, defense counsel should also discuss:

(i) and share with the client evidentiary materials relevant to the matter consistent with the terms of any applicable protective order), and determine in depth the client's view of the facts and other relevant facts known to the client;

(ii) the likely length and course of the pending proceedings;

(iii) potential sources of helpful information, evidence, and investigation;

(iv) the client's wishes regarding, and the likelihood of and steps necessary to gain, release or reduction of supervisory conditions;

(v) likely legal options such as motions, trial, and potential negotiated dispositions;

(vi) the range of potential outcomes and alternatives, and if convicted, possible punishments;

(vii) if appropriate, the possibility and potential costs and benefits of a negotiated disposition, including one that might include cooperation with the government; and

(viii) relevant collateral consequences resulting from the current situation as well as from possible resolutions of the matter.

(d) When asking the client for information and discussing possible options and strategies with the client, defense counsel should not seek to induce the client to make factual responses that are not true. Defense counsel should encourage candid disclosure by the client to counsel and not seek to maintain a calculated ignorance.
Standard 4-3.4 Fees

(a) Counsel should be familiar with statutes and rules regarding fees and costs that govern in the jurisdiction(s) in which counsel practices. Before or within a reasonably short time after commencing a representation, defense counsel should discuss with the client:

(i) the likely cost of the representation including the attorney’s fees, billing structure, and likely expenses;

(ii) how fees and costs will be paid, and any available options regarding the fee structure;

(iii) what services and expenses the fees will cover;

(iv) what stages of the matter the fee covers, such as pre-charge investigation, preliminary hearing, negotiated disposition or trial, sentencing or appeal; and

(v) whether the fee extends to addressing any related matters.

(b) In determining the amount of the fee in a criminal case, it is proper to consider the time and effort required, the responsibility assumed by counsel, the novelty and difficulty of the issues involved, the skill requisite to proper representation, the need for any special technology, experts, investigators, or other unusual expenses, the likelihood that other employment will be precluded, the fee customarily charged in the locality for similar services, the gravity of the charge, the experience, reputation, and expertise of defense counsel, and the ability of the client to pay the fee.

(c) Once agreed upon, the amount, rate, and terms of the fee should be promptly communicated to the client, in clear terms and in writing, as part of the Engagement Letter.

(d) Defense counsel should not enter into an agreement for, charge, or collect an illegal or unreasonable fee. Defense counsel should be aware that accepting a fee comprised of assets that are contraband or proceeds of crime may be a crime and may also subject those fee assets to seizure and forfeiture.

(e) Defense counsel should not permit a dispute or unhappiness regarding compensation to interfere with providing competent and zealous representation. A competent defense does not require all possible expenditures, and counsel is not required to spend out of counsel’s own pocket. If funding becomes an issue, counsel should discuss other possible sources of funds with the client and pursue those that are appropriate. If funding is inadequate, counsel may seek withdrawal in accordance with applicable laws, including court and ethics rules.

(f) A publicly-paid defense counsel should not request or accept additional money or other compensation from non-public sources to represent a client in an appointed criminal case, unless permitted by rules of the jurisdiction.
(g) Retained defense counsel may accept compensation from third parties for the representation of a client, subject to counsel's duties of loyalty and confidentiality to the client and the criteria in Standard 4-1.5(f) above.

(h) Defense counsel should not state or imply that their compensation is for any unethical or secret influence.

(i) Defense counsel should not divide a fee with a nonlawyer, except as permitted by applicable ethics rules.

(j) Defense counsel not in the same firm should not divide fees in a criminal matter among lawyers unless consistent with the rules of the jurisdiction and the division is in reasonable proportion to the experience, ability, and services performed by each counsel and is disclosed to the client; or by written agreement with the client each counsel assumes joint responsibility for the representation, the client is advised of and does not object to the participation of all counsel involved, and the total fee is reasonable.

(k) Defense counsel should not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case or in a criminal forfeiture action.

(l) Defense counsel may charge a non-refundable "flat rate" fee if such is permitted by the law of the jurisdiction and the arrangement is fully explained in advance, but defense counsel should refund any part of such a fee that constitutes an undeserved windfall if exceptional and unanticipated developments arise such that a significant amount of anticipated work is not done by counsel.

(m) When a representation ends, counsel should offer to return any unearned fee.
Standard 4-3.5  Engagement Letter

(a) Upon agreeing or being appointed to take on a criminal representation, defense counsel should promptly provide a new client with an engagement letter, email, or other written communication, as described below, written in plain language that the particular client can understand. If material conditions of the representation change during the representation, counsel should, after consultation with the client, promptly and specifically communicate the changes in writing to the client. Counsel should also provide an engagement letter to clients who have been previously-represented by the same counsel but have now engaged counsel on a new matter, explaining the scope of and any material changes in the terms of the new representation.

(b) While the content and level of detail may vary depending on the context, an engagement letter should include a description of:

(i) the identity of the client and the scope of, and limitations on, the representation;
(ii) the fee arrangement (including costs and expenses);
(iii) the fact that counsel’s duties of confidentiality and loyalty are owed to the client;
(iv) materials that counsel may retain although related to the representation (e.g., legal research for use in future cases);
(v) any other information that is particularly relevant to the specific representation.
Standard 4-3.6  Literary or Media Rights Agreements Prohibited

(a) Before the conclusion of all aspects of a criminal representation in which defense counsel participates, defense counsel should not enter into any agreement or informal understanding by which the defense counsel acquires an interest in a literary or media portrayal or account based on or arising out of defense counsel’s involvement in the matter.

(b) Defense counsel should not allow the client’s representation to be adversely affected by the possibility of future personal literary or other media rights.

(c) In creating or participating in any literary or other media account of a matter in which defense counsel was involved, counsel’s duty of confidentiality must be respected even after a matter is concluded or the client is deceased. When protected confidences are involved, defense counsel should not make disclosure without consent from the client or the client’s authorized representative.
Standard 4-3.7  Prompt and Thorough Actions to Protect the Client

(a) Many important rights of a criminal client can be protected and preserved only by prompt legal action. Defense counsel should inform the client of his or her rights in the criminal process at the earliest opportunity, and timely plan and take necessary actions to vindicate such rights within the scope of the representation.

(b) Defense counsel should promptly seek to obtain and review all information relevant to the criminal matter, including but not limited to requesting materials from the prosecution. Defense counsel should, when relevant, take prompt steps to ensure that the government’s physical evidence is preserved at least until the defense can examine or evaluate it.

(c) Defense counsel should work diligently to develop, in consultation with the client, an investigative and legal defense strategy, including a theory of the case. As the matter progresses, counsel should refine or alter the theory of the case as necessary, and similarly adjust the investigative or defense strategy.

(d) Not all defense actions need to be taken immediately. If counsel has evidence of innocence, mitigation, or other favorable information, defense counsel should discuss with the client and decide whether, going to the prosecution with such evidence is in the client’s best interest, and if so, when and how.

(e) Defense counsel should consider whether an opportunity to benefit from cooperation with the prosecution will be lost if not pursued quickly, and if so, promptly discuss with the client and decide whether such cooperation is in the client’s interest. Counsel should timely act in accordance with such decisions.

(f) For each matter, defense counsel should consider what procedural and investigative steps to take and motions to file, and not simply follow rote procedures learned from prior matters. Defense counsel should not be deterred from sensible action merely because counsel has not previously seen a tactic used, or because such action might incur criticism or disfavor. Before acting, defense counsel should discuss novel or unfamiliar matters or issues with colleagues or other experienced counsel, employing safeguards to protect confidentiality and avoid conflicts of interest.

(g) Whenever defense counsel is confronted with specialized factual or legal issues with which counsel is unfamiliar, counsel should, in addition to researching and learning about the issue personally, consider engaging or consulting with an expert in the specialized area.

(h) Defense counsel should always consider interlocutory appeals or other collateral proceedings as one option in response to any materially adverse ruling.
Standard 4-3.8  Anticipated Unlawful Conduct

(a) If defense counsel anticipates that a client may engage in unlawful conduct, defense counsel should advise the client concerning the meaning, scope and validity of the law and the possible consequences of violating the law, and should advise the client to comply with the law.

(b) Defense counsel should not knowingly propose, advise, or assist in a course of conduct which defense counsel knows to be criminal or fraudulent, but defense counsel may discuss the legal consequences of a proposed course of conduct with a client, and may counsel or assist a client in a good faith effort to determine the validity, scope, meaning, or application of the law.

(c) Defense counsel should not enter into an arrangement with persons or organizations counsel knows to be engaged in ongoing criminal conduct, to provide representation on a regular basis to the participants, if the legal services will knowingly assist the ongoing criminal conduct. Counsel may agree in advance to represent clients as part of a good faith effort to determine the validity, scope, meaning, or application of the law, or incident to a general retainer for providing legal services to a person or enterprise engaged in primarily legitimate activities, or if counsel’s services are intended to bring conduct into conformance with the law.

(d) When unlawful conduct by a client is anticipated or has taken place, defense counsel should be aware of and follow applicable ethical rules, including provisions that require confidentiality and provisions that mandate or permit disclosures.
Standard 4-3.9 Duty to Keep Client Informed and Advised About the Representation

(a) Defense counsel should keep the client reasonably and currently informed about developments in and the progress of the lawyer’s services, including developments in pretrial investigation, discovery, disposition negotiations, and preparing a defense. Information should be sufficiently detailed so that the client can meaningfully participate in the representation.

(b) Defense counsel should promptly comply with the client’s reasonable requests for information about the matter and for copies of or access to relevant documents, unless the client’s access to such information is restricted by law or court order. Counsel should challenge such restrictions on the client’s access to information unless, after consultation with the client, there is good reason not to do so.
(a) Defense counsel who withdraws from a representation at any stage of a criminal matter before its resolution should make reasonable efforts to assist the client in securing competent defense counsel as successor counsel, and to not leave the client unrepresented, unless the client otherwise directs.

(b) Defense counsel should make reasonable efforts to establish and maintain a cooperative relationship with any prior, or successor, defense counsel in the representation.

(c) When successor counsel enters a representation, prior counsel should still act to protect the client’s privileges, confidences and secrets, and obtain consent (express or implied) from the client before providing such information to the new counsel.

(a) When a representation ends, if the client requests the client’s file, defense counsel should provide it to the client or, with the client’s consent, to successor counsel or other authorized representative. Defense counsel should provide the client with notice of the file’s disposition. Unless rules or statutes in the jurisdiction require otherwise, defense offices may retain clients’ files unless a client requests the file. If the client’s file remains with defense counsel, counsel should retain copies of essential portions until the client provides further instructions or for at least the length of time consistent with statutes and rules of the jurisdiction.

(b) During a representation, defense counsel should provide the client with the client’s file upon request, even if fees or costs are disputed or unpaid in whole or in part.

(c) Not everything in defense counsel’s files on a matter is the client’s, and the definition of the contents of “the client’s file” may vary among jurisdictions. Original documents and property delivered to the attorney by the client are part of the client’s file, as are correspondence and court filings in the client’s matter.

(d) When a representation ends, defense counsel may seek a release from the client regarding the representation, but may not unreasonably withhold the client’s file pending such release.
PART IV

Standard 4-4.1 Duty to Investigate and Engage Investigators

(a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.

(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution’s evidence, a client’s alleged admissions to others of facts suggesting guilt, a client’s expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

(c) Defense counsel’s investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client’s best interests, after consultation with the client. Defense counsel’s investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel’s investigation should also include evaluation of the prosecution’s evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

(d) Defense counsel should determine whether the client’s interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.

(e) If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors. Application to the court should be made ex parte if appropriate to protect the client’s confidentiality. Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective.
Standard 4-4.2 Illegal and Unethical Investigation Prohibited

Defense counsel should not use illegal or unethical means to obtain evidence or information, or employ, instruct, or encourage others to do so.
Standard 4-4.3 Relationship With Witnesses

(a) “Witness” in this Standard means any person who has or might have information about a matter, including victims and the client.

(b) Defense counsel should know and follow the law and rules of the jurisdiction regarding victims and witnesses. In communicating with witnesses, counsel should know and abide by law and ethics rules regarding the use of deceit and engaging in communications with represented, unrepresented, and organizational persons.

(c) Defense counsel or counsel’s agents should seek to interview all witnesses, including seeking to interview the victim or victims, and should not act to intimidate or unduly influence any witness.

(d) Defense counsel should not use means that have no substantial purpose other than to embarrass, delay, or burden, and not use methods of obtaining evidence that violate legal rights. Defense counsel and their agents should not misrepresent their status, identity or interests when communicating with a witness.

(e) Defense counsel should be permitted to compensate a witness for reasonable expenses such as costs of attending court, depositions pursuant to statute or court rule, and pretrial interviews, including transportation and loss of income. No other benefits should be provided to witnesses, other than expert witnesses, unless authorized by law, regulation, or well-accepted practice. All benefits provided to witnesses should be documented so that they may be disclosed if required by law or court order. Defense counsel should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance or truthfulness of the witness’s testimony.

(f) Defense counsel should avoid the prospect of having to testify personally about the content of a witness interview. An interview of routine witnesses (for example, custodians of records) should not require a third-party observer. But when the need for corroboration of an interview is reasonably anticipated, counsel should be accompanied by another trusted and credible person during the interview. Defense counsel should avoid being alone with foreseeably hostile witnesses.

(g) It is not necessary for defense counsel or defense counsel’s agents, when interviewing a witness, to caution the witness concerning possible self-incrimination or a right to independent counsel. Defense counsel should, however, follow applicable ethical rules that address dealing with unrepresented persons. Defense counsel should not discuss or exaggerate the potential criminal liability of a witness with a purpose, or in a manner likely, to intimidate the witness, to intimidate the witness, or to influence the truthfulness or completeness of the witness’s testimony, or to change the witness’s decision about whether to provide information.

(h) Defense counsel should not discourage or obstruct communication between witnesses and the prosecution, other than a client’s employees, agents or relatives if
consistent with applicable ethical rules. Defense counsel should not advise any person, or cause any person to be advised, to decline to provide the prosecution with information which such person has a right to give. Defense counsel may, however, fairly and accurately advise witnesses as to the likely consequences of their providing information, but only if done in a manner that does not discourage communication.

(i) Defense counsel should give their witnesses reasonable notice of when their testimony at a proceeding is expected, and should not require witnesses to attend judicial proceedings unless their testimony is reasonably expected at that time, or their presence is required by law. When witnesses' attendance is required, defense counsel should seek to reduce to a minimum the time witnesses must spend waiting at the proceedings. Defense counsel should ensure that defense witnesses are given notice as soon as practicable of scheduling changes which will affect their required attendance at judicial proceedings.

(j) Defense counsel should not engage in any inappropriate personal relationship with any victim or other witness.
Standard 4-4.4  Relationship With Expert Witnesses

(a) An expert may be engaged to prepare an evidentiary report or testimony, or for consultation only. Defense counsel should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only.

(b) Defense counsel should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of an expert based on employer, affiliation or prominence alone.

(c) Before engaging an expert, defense counsel should investigate the expert’s credentials, relevant professional experience, and reputation in the field. Defense counsel should also examine a testifying expert’s background and credentials for potential impeachment issues. Before offering an expert as a witness, defense counsel should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.

(d) Defense counsel who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert’s opinion on the relevant subject.

(e) Before offering an expert as a witness, defense counsel should seek to learn enough about the substantive area of the expert’s expertise, including ethical rules that may be applicable in the expert’s field, to enable effective preparation of the expert, as well as to cross-examine any prosecution expert on the same topic. Defense counsel should explain to the expert that the expert’s role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.

(f) Defense counsel should not pay or withhold a fee, or provide or withhold a benefit, for the purpose of influencing an expert’s testimony. Defense counsel should not fix the amount of the fee contingent upon the substance of an expert’s testimony or the result in the case. Nor should defense counsel promise or imply the prospect of future work for the expert based on the expert’s testimony.

(g) Subject to client confidentiality interests, defense counsel should provide the expert with all information reasonably necessary to support a full and fair opinion. Defense counsel should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. Defense counsel should be aware of expert discovery rules and act to protect confidentiality, for example by not sharing with the expert client confidences and work product that counsel does not want disclosed.
Standard 4-4.5 Compliance With Discovery Procedures

Defense counsel should timely respond to legally proper discovery requests, and make a diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by a court. When the prosecution makes requests for specific information, defense counsel should provide specific responses rather than merely a general acknowledgement of discovery obligations. Requests and responses should be tailored to the case, and “boilerplate” requests and responses should be disfavored.
Standard 4-4.6 Preparation for Court Proceedings, and Recording and Transmitting Information

(a) Defense counsel should prepare in advance for court proceedings. Adequate preparation depends on the nature of the proceeding and the time available, and will often include: reviewing available documents; considering what issues are likely to arise and the client’s position regarding those issues; how best to present the issues and what solutions might be offered; relevant legal research and factual investigation; and contacting other persons who might be of assistance in addressing the anticipated issues. If defense counsel has not had adequate time to prepare and is unsure of the relevant facts or law, counsel should communicate to the court the limits of the defense counsel’s knowledge or preparation.

(b) Defense counsel should appear at all hearings in cases assigned to them, unless with good cause a substitute counsel is arranged. A defense attorney who substitutes at a court proceeding for another attorney should be adequately informed about the case and issues likely to come up at the proceeding and should adequately prepare.

(c) Defense counsel handling any court appearance should document what happens at the proceeding, to aid counsel’s own memory and the client’s future reference, and so that necessary information will be available to counsel who may handle the case in the future.

(d) Defense counsel should take steps to ensure that any court order issued to the defense is transmitted to the appropriate persons necessary to effectuate the order.

(e) A public criminal defense office should be provided sufficient resources and be organized to permit adequate preparation for court proceedings.
Standard 4-4.7 Handling Physical Evidence With Incriminating Implications

(a) Counseling the client: If defense counsel knows that the client possesses physical evidence that the client may not legally possess (such as contraband or stolen property) or evidence that might be used to incriminate the client, counsel should examine and comply with the law and rules of the jurisdiction on topics such as obstruction of justice, tampering with evidence, and protection for the client’s confidentiality and against self-incrimination. Counsel should then competently advise the client about lawful options and obligations.

(b) Permissible actions of the client: If requested or legally required, defense counsel may assist the client in lawfully disclosing such physical evidence to law enforcement authorities. Counsel may advise destruction of a physical item if its destruction would not obstruct justice or otherwise violate the law or ethical obligations. Counsel may not assist the client in conduct that counsel knows is unlawful, and should not knowingly and unlawfully impede efforts of law enforcement authorities to obtain evidence.

(c) Confidentiality: Defense counsel should act in accordance with applicable confidentiality laws and rules. In some circumstances, applicable law or rules may permit or require defense counsel to disclose the existence of, or the client’s possession or disposition of, such physical evidence.

(d) Receipt of physical evidence: Defense counsel should not take possession of such physical evidence, personally or through third parties, and should advise the client not to give such evidence to defense counsel, except in circumstances in which defense counsel may lawfully take possession of the evidence. Such circumstances may include:

(i) when counsel reasonably believes the client intends to unlawfully destroy or conceal such evidence;

(ii) when counsel reasonably believes that taking possession is necessary to prevent physical harm to someone;

(iii) when counsel takes possession in order to produce such evidence, with the client’s informed consent, to its lawful owner or to law enforcement authorities;

(iv) when such evidence is contraband and counsel may lawfully take possession of it in order to destroy it; and

(v) when defense counsel reasonably believes that examining or testing such evidence is necessary for effective representation of the client.

(e) Compliance with legal obligations to produce physical evidence: If defense counsel receives physical evidence that might implicate a client in criminal conduct, counsel should determine whether there is a legal obligation to return the evidence to its source or owner, or to deliver it to law enforcement or a court, and comply with any such legal obligations. A lawyer who is legally obligated to turn over such physical evidence should do so in a lawful manner that will minimize prejudice to the client.
(f) Retention of producible item for examination. Unless defense counsel has a legal obligation to disclose, produce, or dispose of such physical evidence, defense counsel may retain such physical evidence for a reasonable time for a legitimate purpose. Legitimate purposes for temporarily obtaining or retaining physical evidence may include: preventing its destruction; arranging for its production to relevant authorities; arranging for its return to the source or owner; preventing its use to harm others; and examining or testing the evidence in order to effectively represent the client.

(g) Testing physical evidence. If defense counsel determines that effective representation of the client requires that such physical evidence be submitted for forensic examination and testing, counsel should observe the following practices:

(i) The item should be properly handled, packaged, labeled and stored, in a manner designed to document its identity and ensure its integrity.

(ii) Any testing or examination should avoid, when possible, consumption of the item, and a portion of the item should be preserved and retained to permit further testing or examination.

(iii) Any person conducting such testing or examination should not, without prior approval of defense counsel, conduct testing or examination in any manner that will consume the item or otherwise destroy the ability for independent re-testing or examination by the prosecution.

(iv) Before approving a test or examination that will entirely consume the item or destroy the prosecution’s opportunity and ability to re-test the item, defense counsel should provide the prosecution with notice and an opportunity to object and seek an appropriate court order.

(v) If a motion objecting to consumptive testing or examination is filed, the court should consider ordering procedures that will permit independent evaluation of the defense’s analysis, including but not limited to:

(A) permitting a prosecution expert to be present during preparation and testing of the evidence;

(B) video recording the preparation and testing of the evidence;

(C) still photography of the preparation and testing of evidence; and

(D) access to all raw data, notes and other documentation relating to the defense preparation and testing of the evidence.

(h) Client consent to accept a physical item. Before voluntarily taking possession from the client of physical evidence that defense counsel may have a legal obligation to disclose, defense counsel should advise the client of potential legal implications of the proposed conduct and possible lawful alternatives, and obtain the client’s informed consent.
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(i) Retention or return of item when law permits. If defense counsel reasonably
determines that there is no legal obligation to disclose physical evidence in counsel’s
possession to law enforcement authorities or others, the lawyer should deal with the
physical evidence consistently with ethical and other rules and law. If defense counsel
retains the evidence for use in the client’s representation, the lawyer should comply with
applicable law and rules, including rules on safekeeping property, which may require
notification to third parties with an interest in the property. Counsel should maintain the
evidence separately from privileged materials of other clients, and preserve it in a manner
that will not impair its evidentiary value. Alternatively, counsel may deliver the evidence
to a third-party lawyer who is also representing the client and will be obligated to
maintain the confidences of the client as well as defense counsel.

(j) Adoption of judicial and legislated procedures for handling physical
evidence. Courts and legislatures, as appropriate, should adopt procedures regarding
defense handling of such physical evidence, as follows:

(i) When defense counsel notifies the prosecution of the possession of
such evidence or produces such evidence to the prosecution, the prosecution should be
prohibited from presenting testimony or argument identifying or implying the defense as
the source of the evidence, except as provided in Standard 3-3.6;

(ii) When defense counsel reasonably believes that contraband does not
relate to a pending criminal investigation or prosecution, counsel may take possession of
the contraband and destroy it.
PART V.

CONTROL AND DIRECTION OF LITIGATION

Standard 4-5.1 Advising the Client

(a) Defense counsel should exercise independent professional judgment when advising a client.

(b) Defense counsel should keep the client reasonably and regularly informed about the status of the case. Before significant decision-points, and at other times if requested, defense counsel should advise the client with candor concerning all aspects of the case, including an assessment of possible strategies and likely as well as possible outcomes. Such advisement should take place after counsel is as fully informed as is reasonably possible in the time available about the relevant facts and law. Counsel should act diligently and, unless time does not permit, advise the client of what more needs to be done or considered before final decisions are made.

(c) Defense counsel should promptly communicate to the client every plea offer and all significant developments, motions, and court actions or rulings, and provide advice as outlined in this Standard.

(d) In rendering advice to the client, counsel should consider the client’s desires and views, and may refer not only to law but also to other considerations such as moral, economic, social or political factors that may be relevant to the client’s situation. Counsel should attempt to distinguish for the client between legal advice and advice based on such other considerations.

(e) Defense counsel should provide the client with advice sufficiently in advance of decisions to allow the client to consider available options, and avoid unnecessarily rushing the accused into decisions.

(f) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case or exert undue influence on the client’s decisions regarding a plea.

(g) Defense counsel should advise the client to avoid communication about the case with anyone, including victims or other possible witnesses, persons in custody, family, friends, and any government personnel, except with defense counsel’s approval, although where the client is a minor consultation with parents or guardians may be useful. Counsel should advise the client to avoid any contact with jurors or persons called for jury duty; and to avoid either the reality or the appearance of any other improper activity.

(h) Defense counsel should consider and advise the client of potential benefits as well as negative aspects of cooperating with law enforcement or the prosecution.
(i) After advising the client, defense counsel should aid the client in deciding on the best course of action and how best to pursue and implement that course of action.
Standard 4-5.2 Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are for the accused; others are for defense counsel. Determining whether a decision is ultimately to be made by the client or by counsel is highly contextual, and counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds.

(b) The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include:

(i) whether to proceed without counsel;
(ii) what pleas to enter;
(iii) whether to accept a plea offer;
(iv) whether to cooperate with or provide substantial assistance to the government;
(v) whether to waive jury trial;
(vi) whether to testify in his or her own behalf;
(vii) whether to speak at sentencing;
(viii) whether to appeal; and
(ix) any other decision that has been determined in the jurisdiction to belong to the client.

(c) If defense counsel has a good faith doubt regarding the client’s competence to make important decisions, counsel should consider seeking an expert evaluation from a mental health professional, within the protection of confidentiality and privilege rules if applicable.

(d) Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. Such decisions include how to pursue plea negotiations, how to craft and respond to motions and, at hearing or trial, what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what motions and objections should be made, what stipulations if any to agree to, and what and how evidence should be introduced.

(e) If a disagreement on a significant matter arises between defense counsel and the client, and counsel resolves it differently than the client prefers, defense counsel should consider memorializing the disagreement and its resolution, showing that record to the client, and preserving it in the file.
Standard 4-5.3 Obligations of Stand-By Counsel

(a) An attorney whose assigned duty is to actively assist a pro se criminally accused person should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case, while still providing the attorney’s best advice.

(b) An attorney whose assigned duty is to assist a pro se criminally accused person only when the accused requests assistance may bring to the attention of the accused steps that could be potentially beneficial or dangerous to the accused, but should not actively participate in the conduct of the defense unless requested by the accused or as directed by the court.

(c) In either case, the assigned attorney should respect the accused’s right to develop and present the accused’s own case, while still advising the accused of potential benefits and dangers the attorney perceives in the course of the litigation. Such an attorney should be fully prepared about the matter, in order to offer such advice and in case the court and the accused determine that the full representation role should be transferred to defense counsel at some point during the criminal proceedings.
Standard 4-5.4   Consideration of Collateral Consequences

(a) Defense counsel should identify, and advise the client of, collateral consequences that may arise from charge, plea or conviction. Counsel should investigate consequences under applicable federal, state, and local laws, and seek assistance from others with greater knowledge in specialized areas in order to be adequately informed as to the existence and details of relevant collateral consequences. Such advice should be provided sufficiently in advance that it may be fairly considered in a decision to pursue trial, plea, or other dispositions.

(b) When defense counsel knows that a consequence is particularly important to the client, counsel should advise the client as to whether there are procedures for avoiding, mitigating or later removing the consequence, and if so, how to best pursue or prepare for them.

(c) Defense counsel should include consideration of potential collateral consequences in negotiations with the prosecutor regarding possible dispositions, and in communications with the judge or court personnel regarding the appropriate sentence or conditions, if any, to be imposed.
Standard 4-5.5  Special Attention to Immigration Status and Consequences  [New]

(a) Defense counsel should determine a client’s citizenship and immigration status, assuring the client that such information is important for effective legal representation and that it should be protected by the attorney-client privilege. Counsel should avoid any actions that might alert the government to information that could adversely affect the client.

(b) If defense counsel determines that a client may not be a United States citizen, counsel should investigate and identify particular immigration consequences that might follow possible criminal dispositions. Consultation or association with an immigration law expert or knowledgeable advocate is advisable in these circumstances. Public and appointed defenders should develop, or seek funding for, such immigration expertise within their offices.

(c) After determining the client’s immigration status and potential adverse consequences from the criminal proceedings, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client’s immediate family, counsel should advise the client of all such potential consequences and determine with the client the best course of action for the client’s interests and how to pursue it.

(d) If a client is convicted of a removable offense, defense counsel should advise the client of the serious consequences if the client illegally returns to the United States.
PART VI

DISPOSITION WITHOUT TRIAL

Standard 4-6.1 Duty to Explore Disposition Without Trial

(a) Defense counsel should be open, at every stage of a criminal matter and after consultation with the client, to discussions with the prosecutor concerning disposition of charges by guilty plea or other negotiated disposition. Counsel should be knowledgeable about possible dispositions that are alternatives to trial or imprisonment, including diversion from the criminal process.

(b) In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution’s evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client’s best interest.
Standard 4-6.2  Negotiated Disposition Discussions

(a) As early as practicable, and preferably before engaging in disposition discussions with the prosecutor, defense counsel should discuss with and advise the client about possible disposition options.

(b) Once discussions with the prosecutor begin, defense counsel should keep the accused advised of relevant developments. Defense counsel should promptly communicate and explain to the client any disposition proposals made by the prosecutor, while explaining that presenting the prosecution’s offer does not indicate counsel’s unwillingness to go to trial.

(c) Defense counsel should ensure that the client understands any proposed disposition agreement, including its direct and possible collateral consequences.

(d) Defense counsel should not recommend to a defendant acceptance of a disposition without appropriate investigation. Before accepting or advising a disposition, defense counsel should request that the prosecution disclose any information that tends to negate guilt, mitigates the offense or is likely to reduce punishment.

(e) Defense counsel may make a recommendation to the client regarding disposition proposals, but should not unduly pressure the client to make any particular decision.

(f) Defense counsel should not knowingly make false statements of fact or law in the course of disposition discussions.

(g) Defense counsel should be aware of possible benefits from early cooperation with the government, but should also consider possible disadvantages. Counsel should fully advise the client about the client’s overall interests before recommending any cooperation-dependent disposition.

(h) Defense counsel should not negotiate an aggregate disposition for multiple clients, even if joint representation was initially appropriate under applicable conflict provisions.

(i) Defense counsel should not recommend concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case, unless both clients give their fully-informed consent.
Standard 4-6.3  Plea Agreements and Other Negotiated Dispositions

(a) Defense counsel should ensure that any written disposition agreement accurately and completely reflects the precise terms of the agreement, including the prosecution’s promises and the client’s obligations and whether any dismissal of charges will be with or without prejudice to later reinstatement.

(b) During any court hearing regarding a negotiated disposition, defense counsel should ensure that all relevant details of the negotiated agreement are placed on the record, and that the record fully reflects any factors necessary to protect the client’s best interests. Although the presumption is that the record will be public, in some cases the record (or a portion) may be sealed for good cause or as required by applicable rule or statute.

(c) Defense counsel should fully prepare the client for any hearing before a court related to entering or accepting a negotiated disposition, and for any pre-disposition or post-disposition interview conducted by the prosecution or by court agents such as presentence investigators or probation officers. Counsel should ordinarily be present at any such interview to protect the client’s interests there.

(d) In appropriate cases counsel should consider, and with the consent of the client seek, entry of a disposition and immediate sentencing without a presentence investigation.

(e) Defense counsel should investigate and be knowledgeable about sentencing procedures, law, and alternatives, collateral consequences and likely outcomes, and the practices of the sentencing judge, and advise the client on these topics before permitting the client to enter a negotiated disposition. Counsel should also consider and explain to the client how specific terms of an agreement are likely to be implemented.

(f) If defense counsel believes that prosecutorial conduct or conditions (such as unreasonably speedy deadlines or refusal to provide discovery) have unfairly influenced the client’s disposition decision, defense counsel should bring the circumstances to the attention of the court on the record, unless after consultation with the client, it is agreed that the risk of losing the negotiated disposition outweighs other considerations.
[New] Standard 4-6.4 Opposing Waivers of Rights in Disposition Agreements

(a) Defense counsel should not accept disposition agreement waivers of post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence, unless such claims are based on past instances of such conduct that are specifically identified in the agreement or in the transcript of proceedings that address the agreement. If a proposed disposition agreement contains such a waiver regarding ineffective assistance of counsel, defense counsel should ensure that the defendant has consulted with independent counsel regarding the waiver before agreeing to the disposition.

(b) In addition to claims addressed in (a), defense counsel should not agree to waivers of any other important defense rights such as the right to appeal (including sentencing appeals), to receive Brady discovery, or to contest the conviction or sentence in collateral proceedings, unless after consultation with the client it is agreed that the risk of losing the negotiated disposition outweighs other considerations. In negotiations, counsel should request the prosecution to provide specific, individualized reasons for the inclusion of such waivers. Counsel should also consult with the client about whether to object to such waivers in court.

(c) Counsel should not recommend acceptance of any disposition agreement waivers without fully assessing and discussing with the client the impact of any waiver on the defendant’s individualized circumstances. Defense counsel should demand that any such waiver include at the very least an exception for a subsequent showing of manifest injustice based on newly discovered evidence, or actual innocence.

(d) Even if the client wishes to agree to such waivers after fully informed consultation, defense counsel should consider challenging the legitimacy of any such waiver if the challenge can be made without harming the client’s interests.
PART VII

COURT HEARINGS AND TRIAL

[New] Standard 4-7.1 Scheduling Court Hearings [New]

Final control over the scheduling of court appearances, hearings and trials in criminal matters should rest with the court rather than the parties. When defense counsel is aware of facts that would affect scheduling, defense counsel should advise the court and, if the facts are case-specific, the prosecutor.
Standard 4-7.2 Civility with Courts, Prosecutors, and Others

(a) As an officer of the court, defense counsel should support the authority and dignity of the court by adherence to codes of professionalism and by manifesting a courteous and professional attitude toward the judge, opposing counsel, witnesses, jurors, courtroom staff and others. In court as elsewhere, the defense counsel should not display or act out of any improper or unlawful bias.

(b) In all contacts with judges, defense counsel should maintain a professional and independent relationship. Defense counsel should not engage in unauthorized ex parte discussions with, or submission of material to, a judge relating to a particular matter which is, or is likely to be, before the judge. With regard to generalized matters requiring judicial discussion (for example, case-management or administrative matters), defense counsel should invite a representative prosecutor to join in the discussion to the extent practicable.

(c) When ex parte communications or submissions are authorized, defense counsel should inform the court of material facts known to counsel (other than those protected by a valid privilege), including facts that are adverse, sufficient to enable the court to make an informed decision. Except when non-disclosure is authorized, counsel should notify opposing counsel that an ex parte contact has occurred, without disclosing its content unless permitted.

(d) When court is in session, unless otherwise permitted by the court, defense counsel should address the court and should not address other counsel directly on any matter relating to the case.

(e) In written filings, defense counsel should respectfully evaluate and respond as appropriate to opposing counsel’s arguments and representations, and avoid unnecessary personalized disparagement.

(f) Defense counsel should comply promptly and civilly with a court’s orders or seek appropriate relief from such order. If defense counsel considers an order to be significantly erroneous or prejudicial, counsel should ensure that the record adequately reflects the events. Defense counsel has a right to make respectful objections and reasonable requests for reconsideration, and to seek other relief as the law permits. If a judge prohibits making an adequate objection, proffer, or record, counsel may take other lawful steps to protect the client’s rights.

(g) Defense counsel should develop and maintain courteous and civil working relationships with judges and prosecutors, and should cooperate with them in developing solutions to address ethical, scheduling, or other issues that may arise in particular cases or generally in the criminal justice system. Defense counsel should cooperate with courts and organized bar associations in developing codes of professionalism and civility, and should abide by such codes that apply in their jurisdiction.
Standard 4-7.3 Selection of Jurors

(a) Defense counsel should be aware of legal standards that govern the selection of jurors, and be prepared to discharge effectively the defense function in the selection of the jury, including raising appropriate issues concerning the method by which the jury panel was selected and exercising challenges for cause and peremptory challenges.

(b) Defense counsel should not strike jurors based on any criteria rendered impermissible by the constitution, statutes, or applicable rules of the jurisdiction or these standards, including race, sex, religion, national origin, disability, sexual orientation or gender identity. Defense counsel should consider challenging a prosecutor’s peremptory challenges that appear to be based on such criteria.

(c) In cases in which defense counsel conducts a pretrial investigation of the background of potential jurors, the investigative methods used should not harass, intimidate, unduly embarrass, or invade the privacy of potential jurors. Absent special circumstances, such investigation should be restricted to review of records and sources of information already in existence and to which access is lawfully allowed.

(d) The opportunity to question jurors personally should be used solely to obtain information relevant to the well-informed exercise of challenges. Defense counsel should not seek to commit jurors on factual issues likely to arise in the case, or to suggest facts or arguments that the defense counsel reasonably should know are likely to be barred at trial. Voir dire should not be used to argue counsel’s case to the jury, or to unduly ingratiate counsel with the jurors.

(e) During voir dire, defense counsel should seek to minimize any undue embarrassment or invasion of privacy of potential jurors, for example by seeking to inquire into sensitive matters outside the presence of other potential jurors, while still enabling fair and efficient juror selection.

(f) If the court does not permit voir dire by counsel, defense counsel should provide the court with suggested questions in advance if possible, and request specific follow-up questions during the selection process when necessary to ensure fair juror selection.

(g) If defense counsel has reliable information that conflicts with a potential juror’s responses, or that reasonably would support a “for cause” challenge by any party, defense counsel should inform the court and, unless the court orders otherwise, the prosecutor.
Standard 4-7.4     Relationship With Jurors

(a) Defense counsel should not communicate with persons counsel knows to be summoned for jury duty or impaneled as jurors, prior to or during trial, other than in the lawful conduct of courtroom proceedings. Defense counsel should avoid even the appearance of improper communications with jurors, and minimize any out-of-court proximity to or contact with jurors. Where out-of-court contact cannot be avoided, counsel should not communicate about or refer to the specific case.

(b) Defense counsel should treat jurors with courtesy and respect, while avoiding a show of undue solicitude for their comfort or convenience.

c) After discharge of a juror, defense counsel should avoid contacts that may harass or embarrass the juror, that criticize the jury’s actions or verdict, or that express views that could otherwise adversely influence a juror’s future jury service. Defense counsel should know and comply with applicable rules and law governing the subject.

(d) After a jury is discharged, defense counsel may, if no statute, rule or order prohibits such action, communicate with jurors to investigate whether a verdict may be subject to legal challenge, or to evaluate counsel’s performance for improvements in the future. Counsel should consider requesting the court to instruct the jury that, if it is not prohibited by law, it is not improper for jurors to discuss the case with the lawyers, although they are not required to do so. Any post-discharge communication with a juror should not disparage the criminal justice system and the jury trial process, and should not express criticism of the jury’s actions or verdict.

e) Defense counsel who learns reasonably reliable information that there was a problem with jury deliberations or conduct that could support an attack on the client’s judgment of conviction and that is recognized as potentially valid in the jurisdiction, should promptly report that information to the appropriate judicial officer and, unless the court orders otherwise, to the prosecution.
Standard 4-7.5 Opening Statement at Trial

(a) Defense counsel should be aware of the importance of an opening statement and, except in unusual cases, give an opening statement immediately after the prosecution’s, before the presentation of evidence begins. Any decision to defer the opening statement should be fully discussed with the client, and a record of the reasons for such decision should be made for the file.

(b) Defense counsel’s opening statement at trial should be confined to a fair statement of the case from defense counsel’s perspective, and discussion of evidence that defense counsel reasonably believes in good faith will be available, offered, and admitted. A deferred opening should focus on the defense evidence and theory of the case and not be a closing argument.

(c) Defense counsel’s opening statement should be made without expressions of personal opinion, vouching for witnesses, inappropriate appeals to emotion, or personal attacks on opposing counsel.

(d) When defense counsel has reason to believe that a portion of the opening statement may be objectionable, counsel should raise that point with opposing counsel and, if necessary, the court, in advance. Similarly, visual aids or exhibits that defense counsel intends to use during opening statement should be shown to the prosecutor in advance.
Standard 4-7.6 Presentation of Evidence

(a) Defense counsel has no obligation to present evidence, and should always consider, in consultation with the client, whether a decision not to present evidence may be in the client’s best interest. In making this decision, defense counsel should consider the impact of any evidence the defense would present and the potential damage that prosecution cross-examination or a rebuttal case could do, as well as the quality of the prosecution’s evidence.

(b) Defense counsel should not knowingly offer false evidence for its truth, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of material falsity in evidence offered by the defense, unless the court or specific authority in the jurisdiction otherwise permits.

(c) If defense counsel reasonably believes that there has been misconduct by opposing counsel, a witness, the court or other persons that affects the fair presentation of the evidence, defense counsel should challenge the perceived misconduct by appealing or objecting to the court or through other appropriate avenues, and not by engaging in retaliatory conduct that defense counsel knows is improper.

(d) Defense counsel should not bring to the attention of the trier of fact matters that defense counsel knows to be inadmissible, whether by offering or displaying inadmissible evidence, asking legally objectionable questions, or making impermissible comments or arguments. If defense counsel is uncertain about the admissibility of evidence, counsel should seek and obtain resolution from the court before the hearing or trial if possible, and reasonably in advance of the time for proffering the evidence before a jury.

(e) Defense counsel should exercise strategic judgment regarding whether to object or take exception to evidentiary rulings that are materially adverse to the client, and not make every possible objection. Defense counsel should not make objections without a reasonable basis, or for improper reasons such as to harass or to break the flow of opposing counsel’s presentation. Defense counsel should make an adequate record for appeal, and consider the possibility of an interlocutory appeal regarding significant adverse rulings if available.

(f) Defense counsel should not display tangible evidence (and should object to such display by the prosecutor), until it is admitted into evidence, except insofar as its display is necessarily incidental to its tender, although counsel may seek permission to display admissible evidence during opening statement. Defense counsel should avoid displaying even admitted evidence in a manner that is unduly prejudicial.
Standard 4-7.7 Examination of Witnesses in Court

(a) Defense counsel should conduct the examination of witnesses fairly and with due regard for dignity and legitimate privacy concerns, and without seeking to intimidate or humiliate a witness unnecessarily.

(b) Defense counsel’s belief or knowledge that a witness is telling the truth does not preclude vigorous cross-examination, even though defense counsel’s cross-examination may cast doubt on the testimony.

(c) Defense counsel should not call a witness in the presence of the jury when counsel knows the witness will claim a valid privilege not to testify. If defense counsel is unsure whether a particular witness will claim a privilege to not testify, counsel should alert the court and the prosecutor in advance and outside the presence of the jury.

(d) Defense counsel should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.
Standard 4-7.8  Closing Argument to the Trier of Fact

(a) In closing argument to a jury (or to a judge sitting as trier of fact), defense counsel may argue all reasonable inferences from the evidence in the record. Defense counsel should, to the extent time permits, review the evidence in the record before presenting closing argument. Defense counsel should not knowingly misstate the evidence in the record, or argue inferences that counsel knows have no good-faith support in the record.

(b) Defense counsel should not argue in terms of counsel’s personal opinion, and should not imply special or secret knowledge of the truth or of witness credibility.

(c) Defense counsel should not make arguments calculated to appeal to improper prejudices of the jury.

(d) Defense counsel should not argue to the jury that the jury should not follow its oath to consider the evidence and follow the law.

(e) Defense counsel may respond fairly to arguments made in the prosecution’s initial closing argument. Defense counsel should object and request relief from the court regarding prosecution arguments it believes are improper, rather than responding with arguments that counsel knows are improper.

(f) If the prosecution is permitted a rebuttal argument, defense counsel should craft the defense closing argument to anticipate the government’s rebuttal. If defense counsel believes the prosecution’s rebuttal closing argument is or was improper, defense counsel should timely object and consider requesting relief from the court, including an instruction that the jury disregard the improper portion of the argument or an opportunity to reopen argument and respond before the factfinder.
When before a jury, defense counsel should not knowingly refer to, or argue on the basis of, facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience or are matters of which a court clearly may take judicial notice, or are facts that counsel reasonably believes will be entered into the record at that proceeding. In a nonjury context counsel may refer to extra-record facts relevant to issues about which the court specifically inquires, but should note that they are outside the record.
Comments by Defense Counsel After Verdict or Ruling

(a) Defense counsel may publicly express respectful disagreement with an adverse court ruling or jury verdict, and may indicate that the defendant maintains innocence and intends to pursue lawful options for review. Defense counsel should refrain from public criticism of any participant. Public comments after a verdict or ruling should be respectful of the legal system and process.

(b) Defense counsel may publicly praise a favorable court verdict or ruling, compliment participants, supporters, and others who aided in the matter, and note the social value of the ruling or event. Defense counsel should not publicly gloat or seek personal aggrandizement regarding a verdict or ruling.
[New] Standard 4-7.11  Motions For Acquittal During Trial [New]

Defense counsel should move, outside the presence of the jury, for acquittal after the close of the prosecution’s evidence and at the close of all evidence, and be aware of applicable rules regarding waiver and preservation of issues when no or an inadequate motion is made.
PART VIII

POST-TRIAL MOTIONS AND SENTENCING

Standard 4-8.1 Post-Trial Motions

(a) Defense counsel should know the relevant rules governing post-trial motions and, if the trier of fact renders a judgment of guilty, timely present all motions necessary to protect the client’s rights, including the defendant’s right to appeal all aspects of the case. A motion for acquittal notwithstanding a verdict should be filed absent rare and unusual circumstances, and counsel should consider the strategic value of a motion for a new trial. Defense counsel should file only those motions that have a non-frivolous legal basis.

(b) Unless contrary to the client’s best interests or otherwise agreed or provided by law, defense counsel should ordinarily to represent the client in post-trial proceedings in the trial court. Defense counsel should consider, however, whether the client’s best interests would be served by substitution of new counsel for post-trial motions.

(c) If a post-trial motion is based on ineffective assistance of counsel, defense counsel should seek to withdraw in accordance with the law regarding withdrawal and aid the client in obtaining substitute counsel.
[New] Standard 4-8.2 Reassessment of Options After Trial [New]

After a guilty verdict and before sentencing, defense counsel should, in consultation with the client, reassess prior decisions made in the case, whether by counsel or others, in light of all changed circumstances, and pursue options that now seem appropriate, including possible motions to set or reduce bail or conditions, and possible cooperation with the prosecution if in the client's best interests.
Standard 4-8.3  Sentencing

(a) Early in the representation, and throughout the pendency of the case, defense counsel should consider potential issues that might affect sentencing. Defense counsel should become familiar with the client’s background, applicable sentencing laws and rules, and what options might be available as well as what consequences might arise if the client is convicted. Defense counsel should be fully informed regarding available sentencing alternatives and with community and other resources which may be of assistance in formulating a plan for meeting the client’s needs. Defense counsel should also consider whether consultation with an expert specializing in sentencing options or other sentencing issues is appropriate.

(b) Defense counsel’s preparation before sentencing should include learning the court’s practices in exercising sentencing discretion; the collateral consequences of different sentences; and the normal pattern of sentences for the offense involved, including any guidelines applicable for either sentencing and, where applicable, parole. The consequences (including reasonably foreseeable collateral consequences) of potential dispositions should be explained fully by defense counsel to the client.

(c) Defense counsel should present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused. Defense counsel should ensure that the accused understands the nature of the presentence investigation process, and in particular the significance of statements made by the accused to probation officers and related personnel. Defense counsel should cooperate with court presentence officers unless, after consideration and consultation, it appears not to be in the best interests of the client. Unless prohibited, defense counsel should attend the probation officer’s presentence interview with the accused and meet in person with the probation officer to discuss the case.

(d) Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible; and in an appropriate case, with the consent of the accused, counsel should suggest alternative programs of service or rehabilitation or other non-imprisonment options, based on defense counsel’s exploration of employment, educational, and other opportunities made available by community services.

(e) If a presentence report is made available to defense counsel, counsel should seek to verify the information contained in it, and should supplement or challenge it if necessary. Defense counsel should either provide the client with a copy or (if copying is not allowed) discuss counsel’s knowledge of its contents with the client. In many cases, defense counsel should independently investigate the facts relevant to sentencing, rather than relying on the court’s presentence report, and should seek discovery or relevant information from governmental agencies or other third-parties if necessary.

(f) Defense counsel should alert the accused to the right of allocution. Counsel should consider with the client the potential benefits of the judge hearing a personal
statement from the defendants as contrasted with the possible dangers of making a statement that could adversely impact the sentencing judge’s decision or the merits of an appeal.

(g) If a sentence of imprisonment is imposed, defense counsel should seek the court’s assistance, including an on-the-record statement by the court if possible, recommending the appropriate place of confinement and types of treatment, programming and counseling that should be provided for the defendant in confinement.

(h) Once the sentence has been announced, defense counsel should make any objections necessary for the record, seek clarification of any unclear terms, and advise the client of the meaning and effects of the judgment, including any known collateral consequences. Counsel should also note on the record the intention to appeal, if that decision has already been made with the client.

(i) If the client has received an imprisonment sentence and an appeal will be taken, defense counsel should determine whether bail pending appeal is appropriate and, if so, request it.
PART IX

APPEALS AND POST-CONVICTION REMEDIES

Standard 4-9.1 Preparing to Appeal

(a) If a client is convicted, defense counsel should explain to the client the
meaning and consequences of the court’s judgment and the client’s rights regarding
appeal. Defense counsel should provide the client with counsel’s professional judgment
as to whether there are meritorious grounds for appeal and the possible, and likely, results
of an appeal. Defense counsel should also explain to the client the advantages and
disadvantages of an appeal including the possibility that the government might cross-
appeal, and the possibility that if the client prevails on appeal, a remand could result in a
less favorable disposition. Counsel should also be familiar with, and discuss with the
client, possible interactions with other post-conviction procedures such as habeas corpus
rules and actions.

(b) The ultimate decision whether to appeal should be the client’s. Defense
counsel should consider engaging or consulting with an expert in criminal appeals in
order to determine issues related to making a decision to appeal.

(c) Defense counsel should take whatever steps are necessary to protect the
client’s rights of appeal, including filing a timely notice of appeal in the trial court, even
if counsel does not expect to continue as counsel on appeal.

(d) Defense counsel should explain to the client that the client has a right to
counsel on appeal (appointed, if the client is indigent), and that there are lawyers who
specialize in criminal appeals. Defense counsel should candidly explore with the client
whether trial counsel is the appropriate lawyer to represent the client on appeal, or
whether a lawyer specializing in appellate work should be consulted, added or
substituted.
Standard 4-9.2  Counsel on Appeal

(a) Appellate defense counsel should seek the cooperation of the client’s trial
counsel in the evaluation of potential appellate issues. A client’s trial counsel should
provide such assistance as is possible, including promptly providing the file of the case to
counsel.

(b) When evaluating the case for appeal, appellate defense counsel should
consider all issues that might affect the validity of the judgment of conviction and
sentence, including any that might require initial presentation in a trial court. Counsel
should consider raising on appeal even issues not objected to below or waived or
forfeited, if in the best interests of the client.

(c) After examining the record and the relevant law, counsel should provide
counsel’s best professional evaluation of the issues that might be presented on appeal.
Counsel should advise the client about the probable and possible outcomes and
consequences of a challenge to the conviction or sentence.

(d) Even if a client has agreed to a waiver of appeal, counsel should follow a
client’s direction to file an appeal if there are non-frivolous grounds to argue that the
waiver is not binding or that the appeal should otherwise be heard.

(e) Appellate defense counsel should not file a brief that counsel reasonably
believes is devoid of merit. However, counsel should not conclude that a defense appeal
lacks merit until counsel has fully examined the trial court record and the relevant legal
authorities. If appellate counsel does so conclude, counsel should fully discuss that
conclusion with the client, and explain the “no merit” briefing process applicable in the
jurisdiction if available. Counsel should endeavor to persuade the client to abandon a
frivolous appeal, and to eliminate appellate contentions lacking in substance. If the client
ultimately demands that a no-merit brief not be filed, defense counsel should seek to
withdraw.

(f) If the client chooses to proceed with a non-frivolous appeal against the advice
of counsel, counsel should present the appeal. When counsel cannot continue without
misleading the court, counsel may request permission to withdraw.

(g) Appellate counsel should discuss with the client the arguments to present in
appellate briefing and at argument, and should diligently attempt to accommodate the
client’s wishes. If the client desires to raise an argument that is colorable, counsel should
work with the client to an acceptable resolution regarding the argument. If appellate
counsel decides not to brief all of the issues that the client wishes to include, appellate
counsel should inform the client of pro se briefing rights and consider providing the
appellate court with a list of additional issues the client would like to present.

(h) In a jurisdiction that has an intermediate appellate court, appellate defense
counsel should ordinarily continue to represent the client after the intermediate court
renders a decision if further appeals are likely, unless a retainer agreement provides
otherwise, new counsel is substituted, or a court permits counsel to withdraw. Similarly,
unless a retainer agreement provides otherwise, new counsel is substituted, or a court
permits counsel to withdraw, appellate counsel should ordinarily continue to represent the
client through all stages of a direct appeal, including review in the United States Supreme
Court.

(i) If trial defense counsel will not remain as appellate counsel, trial counsel
should notify the client of any applicable time limits, act to preserve the client’s appellate
rights if possible, and cooperate and assist in securing qualified appellate counsel. If
appellate counsel’s representation ends but further appellate review is possible, appellate
counsel should advise the client of further options and deadlines, such as for a petition for
certiorari.

(j) When the prosecution appeals a ruling that was favorable to the client, defense
counsel should analyze the issues and possible implications for the client and act to
zealously protect the client’s interests. If the prosecution is appealing, defense counsel
should consider adding or consulting with an appellate expert about the matter.

(k) When the law permits the filing of interlocutory appeals or writs to challenge
adverse trial court rulings, defense counsel should consider whether to file an
interlocutory appeal and, after consultation with the client, vigorously pursue such an
appeal if in the client’s interest. If the prosecution files an interlocutory appeal, defense
counsel should act in accordance with the foregoing paragraphs.
Standard 4-9.3 Conduct of Appeal

(a) Before filing an appellate brief, appellate defense counsel should consult with the client about the appeal, and seek to meet with the client unless impractical.

(b) Appellate counsel should be aware of opportunities to favorably affect or resolve a defendant’s appeal by motions filed in the appellate court, before filing a merits brief.

(c) Counsel should understand the complex rules that govern whether arguments listed or omitted on direct appeal can limit issues available in later collateral proceedings, and not unnecessarily or unknowingly abandon arguments that should be preserved. Counsel should explicitly label federal constitutional arguments as such, in order to preserve later federal litigation options.

(d) Appellate counsel should be aware of applicable rules relating to securing all necessary record documents, transcripts, and exhibits, and ensure that all such items necessary to effectively prosecute the appeal are properly and timely ordered. Before filing the brief, appellate counsel should ordinarily examine the docket sheet, all transcripts, trial exhibits and record documents, not just those designated by another lawyer or the client. Counsel should consider whether, and how appropriately, to augment the record with any other matters, documents or evidence relevant to effective prosecution of the client’s appeal. Appellate counsel should seek by appropriate motion, filed in either the trial or the appellate court, to make available for the appeal any necessary, relevant extra-record matters.

(e) Appellate counsel should be diligent in perfecting appeals and expediting their prompt submission to appellate courts, and be familiar with and follow all applicable appellate rules, while also protecting the client’s best interests on appeal.

(f) Appellate counsel should be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument. Appellate counsel should present directly adverse authority in the controlling jurisdiction of which counsel is aware and that has not been presented by other counsel in the appeal.

(g) Appellate counsel should not intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or are other matters of which the court properly may take judicial notice.

(h) If the appeal is set for oral argument, appellate counsel should explain to an out-of-custody client that the client is permitted to attend, and that attending the argument may have certain strategic advantages and disadvantages. If after consultation the client desires to attend the argument, counsel should help the client to be present. If the client
is in custody, counsel should request a tape or transcript of the oral argument, and consider filing a motion for the government to transport client to the argument.

(i) Appellate counsel should be aware of local rules and practices that may apply to oral arguments, including, for example, rules that apply to the submission of subsequent authorities or the use of demonstrative aids or exhibits during argument.

(j) If appellate counsel’s study of the record reveals that an ineffective assistance of trial counsel claim should be made, appellate counsel should weigh the advantages and disadvantages of raising an ineffective assistance claim on the existing record versus pursuing such a claim in the trial court either before, or after, the appeal is heard. Counsel should also learn the rules, if any, of the particular jurisdiction regarding this issue.

(k) Appellate counsel should consider, in preparing the appellate briefing, whether there might be any potential grounds for relief using other post-conviction remedies (such as habeas corpus), and consult with the client regarding timing and who might represent the client in such actions.
Standard 4-9.4  New or Newly-Discovered Law or Evidence of Innocence or Wrongful Conviction or Sentence

(a) When defense counsel becomes aware of credible and material evidence or law creating a reasonable likelihood that a client or former client was wrongfully convicted or sentenced or was actually innocent, counsel has some duty to act. This duty applies even after counsel's representation is ended. Counsel must consider, and act in accordance with, duties of confidentiality. If such a former client currently has counsel, former counsel may discharge the duty by alerting the client's current counsel.

(b) If such newly discovered evidence or law (whether due to a change in the law or not) relevant to the validity of the client's conviction or sentence, or evidence or law tending to show actual innocence of the client, comes to the attention of the client's current defense counsel at any time after conviction, counsel should promptly:

(i) evaluate the information, investigate if necessary, and determine what potential remedies are available;

(ii) advise and consult with the client; and

(iii) determine what action if any to take.

(c) Counsel should determine applicable deadlines for the effective use of such evidence or law, including federal habeas corpus deadlines, and timely act to preserve the client's rights. Counsel should determine whether -- and if so, how best -- to notify the prosecution and court of such evidence.
Standard 4-9.5  Post-Appellate Remedies

(a) Once a defendant’s direct appellate avenues have been exhausted, appellate counsel is not obligated to represent the defendant in a post-appellate collateral proceeding unless counsel has agreed, or has been appointed, to do so. But counsel should still reasonably advise and act to protect the client’s possible collateral options.

(b) If appellate counsel believes there is a reasonable prospect of a favorable result if collateral proceedings are pursued, counsel should explain to the client the advantages and disadvantages of pursuing collateral proceedings, and any timing deadlines that apply. Appellate defense counsel should assist the client to the extent practicable in locating competent counsel for any post-appellate collateral proceedings.

(c) Post-appellate counsel should seek the cooperation of the client’s prior counsel in the evaluation and briefing of potential post-conviction issues. Prior counsel should provide such assistance as is possible, including providing the file or copies of the file to post-appellate counsel.
Standard 4- 9.6 Challenges to the Effectiveness of Counsel

(a) If appellate or post-appellate counsel is satisfied after appropriate investigation and legal research that another defense counsel who served in an earlier phase of the case did not provide effective assistance, new counsel should not hesitate to seek relief for the client.

(b) If defense counsel concludes that he or she did not provide effective assistance in an earlier phase of the case, counsel should explain this conclusion to the client. Unless the client clearly wants counsel to continue, counsel in this situation should seek to withdraw from further representation of the client with an explanation to the court of the reason, consistent with the duty of confidentiality to the client. Counsel should recommend that the client consult with independent counsel if the client desires counsel to continue with the representation. Counsel should continue with the representation only if the client so desires after informed consent and such further representation is consistent with applicable conflict of interest rules.

(c) Defense counsel whose conduct in a criminal case is drawn into question is permitted to testify concerning the matters at issue, and is not precluded from disclosing the truth concerning the matters raised by his former client, even though this involves revealing matters which were given in confidence. Former counsel must act consistently with applicable confidentiality rules, and ordinarily may not reveal confidences unless necessary for the purposes of the proceeding and under judicial supervision.

(d) In a proceeding challenging counsel’s performance, counsel should not rely on the prosecutor to act as counsel’s lawyer in the proceeding, and should continue to consider the former client’s best interests.

-- END of Proposed Revisions to the DEFENSE FUNCTION Standards --
REPORT

History of the ABA Standards for Criminal Justice
The idea of developing the *ABA Standards for Criminal Justice* was formulated in 1963. The various chapters in the first edition of the Standards were approved by the ABA House of Delegates between 1968 and 1973. They were described by Chief Justice Warren Burger as the “single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history.”

Beginning in 1978, the ABA House of Delegates approved revisions to the Standards. Publications of its second edition occurred in 1980. Since that time, periodic changes have been made to the Standards and publication of these Prosecution Function and Defense Function Standards would begin the Fourth edition of the Standards.

Overview of the Recommended Changes
It has been over 20 years since the third edition of the Prosecution Function and Defense Function Standards was passed by the ABA House of Delegates. In that time there have been many changes in the way that criminal cases are tried. These updated Standards reflect these changes and create best practices in consideration of those changes. In addition to several new Standards noted in the Table of Contents, every Standard has been revised since the previous edition.


The Fourth Edition of the Standards substantively revises all of the Standards in the previous edition. In addition, this edition proposes 21 new Prosecution Function Standards including standards handling incriminating evidence, plea agreements and improper bias. This edition also proposes 21 new Defense Function Standards including standards on handling incriminating evidence, plea agreements and improper bias.

The Standards that are new are noted in this resolution’s Table of Contents. While there are too many changes to list here, you can find a copy of the third edition Standards at

http://www.americanbar.org/groups/criminal_justice/standards/prosecution_function_standards.html (Prosecution Function) and


The Criminal Justice Section urges prompt consideration of the proposed Standards by the House due to the ABA’s continuing obligation to see to it that the *ABA Standards for Criminal Justice* reflect current developments in the law.
These chapters cover the function of prosecutors and defense counsel. The recommended revisions represent a comprehensive examination of Chapter Three and Four of the *ABA Standards for Criminal Justice*, Third Edition, now more than two decades old.

**Background**

The proposed black letter standards in these chapters emerge from an effort of more than eight years, begun with the work of an updating task force in March 2006. The Task Force was appointed by the Criminal Justice Standards Committee, a Standing Committee of the Criminal Justice Section. The Task Force, which focused on the standards relating to the prosecution and defense function first met in March 2006 to chart direction. After 11 meetings the Task Force submitted a draft to the Criminal Justice Section Standards Committee in May 2009. After 13 Standards Committee meetings, the draft was submitted to the Criminal Justice Section Council for review at the Spring 2013 Meeting. After four Council meetings the Criminal Justice Section Council approved these revised Standards at its April 2014 meeting.

The final proposed standards are, accordingly, the result of careful drafting and extensive review by representatives of all segments of the criminal justice system—judges, prosecutors, defense counsel, court personnel and academics active in criminal justice teaching and research. Circulation of the standards to a wide range of outside expertise also produced a rich array of comment and criticism which has greatly strengthened the final product.

**Proposed Amendments**

Since these chapters were last amended, there have been dramatic developments in the area of legal ethics. Thousands of new judicial decisions have been handed down. Hundreds of new books and articles touching upon the ethics of our profession have been published. Indeed, the proper role and function of prosecutors and defense counsel has been a particularly topical focus of discussion, debate and controversy in recent years.

The Fourth Edition of the Prosecution and Defense Function Standards substantively revises all of the Standards in the previous edition. In addition, this edition proposes eight new Standards, and two new sections of Standards: *Prosecutorial Relationships* and *Appeals and Other Conviction Challenges*.

**Conclusion**

The Criminal Justice Section urges that the House of Delegates adopt the proposed amendments to the Standards on Prosecution Function, which will be published as the Fourth Edition of Chapter Three of the *ABA Standards for Criminal Justice*.

Respectfully submitted,

**Jim Felman and Cynthia Orr, Chairs**

Criminal Justice Section

February 2015
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Jim Felman and Cynthia Orr, Chairs

1. **Summary of Resolution(s).** The Criminal Justice Section recommends that the ABA adopt the black letter standards, dated February 2015, including chapter three “The Prosecution Function” and chapter four, “The Defense Function” of the *American Bar Association Standards for Criminal Justice*.

2. **Approval by Submitting Entity.** This resolution was approved by the Criminal Justice Section Council at its Fall Meeting on October 25, 2014.

3. **Has this or a similar resolution been submitted to the House or Board previously?** These Standards were previously introduced at the 2014 ABA Annual Meeting. They were withdrawn to resolve language issues presented by other ABA entities. These Standards are being re-introduced with the agreed upon language.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** Approval of this resolution would supplant resolutions 104D Midyear 1991 and 101A Midyear 1992. These Standards do not conflict with the Standards on Trial by Jury.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** Not applicable.

6. **Status of Legislation.** (If applicable) Not applicable.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The policy will be distributed to various criminal justice stakeholders as a tool to offer guidance on the role of the prosecutor and defense counsel. The policy will also be featured on the Criminal Justice Section website and in Section publications.

8. **Cost to the Association.** (Both direct and indirect costs) No cost to the Association is anticipated.

9. **Disclosure of Interest.** (If applicable) None
107D

10. Referrals.
   At the same time this policy resolution is submitted to the ABA Policy Office for
   inclusion in the 2015 Midyear Agenda Book for the House of Delegates, it is being
circulated to the chairs and staff directors of the following ABA entities:

   **Standing Committees**
   Ethics and Professional Responsibility
   Federal Judicial Improvements
   Federal Judiciary
   Governmental Affairs
   Law and National Security
   Legal Aid and Indigent Defendants

   **Special Committees and Commissions**
   Center for Human Rights
   Coalition on Racial and Ethnic Justice
   Commission on Domestic and Sexual Violence
   Commission on Immigration
   Commission on Youth at Risk
   Death Penalty Representation Project

   **Sections, Divisions**
   Government and Public Sector Lawyers Division
   Individual Rights and Responsibilities
   Judicial Division
   Law Student Division
   Litigation
   Commission on the American Jury Project
   Solo, Small Firm and General Practice Division
   State and Local Government Law
   Young Lawyers Division

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name,
   address, telephone number and e-mail address)

   Kevin Scruggs
   Director, Criminal Justice Standards Project
   American Bar Association
   1050 Connecticut Ave. NW, Suite 400
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   Phone: 202-662-1503
   Fax: 202-662-1501
   Email: kevin.scruggs@americanbar.org
12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**
   The Criminal Justice Section recommends that the ABA adopt the black letter standards, dated February 2015, to chapter three “The Prosecution Function” and chapter 4, “The Defense Function” of the *American Bar Association Standards for Criminal Justice.*

2. **Summary of the Issue that the Resolution Addresses**
   Since these chapters were last amended, there have been dramatic developments in the area of legal ethics. Thousands of new judicial decisions have been handed down. Hundreds of new books and articles touching upon the ethics of our profession have been published. Indeed, the proper role and function of defense counsel has been a particularly topical focus of discussion, debate and controversy in recent years.

3. **Please Explain How the Proposed Policy Position will address the issue**
   The Fourth Edition of the Standards substantively revises all of the Standards in the previous edition. In addition, this edition proposes 21 new Prosecution Function Standards including standards handling incriminating evidence, plea agreements and improper bias. This edition also proposes 21 new Defense Function Standards including standards on handling incriminating evidence, plea agreements and improper bias.

   The Standards that are new are noted in the Table of Contents in this resolution. While there are too many changes to list here, you can find a copy of the third edition Standards at
   http://www.americanbar.org/groups/criminal_justice/standards/prosecution_function_standards.html (Prosecution Function) and

   The Criminal Justice Section urges prompt consideration of the proposed Standards by the House due to the ABA’s continuing obligation to see to it that the *ABA Standards for Criminal Justice* reflect current developments in the law.

4. **Summary of Minority Views**
   None are known.
AMERICAN BAR ASSOCIATION

DEATH PENALTY DUE PROCESS REVIEW PROJECT
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges all federal, state, and territorial governments, that impose capital punishment, and the military, to require that:

(1) Before a court can impose a sentence of death, a jury must unanimously recommend or vote to impose that sentence; and

(2) The jury in such cases must also unanimously agree on the existence of any fact that is a prerequisite for eligibility for the death penalty and on the specific aggravating factors that have each been proven beyond a reasonable doubt.
REPORT

The vast majority of U.S. jurisdictions that have capital punishment require a jury's recommendation of a death sentence to be unanimous. However, there are a few outliers that allow a person to be sentenced to death on the recommendation of a non-unanimous jury. This Recommendation urges the retention or adoption of the unanimous jury-based sentencing schemes maintained, and successfully utilized, by the vast majority of states, the military, and the Federal government. With a decision as serious and irreversible as imposing the death penalty – arguably the most significant determination we ask our citizens to make – the American Bar Association believes that the vote of the jury should be unanimous both in its fact-finding role on the aggravating circumstances that legally allow consideration of a death sentence and in the ultimate determination that permits a court to impose a sentence of death.

As this Report outlines, this Recommendation complements the ABA’s other policies and principles reflecting its longstanding and strong support of jury verdict unanimity, particularly in criminal trials, and the ABA’s extensive policies on the importance of ensuring that death penalty cases are administered fairly and impartially, in accordance with due process. This Recommendation, which speaks to the particular significance of the sentencing determination in a death penalty case, shall reflect the ABA’s position that when imposition of the ultimate punishment is to be permitted, unanimity in the jury’s decision is essential.

I. Background

The capital punishment laws currently used in the United States have been approved by the Supreme Court only since 1976, when the newly enacted death penalty statutes of Georgia, Florida, and Texas were upheld, effectively reinstating the constitutionality of the modern death penalty in Gregg v. Georgia and its companion cases. Although the three capital punishment statutes provided for differing sentencing structures, all permitted jury input with schemes that the Court found guaranteed the reliability required by the Eighth Amendment.

However, of the 32 U.S. states that currently have the death penalty, only three do not now require that the jury that votes on the life or death sentence be unanimous in its final sentencing recommendation or decision; the federal government also requires unanimity. Alabama permits a jury to recommend a death sentence on a vote of 10-2 and that vote is not binding on the trial court. By judicial decision, Alabama ensures that every death sentence has been based on a unanimous finding of at least one aggravating circumstance. But Alabama also permits the judge to make a decision to issue a death sentence, even after a unanimous jury makes a recommendation for a life sentence. Delaware requires that the jury unanimously find at least one aggravating circumstance beyond a reasonable doubt and that the jury note how each juror voted on the decision whether the aggravating circumstances outweigh the mitigating

2 Gregg, 428 U.S. at 181; Proffitt, 428 U.S. at 252; Jurek, 428 U.S. at 276.
5 See, e.g., Ex parte McNabb, 887 So. 2d 998, 1005-05 (Ala. 2004); Ex parte Waldrop, 859 So. 2d 1181, 1188 (Ala. 2002); McCray v. State, 88 So. 3d 1, 82 & n.33 (Ala. Crim. App. 2010).
circumstances, but leaves the sentencing decision to the trial judge. Finally, Florida requires neither a unanimous jury recommendation nor a unanimous finding by the jury that any aggravating circumstance has been proved. A Florida jury can recommend a death sentence to the trial judge on a simple majority vote of the 12 jurors, and there is no special verdict required that would reflect the vote on the aggravating circumstances.

In 2002 there was a sea change in terms of the legal significance of jury sentencing decisions in capital cases when, in *Ring v. Arizona*, the U.S. Supreme Court concluded that capital defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." While the issue of whether the Sixth Amendment required the jury to make the ultimate penalty determination was not before the Court, the Court observed that "the great majority of States responded to the Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury." The Court then held that because the enumerated aggravating circumstances "operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury.

The *Ring* Court, quoting from *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968), also generally extolled the virtue of trial by jury, explaining, "[t]he guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." In a concurring opinion, Justice Scalia bemoaned the "perilous decline" in the belief in the right to a jury trial, and noted:

That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because a judge found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.

Following *Ring*, the Supreme Court of Florida, in *State v. Steele*, addressed the lack of any jury-unanimity requirement in the Florida death penalty scheme and underscored the need for that state’s legislature to change its statute:

[W]e express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at

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7 Even in 1976, Florida's capital sentencing scheme was particularly unique in that the jury only recommended a sentence, its recommendation need not be unanimous or by any particular numerical vote, and the trial judge was permitted to override the jury's sentencing vote, whether it was for a life or a death sentence. See *Proffitt*, 428 U.S. at 252; see also, *Spaziano v. Florida*, 468 U.S. 447 (1984).
9 536 U.S. 584 at 589 (2002).
10 Id. at 597 n.4
11 Id. at 607-08 (footnote omitted).
12 Id. at 609 (citation omitted).
13 536 U.S. at 609.
14 Id. at 612 (emphasis in original).
the federal level, the legislature should revisit the statute to require some unanimity in
the jury’s recommendations. Florida is now the only state in the country that allows a jury to
decide that aggravators exist and to recommend a sentence of death by a mere majority
vote.\textsuperscript{15}

To date, however, Florida’s legislature has not voted to change its statute that provides for a
recommendation from a simple majority of capital sentencing jurors, and Delaware and Alabama
also have not taken significant steps to reform their laws.

II. The Importance of Unanimity

Not only is the principle that juries should be unanimous steeped in the common law dating back
to the 14\textsuperscript{th} Century and in American jurisprudence as early as the 19\textsuperscript{th} Century,\textsuperscript{16} but more recent
jury research over the past two decades has established that eliminating the unanimity
requirement “can result in truncating or even eliminating jury deliberations.”\textsuperscript{17} Empirical studies
have revealed that, without a unanimity requirement for a recommendation of death, capital
jurors do not devote the same energy or emotional commitment to the discussion among jurors
on the ultimate sentencing decision, and pro-death jurors are able to overpower and ultimately
silence undecided or minority viewpoint jurors.\textsuperscript{18} As Cantero & Kline aptly explain:

[C]ourts that allow a non-unanimous jury to render a verdict invariably empower
superficial, narrow, and prejudiced arguments that appeal only to certain groups.
Unanimous verdicts ensure that defendants are convicted on the merits and not merely on
the whims of a majority.\textsuperscript{19}

Thus, the data suggest that any measure that encourages jurors to devote more time and thought
to deliberations, and empowers minority jurors to voice their opinions and fully participate in the
process, increases the reliability of jury determinations and is a constitutional imperative. It is
crucial that jurors seriously discuss and consider all of the evidence, both with regard to
aggravation and mitigation, before issuing a recommendation or decision supporting a death
sentence.

Reaching a unanimous consensus is particularly critical when the jury is determining what
aggravating circumstances, if any, have been proven. When the Supreme Court invalidated the
death penalty in \textit{Furman v. Georgia}, the central concern was that defendants were being

\textsuperscript{15} 921 So. 2d 538 at 548 (Fla. 2005) (emphasis in original).
\textsuperscript{16} See Stephan Landsman, The Civil Jury in America: Scenes from an Unappreciated
\textsuperscript{17} Kim Taylor-Thompson, \textit{Empty Votes in Jury Deliberations}, 113 Harv. L. Rev. 1261, 1263 (2000).
\textsuperscript{18} See William J. Bowers et al., \textit{The Decision Makers: An Empirical Examination of the Way the Role of the Judges
Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations}, 90
J. Personality & Soc. Psychol. 597 (2006); Dennis J. Devine et al., \textit{Jury Decision Making: 45 Years of Empirical
\textsuperscript{19} Raoul G. Cantero & Robert M. Kline, \textit{Death is Different: The Need for Jury Unanimity in Death Penalty Cases},
22 St. Thomas Law Rev. 31-32 (2009) (Footnotes omitted).
condemned to death arbitrarily and capriciously. In an oft quoted assessment, Justice White pointed out that the schemes under review provided “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”

To address the Furman Court’s concerns that capital sentencers had unguided discretion, legislatures subsequently delineated aggravating circumstances that — whether or not one or more of them were prerequisites to consideration of capital punishment — were justified as channeling the jury’s discretion and narrowing the scope of homicides for which the death penalty may be imposed in order to establish less arbitrary — and constitutional — death penalty statutes. They clearly are, as the Supreme Court has said, the functional equivalent of elements of the offense when their existence is a prerequisite to imposing the death penalty. But aggravating circumstances also play a special role that can lead to a death rather than life outcome when they are otherwise considered as part of a sentencing determination.

Because the ABA has long sought to ensure that “death penalty cases are administered fairly and impartially,” it is manifest that the jury’s determination that any aggravating circumstance has been established should be by a unanimous vote, upon proof beyond a reasonable doubt. Indeed, capital juries are often asked to weigh evidence of one or multiple statutorily-specified aggravating factors against mitigation evidence, or are allowed to consider additional or “catch-all” evidence as aggravating that was not proven as an element of the crime but may otherwise justify the death penalty. Therefore, under most death penalty schemes, evidence of specific aggravators clearly plays a special role in determining whether or not the death penalty is ultimately appropriate.

Plus, this is a complicated and unique analysis being requested of a capital sentencing jury — or any jury, for that matter. Requiring unanimity on this most crucial determination, as discussed above, promotes a thorough and reasoned resolution. And the reasonable doubt standard is the “prime instrument for reducing the risk of [sentences] resting on factual error.” When aggravating circumstances must be unanimously found beyond a reasonable doubt a community’s confidence that its capital scheme is designed to defeat arbitrary and capricious infliction of the death sentence is likely enhanced, as is the integrity of the entire process.

Additionally, to the extent that lack of unanimity on the finding of an aggravating circumstance or on the final sentencing verdict reflects jurors’ lack of complete confidence in the evidence presented to them, the constantly growing number of exonerations of death-sentenced individuals nationwide supports the value of jury unanimity. Indeed, there are now 147 individuals exonerated from death row nationwide, and 25 of those, more than any other state, come from

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20 See, e.g., 408 U.S. at 313 (White, J., concurring).
21 Id.
23 Ring, 536 U.S. at 609 (citation omitted).
24 ABA Resolution 107 (Feb. 1997).
25 Capital jury researchers have found that jurors are often confused about how to conduct the statutorily required weighing of aggravation and mitigation evidence. See e.g. William J. Bowers, The Capital Jury Project: Rationale, Design, and Preview of Early Findings, 70 Ind. L. J. 1043 (1995). Thus, requiring jurors to methodically determine unanimity on each aggravating factor presented may help prevent truncation of this process.
Florida, where there is no unanimity requirement on the aggravating-circumstance findings and a simple majority of jurors can authorize a death sentence.\textsuperscript{27}  

III. Existing ABA Policies Support Unanimous Verdicts

In recognition of these principles of American justice and the empirical evidence discussed above, the ABA has enacted several policies related to the importance of unanimity in jury verdicts, but not yet on jury death penalty sentencing determinations. In 1974, the ABA first took a firm stance on the necessity of unanimity in federal criminal cases. The resolution states that the ABA is “opposed to the concept of less than unanimous verdicts in Federal criminal cases.” In the accompanying policy report, the Committee detailed the rationale for its position, stating that “God’s most precious gifts of life/liberty are involved in Federal criminal cases” and as such, “our time-honored procedures for depriving a person of these precious gifts only by a unanimous verdict by a jury of his peers should be retained.”\textsuperscript{28}

Subsequently, the Commission on Standards of Judicial Administration published Standards Relating to Trial Courts, calling for all criminal case jury verdicts to be unanimous, not just federal cases. The ABA also has promulgated its extensive and widely-cited Criminal Justice Standards and Jury Principles that both reflect the ABA’s strong position favoring unanimous jury verdicts in all criminal cases.\textsuperscript{29} Specifically, Standard 15-1.1 (c) calls for a unanimous jury verdict in all cases “in which confinement in jail or prison may be imposed,” and Jury Principle 4 (b), promulgated in 2005, uses similar language, saying “a unanimous decision should be required in all criminal cases heard by a jury.”

The accompanying commentary for Jury Principle 4 cites both historical and empirical reasons that jury unanimity is vitally important, including findings like the research cited above and other evidence. In criminal trials, there is a heightened need for accuracy when “a person’s liberty is at risk and society faces the threat of mistaken acquittal or conviction.”\textsuperscript{30} Several studies have shown that unanimous verdicts provide this accuracy through increased minority juror participation. As the accompanying commentary notes, unanimous verdicts require “each point of view to be considered and all jurors persuaded.” Wide ranging discussions with all jurors participating are “likely to be more accurate” than the non-unanimous alternative. Moreover, a non-unanimous verdict “fosters a public perception of unfairness and undermines acceptance of verdicts and the legitimacy of the jury system.”\textsuperscript{31} In the death-penalty realm, this perception is exacerbated by the statistical evidence that, after controlling for variables, black defendants who kill white victims have a significantly greater chance of being sentenced to death.\textsuperscript{32}

Additionally, the ABA’s Death Penalty Due Process Review Project, in conjunction with independent state-based experts, has coordinated comprehensive studies and analyses of the

\textsuperscript{28} See ABA Resolution 134 (Aug. 1974).
\textsuperscript{29} ABA Standards for Criminal Justice (1978); ABA Principles for Juries and Jury Trials (2005).
\textsuperscript{30} ABA Principles for Juries and Jury Trials at 25 (2005).
\textsuperscript{31} Id. at 24-25 (internal citations omitted).
\textsuperscript{32} David C. Baldus et al., Equal Justice and the Death Penalty, 150 (1990).
administration of capital punishment in twelve U.S. states. The assessments were designed to give jurisdictions an objective instrument to evaluate their administration of the death penalty, by comparing the actual practices in the state with a series of recommendations based on the original 2001 ABA Protocols on the Administration of Capital Punishment and the revised version in 2010. The Project completed assessments of both Florida and Alabama in 2006, and in both reports the Assessment Teams, made up of law and psychology professors, former judges, prosecutors, and defense lawyers, specifically recommended changing the states' laws allowing for non-unanimous jury recommendations that death be imposed.

Finally, the ABA has sought meaningful application of its overarching position favoring jury verdict unanimity, submitting an amicus curiae brief in Lee v. Louisiana before the Supreme Court of the United States in 2008. The ABA asked the Court to grant certiorari in Lee to consider whether the Sixth Amendment right to jury trial, as applied to the States through the Fourteenth Amendment, should allow a criminal conviction based on a non-unanimous jury verdict. The brief noted that the “ABA’s long-standing position on jury unanimity in criminal trials is the result of its continuing and comprehensive study of the jury’s role in the criminal justice system” and extensively cited the aforementioned policies calling for unanimous jury verdicts set forth in the ABA Criminal Justice Standards on Trial by Jury and the ABA Jury Principles.

IV. Conclusion

In short, the ABA believes in the vital and time-honored role of the American jury as fact-finder, expressing the “conscience of the community.” For the reasons stated in this Report and in the other ABA policies surrounding the importance of verdict unanimity and the reasonable doubt standard, all capital jurisdictions should require their sentencing juries to determine unanimously and beyond a reasonable doubt the existence of any aggravating circumstance, and, ultimately, to reach a unanimous determination that a death sentence is legally warranted in a particular case. This deliberative function is crucial in order to ensure that the death sentence is not being unfairly or arbitrarily imposed. The decisions from the United States Supreme Court on the size and vote requirements for petit juries generally, coupled with the empirical data about jury behavior and the capital jurisprudence that underscores that "death is different," reinforce the significance of and need for juror unanimity in the determination whether a man or woman lives or dies.

34 Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report, pg. x, September 2006 (“The State of Florida should require that the jury’s sentencing verdict in capital cases be unanimous and, when the sentencing verdict is a death sentence, that the jury reach unanimous agreement on at least one aggravating circumstance.”), Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report, pg. vi, June 2006 (“The State of Alabama should require that the jury be unanimous before it may recommend a sentence of death.”).
37 Cantero & Kline, supra, at 17-25.
Respectfully submitted,

Virginia E. Sloan, Chair
Death Penalty Due Process Review Project
February 2015

Mark I. Schickman, Chair
Section of Individual Rights and Responsibilities
February 2015
1. Summary of Resolution(s).

This Recommendation addresses the particular significance of the sentencing determination in a death penalty case and calls upon all jurisdictions with capital punishment to require the jury to unanimously recommend or vote for a death sentence before such punishment can be imposed. Additionally, a capital sentencing jury should unanimously agree on the existence of any fact whose existence is a prerequisite for eligibility for death, and unanimously agree on the specific aggravating factors that have each been proven beyond a reasonable doubt.

2. Approval by Submitting Entity.

Yes, the Steering Committee of the Death Penalty Due Process Review Project approved the Recommendation. The Council of the Section of Individual Rights and Responsibilities approved the Recommendation on November 8, 2014 at the Section’s Fall Meeting in Snowbird, Utah.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The American Bar Association has no existing policies specific to death penalty sentencing jury recommendations. However, this resolution complements extensive ABA policies on the importance of jury verdict unanimity in criminal cases, as well as the ABA policies related to the death penalty that seek to protect the constitutional rights of persons facing possible death sentences, including the 1997 ABA Policy Supporting a Temporary Halt on Executions in the United States and the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A. The report is not late filed, but the Recommendation should be considered at the 2015 Mid-Year meeting so that the ABA is able to engage in the policy discussions surrounding reform legislation to be introduced in January 2015 in Florida.
6. **Status of Legislation.**

There is no relevant legislation pending in Congress, but there was legislation introduced in the Florida Legislature last year, SB 344, introduced by Senator Altman, that would change Florida’s existing law to comply with this Recommendation. As that bill did not pass in the last legislative cycle, legislators have expressed the intention to re-file a version of the bill in 2015.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

If this recommendation and resolution are approved by the House of Delegates, the sponsors will use that approval to provide information to policymakers and other stakeholders about the importance of juror unanimity in capital sentencing. The policy will support the filing of amicus briefs in cases that present issues related to death sentences imposed by non-unanimous juries. The sponsors will also use the policy to consult on issues related to jury unanimity when called upon to do so by judges, lawyers, government entities, and bar associations.

8. **Cost to the Association.**

None.

9. **Disclosure of Interest.**

N/A.

10. **Referrals.**

    Death Penalty Representation Project
    Criminal Justice Section
    Government and Public Sector Lawyers Division
    Section of International Law
    Section of Litigation
    Section of State and Local Government Law
    Tort Trial and Insurance Practice Section
    Judicial Division
    Law Student Division
    Solo, Small Firm and General Practice Division
    Senior Lawyers Division
    Young Lawyers Division
    Center for Racial & Ethnic Diversity
    Standing Committee on Legal Aid and Indigent Defense
11. **Contact Name and Address Information** (prior to the meeting)

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12. **Contact Name and Address Information** (Who will present the report to the House?)

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

This Recommendation addresses the particular significance of the sentencing determination in a death penalty case and calls upon all jurisdictions with capital punishment to require the jury to unanimously recommend or vote for a death sentence before such punishment can be imposed. Additionally, a capital sentencing jury should unanimously agree on the existence of any fact whose existence is a prerequisite for eligibility for death, and unanimously agree on the specific aggravating factors that have each been proven beyond a reasonable doubt.

2. **Summary of the Issue that the Resolution Addresses**

This resolution addresses the outlier policies in a handful of states that do not require a jury to be unanimous before imposing the sentence of death. This resolution clarifies that the ABA’s long-standing policies in favor of unanimous jury verdicts also extends to the profoundly significant decision by a jury of whether a person convicted of a capital crime should be put to death.

3. **Please Explain How the Proposed Policy Position will address the issue**

The proposed policy will clarify the ABA’s view on the best practice in this area of criminal law and highlight the outlier status of the three places that still allow non-unanimous decisions to lead to a recommendation of death.

4. **Summary of Minority Views**

There has been no opposition raised or any minority views expressed within the American Bar Association to this Recommendation. The opposition in the outlier states is usually based on a claim that a unanimity requirement would reduce the number of sentences of death imposed in that jurisdiction and lead to a reduction in the availability of the death sentence generally.
RESOLVED, That the American Bar Association urges federal, state, and territorial legislative bodies and governmental agencies, including departments of corrections, and the military that impose or implement capital punishment, to:

(1) promulgate execution protocols in an open and transparent manner and allow public comment prior to final adoption; and,

(2) require disclosure to the public, to condemned prisoners facing execution, and to courts all relevant information regarding execution procedures, including but not limited to:

a. the steps to be followed in preparation for, during, and after an execution,
b. the qualifications and background of execution team members, and
c. details about any drugs to be used, including the names, manufacturers or suppliers, doses, expiration date(s), and testing results concerning use of the drugs.

(3) require that an execution process, including the process of setting IVs, be viewable by media and other witnesses from the moment the condemned prisoner enters the execution chamber until the prisoner is declared dead or the execution is called off;

(4) create and maintain contemporaneous records of what transpires during the execution, including but not limited to the drugs administered, the timing of administration, and any complications, errors or unanticipated events;

(5) disclose the entirety of records and logs on the execution process upon order of the court or as otherwise required in discovery or by law upon request of a death-sentenced prisoner, the prisoner’s counsel, or successors; and,

(6) provide an immediate, thorough, and independent review of any execution where the condemned prisoner struggles or appears to suffer, where the execution is otherwise prolonged, or where the execution deviates from the adopted protocols and regulations concerning the execution process.
REPORT

In the modern era of capital punishment, secrecy has surrounded many aspects of the imposition of a death sentence in the United States. States have sought to shield not just the identities of executioners and other members of the execution team, but the details of those individuals' basic qualifications, pertinent information about the drug formulas used in lethal injections, and the protocols that instruct how the execution is to be carried out. They have long used blinds and curtains to control which aspects of executions the witnesses can view. Even certain lethal injection drug combinations sometimes contribute to hiding what is happening by paralyzing the condemned prisoners, thereby preventing witnesses from knowing what the prisoners are actually experiencing.¹

However, the past few years have been particularly noteworthy, as many states have increased efforts to cloak their execution procedures in secrecy. Many states have passed statutes that broaden the categories of information that will be kept confidential, exempting information about execution practices and procedures from public disclosure requirements and exempting departments of corrections from the public rulemaking requirements of administrative procedures act laws. The result of this troubling trend is that many jurisdictions have made secret information that may have once been readily available concerning their execution procedures, and other states are trying to do so.

The American Bar Association is concerned about this movement toward increased secrecy and regressive policies surrounding the processes by which prisoners are executed by lethal injection, particularly given the gravity of the authority exercised by state and federal governments in the execution of prisoners. This resolution reflects and complements the ABA’s longstanding policy that “death penalty cases [should be] administered fairly and impartially, in accordance with due process.”²

I. Background

A. Declining Drug Availability

The vast majority of U.S. executions since 1976 have been carried out by lethal injection using a three-drug formula, where the first drug is supposed to anesthetize the prisoner; the second drug causes paralysis of all voluntary muscles; and the third drug stops the heart, causing death.³ In 2008, the Supreme Court decided Baze v. Rees, upholding Kentucky’s three-drug execution formula as constitutional.⁴ Nevertheless, challenges to lethal injection have continued over the

¹ Of the 1,215 executions imposed using lethal injection since 1976, 1,135 included administration of a paralyzing agent. Once the paralytic is administered, the condemned prisoner is unable to move, speak or otherwise communicate any distress s/he may experience. See generally, Lethal Injection, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision?did=1686&scid=64 (last visited Nov. 18, 2014).
² ABA House of Delegates Resolution 107 (Feb. 1997).
six years since the *Baze* decision, in part due to substantial changes in execution protocols and states’ increasing difficulties securing reliable sources for and obtaining execution drugs.5

Sodium pentothal (thiopental) was used as the first drug in the three-drug formula and also as a stand-alone agent in one-drug procedures.6 When the sole U.S. manufacturer of thiopental, Hospira, temporarily ceased manufacture of the drug in 2010, thiopental became scarce—not only for corrections departments looking for execution drugs, but also for hospitals and other health care providers.7 In response to the limited availability of thiopental, some corrections departments began to import unregulated thiopental from overseas sources.8 Hospira permanently ceased manufacture of thiopental for sale in the United States in January 2011, and since then there have been no Food and Drug Administration (FDA) -approved forms of the drug available in this country.

The unavailability of thiopental set off a chain reaction, as states scrambled to identify and stockpile other execution drugs.9 Many states turned to pentobarbital to replace thiopental in both three-drug and one-drug formulas. However, in July 2011, the Danish manufacturer of pentobarbital instituted distribution controls designed to prevent the sale of its drugs for use in executions.10 Since then, additional pharmaceutical companies have taken similar steps to prevent departments of corrections from obtaining their drugs for use in executions. As a result, states continue to struggle to identify and obtain drugs for use in executions and have turned to purchasing pentobarbital produced in compounding pharmacies that mix small batches of drugs “made-to-order” from the raw ingredients (called active pharmaceutical ingredients). Other states have developed protocols that use the benzodiazepine drug Midazolam in two-drug and three-drug formulas. The use of compounded drugs and the reliance on novel drug combinations mark a new era of experimentation in execution procedures. When corrections departments turned to these new drugs and new drug formulas, they simultaneously and dramatically increased the secrecy surrounding their execution procedures.

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B. Expanding Secrecy Policies

In response to changes in drug availability, states have taken measures to decrease access to information about their lethal injection practices. Some states have heightened secrecy about lethal injection by passing confidentiality statutes that broaden the scope of information that is deemed secret, while others have simply begun to refuse to disclose information about lethal injection practices without passing statutes to authorize confidentiality.

1. Secrecy Statutes

In order to safeguard their access to execution drugs, some states have added—or are currently seeking to add—categories of confidential information to their previously existing frameworks, which had previously been focused only on protecting the identities of execution team members. These new statutes make confidential the identities of pharmacies, pharmacists, and pharmaceutical distributors who make and/or supply the drugs and other materials intended for use in executions. Some states, like Missouri, have actually defined the drug suppliers as confidential and privileged members of the execution team; others simply state that drug manufacturers and suppliers’ identities shall be confidential.

Georgia’s secrecy statute, for example, defines pertinent information about the drugs and equipment used in an execution as a “confidential state secret,” subject to the highest level of secrecy, such that the public, condemned prisoners, and even the courts are prevented from viewing the information. Other statutes do not apply the designation of state secret, but nonetheless make the pertinent information unavailable through discovery in the course of litigation and unavailable even for in camera review by the courts. This type of secrecy surrounding the sources and production of drugs used in executions causes opacity regarding the quality and effectiveness of the drugs to be used.

11 MO. ANN. STAT. § 546.720(2-3) (2007) (“The identities of members of the execution team, as defined in the execution protocol of the department of corrections, shall be kept confidential. Notwithstanding any provision of law to the contrary, any portion of a record that could identify a person as being a current or former member of an execution team shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity, the remainder of such record shall not be privileged or closed unless protected from disclosure by law.”).

12 See, e.g., ARIZ. REV. STAT. ANN. § 13-757(c) (2011) (“The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure pursuant to title 3-9, chapter 1, article 2.”); FLA. STAT. § 945.10(l)(g) (2014) (“Information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection” is confidential).

13 GA. CODE ANN. § 42-5-36(d)(2) (2013) (“The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50 or under judicial process. Such information shall be classified as a confidential state secret.”).

14 See, e.g., 22 OKLA. STAT. ANN. tit. 22 § 1015(B) (2011) (“The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.”).
2. Non-Disclosure Statutes

Other states have passed somewhat narrower statutes that exempt information about execution drugs from disclosure under state public records laws. Under these statutory schemes, the information may still be subject to disclosure through discovery in litigation—perhaps subject to a protective order—but the state is not required to make the information publicly available. For example, the Tennessee execution protocol calls for administration of a compounded drug in a one-drug formula; and under Tennessee law, information “identifying an individual or entity” involved in executions “shall be treated as confidential and shall not be open to public inspection.” This information includes prison employees and private contractors who are part of the execution team and individuals or entities that procure or supply drugs and other materials for use in executions. Arizona has a similar statute that exempts from disclosure confidential, identifying information about persons and entities who participate directly or in ancillary ways. In Colorado, it is not statutory but case law that dictates that information about drug inventory in the possession of the Department of Corrections and the source of any drugs is not subject to public disclosure.

3. Refusal to Disclose Pertinent Information

Some states have refused to disclose information about execution procedures, despite having little or no legal support for the refusal. For example, Texas has neither a secrecy statute that prevents the disclosure of execution information, nor a non-disclosure statute that specifically exempts execution information from disclosure under the state’s Public Information Act. In fact, historically, the Texas Department of Criminal Justice (TDCJ) had consistently disclosed information about its execution procedures and drug suppliers in response to Public Information Act requests. However, in April 2014, despite previously providing this information, TDCJ sought an opinion from the Texas Attorney General on whether it could withhold identifying information pursuant to a common-law physical safety exception to the disclosures required under the Public Information Act. The Attorney General agreed that publicly disclosing identifying information would subject the execution drug-supplying pharmacy and pharmacist to a “substantial threat of physical harm” and ordered that the information be withheld. In a subsequent opinion, the Attorney General further opined that releasing the name of a laboratory that conducts testing of execution drugs would similarly put it at risk and ordered that TDCJ not release identifying information regarding laboratories that conduct execution drug testing. Mississippi has recently taken a similar position, and has withheld information about execution

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16 Id.
17 ARIZ. REV. STAT. § 13-757(C) (2009) (“The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure pursuant to title 39, chapter 1, article 2.”).
procedures and drug sources without citing any statutory authority for non-disclosure. The State has simply opined that “[f]or security purposes, MDOC cannot release the name of the entity.”

C. Decreasing Transparency During and After Executions

In a majority of states carrying out executions, witnesses are also denied access to significant parts of the lethal injection process. In these states, witnesses are only permitted to see the condemned prisoner after the execution team members have set the IV lines and left the chamber. This means that steps crucial to ensuring that an execution is carried out in a humane manner are hidden from public view, and no independent scrutiny of that part of the process is possible. Witnesses and the public must then rely on departments of corrections to provide information about whether, and to what extent, there were problems during executions.

The April 2014 botched execution of Clayton Lockett in Oklahoma underscores the importance of independent witnesses’ access to the entire execution process. During the execution, witnesses had no idea that Mr. Lockett was punctured at least fifteen times in his arms, legs, feet, and neck before the execution team purportedly set an IV in the femoral vein in his groin. By the time the Oklahoma Department of Corrections (ODOC) opened the curtains to witnesses, Mr. Lockett was already laying on the gurney and his body was covered with a sheet. When the IV line failed and drugs were administered into Mr. Lockett’s surrounding tissue, instead of into his vein, resulting in his prolonged death, witnesses did not know where the IV had been set or that there was visible evidence of its improper placement. This was not revealed until three days later when the ODOC released piecemeal and conflicting information about the execution. Additionally, when Mr. Lockett was observed writhing and groaning, the ODOC once again closed the curtain to prevent witnesses from observing the actions of the execution team. As a result, there was a significant gap in the public’s knowledge about what happened to Mr. Lockett during the subsequent twenty-four minutes until he was pronounced dead. Because witnesses were prevented from observing the setting of the IV as well as the actions of the execution team after Mr. Lockett regained consciousness, the public only has the information provided by

21 Memorandum from Tara Booth, Office of Communications, Miss. Dep’t of Corr. to Vanessa Carroll, MacArthur Justice Ctr. (Feb. 18, 2014) (on file with the Berkeley Law Death Penalty Clinic).


25 Cf. Baze, 553 U.S. at 56 (“Three of the Commonwealth’s medical experts testified that identifying signs of infiltration would be ‘very obvious,’ even to the average person, because of the swelling that would result.”).


ODOC and subsequent results from an internal investigation into what happened during the execution by the Department of Public Safety, issued four months later.

In a handful of states witnesses are permitted to view the entire execution process. California was the first state required to provide full access after the Ninth Circuit ruled that "the public enjoys a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber, including those 'initial procedures' that are inextricably intertwined with the process of putting the condemned inmate to death."28 In 2013, the Ninth Circuit’s ruling was extended to Idaho and Arizona, and witnesses in those states now have access to the entire execution procedure.29 Similarly, in 2012, a federal district court judge in Pennsylvania granted an injunction against the Pennsylvania Department of Corrections barring them from preventing witnesses, including members of the press, from observing the full execution process. The judge held that reporters must be allowed to observe the entire execution because it contributes to the "wide freedom in matters of adult public discourse" guaranteed by the First Amendment.30 Witnesses in Ohio have been permitted to watch the setting of IVs on a closed-circuit television screen before the execution chamber curtain is opened to witnesses.31

The shift in some states to require full witness access is a significant step toward ensuring a level of independent public scrutiny of the actual execution process in those states. However, a majority of executions are still carried out without this independent oversight. In those states, just as during the Lockett execution, department of corrections officials can limit witness access to the aspects of the execution that appear in compliance with standard protocol and have complete control over the information that is ultimately released about whether an execution was carried out in a humane manner, absent a court or executive order for a more independent review of the facts. Media plaintiffs have petitioned the courts in Missouri and Oklahoma to grant witness access to the entire execution procedure.32

II. Botched Executions and Internal Investigations

While it is impossible to know how many recent executions were problematic, there were four plainly botched executions in the United States in 2014. The botched executions in Arizona, Ohio, and Oklahoma are stark illustrations of the risks involved in the execution procedures shrouded in secrecy and using novel and experimental drug formulas. When jurisdictions are permitted to operate in secrecy, the courts, legislatures, and the public cannot provide critical oversight to guard against the use of risky and experimental drug protocols and untrained and unqualified execution team members. Botched executions are the predictable result of such practices.

28 Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 877 (9th Cir. 2002).
29 The Associated Press v. Otter, 682 F.3d 821 (9th Cir. 2012).
31 State of Ohio Department of Rehabilitation and Correction Execution Policy, supra note 22, at 14.
For example, in January 2014, on the eve of Dennis McGuire’s execution in Ohio, the U.S. District Court considered whether Mr. McGuire could show a reasonable likelihood of success on the merits of his claim that the new drug combination to be used in his execution posed a substantial risk of serious harm. The court denied Mr. McGuire’s request for a temporary injunction but acknowledged that the case presented the unknowable:

There is absolutely no question that Ohio’s current protocol presents an experiment in lethal injection processes. The science involved, the new mix of drugs employed at doses based on theory but understandably lacking actual application in studies, and the unpredictable nature of human response make today’s inquiry at best a contest of probabilities.

The court was prescient in describing Ohio’s new protocol as an experiment—one that led to Mr. McGuire’s prolonged execution, as there was widely-reported evidence that he “gassed, choked, clenched his fists and appeared to struggle against his restraints for about 10 minutes after the administration of . . . midazolam and hydromorphone.” Since then, that same drug combination was also used in July 2014, when Joseph Wood was given fifteen times the fifty milligram doses of midazolam and hydromorphone provided for in Arizona’s two-drug execution protocol. Witnesses reported that he gasped for breath for more than an hour and forty minutes before he was pronounced dead.

Additionally, witnesses who observed the April 2014 execution of Clayton Lockett, discussed above, also stated that Mr. Lockett grimaced, writhed, and clenched his jaw well after the sedative should have rendered him unconscious. Mr. Lockett was not declared dead until more than forty minutes after the execution started. These gruesome and prolonged executions have led many to find that these new protocols, which are sometimes developed without expert consultation and using drugs that do not carry the assurances associated with FDA approval, constitute dangerous and failed experiments on human subjects.

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34 Id. at 913.
Finally, in furtherance of these secrecy laws and policies, several states have sought to have the same departments of corrections who were involved in administering the executions also conduct the sole investigative review following a botched execution. After the January botched execution of Dennis McGuire in Ohio, the Department of Rehabilitation and Corrections conducted an internal review and released an Executive Summary on April 28, 2014. The summary explains that the department interviewed nearly twenty witnesses and consulted with the same medical expert who had testified for the state prior to the botched execution. The summary ultimately concluded that “[t]here is no evidence that McGuire experienced any pain, distress or anxiety” during the execution. The Ohio Department of Corrections and Rehabilitation did not release any transcripts from the interviews that were conducted, did not provide any primary documents, and no autopsy was performed after the execution. In Oklahoma, following the Lockett execution, the Governor ordered the state’s Department of Public Safety to conduct an “independent review” of the state’s execution procedures. While the report that was released by Oklahoma was much more extensive than what was released by Ohio after the McGuire execution, including the results from an autopsy and toxicology tests, the review was led by the commissioner of the state agency that oversees the department of corrections instead of an independent party.

III. The Importance of Transparent Execution Laws and Protocols

The ABA has long been a champion of due process and a leader in the call for fair administration of the death penalty in accordance with the Constitution. The trend of decreasing transparency in execution processes implicates numerous constitutional and public policy issues that should be of great concern to members of the ABA. Such concerns are the subject of active litigation in the courts and make a strong case in favor of transparency. Included among these constitutional issues are lack of due process and violations of the First, Eighth, and Fourteenth Amendments.

A. Constitutional Concerns

1. Due Process

When condemned prisoners, their lawyers, the public, and even the courts are prevented from knowing about the protocols, drugs, and personnel involved the execution, any meaningful exploration of these issues in civil discourse, the media, or in the courts is completely foreclosed. State secrecy laws greatly impede the ability of prisoners to access the courts in order to raise

41 Id. at 1.
44 Although the U.S. Supreme Court has not yet considered a case regarding the new and increasing secrecy policies surrounding lethal injection drugs and other execution protocols, these issues are likely ripe for further judicial review.
meritorious challenges to the protocols, drugs, and qualifications and training of personnel involved the execution. The promise of due process and access to the courts is hollow if the evidence required to raise such claims may be withheld by the state.

These secrecy laws and policies also fundamentally deny condemned prisoners real and true notice of how they will be put to death. Although they may be provided with general information about the names of the drugs to be used, they often do not know the type of IV that will be set in their body or the provenance of the drugs and, therefore, whether they will be effective generally (or in their bodies specifically), or the competence of the execution personnel to establish IV access and administer the drugs. When condemned prisoners are denied access to this critical information about the drugs and the execution team members’ qualifications, they are denied due process and are prevented from presenting legal claims to the courts that are charged with determining whether execution procedures are constitutional under the Eighth Amendment.

2. The Eighth Amendment

The Eighth Amendment’s prohibition on cruel and unusual punishment is the traditional vehicle by which prisoners have challenged the constitutionality of methods of execution. The U.S. Supreme Court has recognized that this prohibition extends to “subjecting individuals to a risk of future harm—not simply actually inflicting pain . . . .” As discussed above, this risk of harm is not merely theoretical; several prisoners have suffered actual physical harm as the result of ineffective and experimental combinations and untrained corrections staff. Proving such harm prospectively, however, requires access to the very information that states seek to hide behind their secrecy laws.

In order to prevail on an Eighth Amendment challenge to an execution method, the prisoner must show that there is a “substantial risk of serious harm” that is “objectively intolerable.” To conduct this analysis, courts look to the details of the execution protocol and drugs being used—precisely the information that many states seek to withhold. For example, in Baze v. Rees, the U.S. Supreme Court analyzed the Eighth Amendment challenge to an execution method by considering evidence about the training of corrections officers who administer the lethal drugs, evaluating how many other states use the exact same drugs, and reviewing expert testimony about the efficacy of the specific drug combination. Under many of today’s active and proposed secrecy laws, such an analysis would not be possible.

For example, many different types of professionals participate in executions across the country, from prison guards, to paramedics, nurses, doctors, and pharmacists. In a situation where corrections departments maintain secrecy beyond just the identities of execution team members who are performing crucial tasks and also shroud the qualifications and training required of those individuals, such secrecy has the ability to unjustifiably protect individuals who are unqualified to perform the required steps and/or who already have performed them incorrectly in the past. When a department knows that it will be required to disclose information about the members and

45 See Baze, 553 U.S. at 48 (2008) (citing Wilkerson v. Utah, 99 U.S. 130 (1879)).
46 Id. at 49.
47 Id. at 50.
training of its execution team, it is also more motivated to set rigorous standards for and select qualified, competent personnel.

Likewise, in order for the court to assess whether a lethal injection is humane and constitutional, governments must provide advance information about the drugs they possess and plan to use both in preparation for the execution and in the execution itself, including: the source of the drugs and whether they are manufactured or compounded; whether the drugs are FDA-approved; dealers and brokers involved in the purchase; the doses to be used; and any testing that was conducted on the drugs. All of this information should be known by the corrections department and is easy to disclose well in advance of a planned execution, even when the jurisdictions have found certain drugs newly unavailable and have had to identify and procure new drug sources and plan for new combinations and new doses. This transparency is particularly important when these new drug combinations and procedures have never been utilized for an execution before and/or have been developed without expert medical or pharmacological consultation.

As bedrock principles of civil litigation, there must be meaningful ability for parties to obtain information about their claims and present relevant information as evidence. So when lethal injection procedures are challenged, the court must have the relevant facts before it to determine whether the procedures present a substantial risk of harm, whether past executions have in fact risen to the level of an Eighth Amendment violation, and/or whether the corrections department has acted with deliberate indifference to the known risks of harm. Simply put: without the facts, a court is prevented from making these determinations. Consequently, secrecy laws and practice render it virtually impossible for prisoners to carry their burden, no matter how great a state’s violation of constitutional principles may be, and the Eighth Amendment becomes effectively meaningless. If executions are to be conducted in accordance with the principles of the U.S. Constitution, rather than operating outside the rule of law, prisoners and courts must have access to the basic information required for the legal analysis of such claims.

3. The First and Fourteenth Amendments

Public right of access to executions and execution protocols is also safeguarded by the First Amendment and the Fourteenth Amendment. State secrecy laws and limits on access to media and witness viewing of executions violate this public right. Traditionally, executions—and information about how executions are conducted—have been accessible to the public. In fact, executions were popular public events well into the twentieth century, when technological changes in execution methods required that executions take place behind prison walls, rather

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50 Cal. First Amendment Coal., 299 F.3d at 875.
than in public squares. Throughout U.S. history, the open availability of information about execution procedures has served to ensure the fair functioning of our criminal justice system and promote confidence in the integrity of our government. The free flow of information about executions has enabled the public to evaluate state actions to decide if they comport with our country’s evolving values, and to check state powers by calling for reforms when appropriate. Though execution methods have changed over time, the importance of protecting the public’s right to access information about the death penalty has not. By allowing states to shroud irreversible and momentous state actions, like executions, in secrecy, we violate core values found in the First Amendment and risk eroding the public’s faith in the judicial system as a whole.

Society, the courts, and condemned prisoners should have assurances that execution procedures are humane and constitutional before the procedures are implemented. For this surety to happen, there must be transparency. Core constitutional values including due process, free speech and press, and freedom from cruel and unusual punishment require that states that wish to conduct executions do so in a transparent manner.

B. Public Policy Concerns

As a fundamental matter, the ABA has consistently and frequently taken the position that a good and democratic government requires transparency, and carrying out death sentences—which is one of the government’s greatest and most extraordinary powers—is no exception. Governmental secrecy can undermine public confidence in the justice system, leaving citizens to view that these governmental acts are being done in violation of one of our system’s principles that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person.” Compliance with state administrative rulemaking requirements would allow for public knowledge of the proposed protocol, including the evidence and reasoning behind it. Exemption from the law prevents such fundamental public oversight. Likewise, exemption from public records act requests (or refusal to comply with them) prevents the media from obtaining relevant information and presenting it to the public.

52 For example, in 1974, the ABA House of Delegates passed a Resolution supporting, in principle, the adoption of legislation designed to improve the Freedom of Information Act to “protect all interests yet place emphasis on the fullest responsible public disclosure and maximum public access.” 1974 REPS. OF THE A.B.A. 99, at 583. See also, ABA House of Delegates Resolution 107D (Feb. 2006) (calling for “a system for administering our immigration laws that is transparent, user-friendly, accessible, fair, and efficient...”); ABA House of Delegates Resolution 304 (Aug. 1995) (encouraging the Food and Agriculture Organization of the United Nations to “restructure itself, streamline its operations, and strengthen its transparency and accountability”); and ABA House of Delegates Resolution 109B (Feb. 1993) (supporting the “governments of Canada, Mexico and the United States to establish, through the North American Free Trade Agreement (NAFTA) principles, rules, procedures, and institutions for the conduct of trade and other economic relations among the participating countries which are designed to provide transparency, predictability, fairness and due process.”).
53 See, e.g., CAL. GOV'T CODE § 6250 (West 2014).
Moreover, procedures that are created in secrecy and maintained without transparency are far more likely to be ill-conceived and poorly or inconsistently administered. When execution protocols are promulgated without public notice, opportunity for comment, or a public hearing, there is no mechanism for citizen and expert engagement in the creation the policies, foreclosing the possibility of valuable perspectives and information from external, non-governmental sources. Finally, without meaningful public process in formulating these execution protocols, no record is created that would allow a court to evaluate the diligence and deliberation that went into creation of the execution protocol.

**C. Balancing States' Justifications for Secrecy**

Some states have indicated that their increasing secrecy is necessary in order to prevent lethal injection drug suppliers from becoming the targets of public backlash. However, fear of criticism and outcry does not justify hiding critical information about executions from the public. The public’s view of drugmakers’ participation in executions—whether it be a detriment or even a boon to a business’s reputation and bottom line—is part and parcel of the American economic system. It is difficult to imagine other scenarios in which a business’s concerns about the public’s response to their activities would lead U.S. elected officials to conceal that business’s identity from the public.

Proponents of secrecy have also argued that manufacturers need to be protected from harassment and threats to their personal safety, presumably by opponents of the death penalty. However, such claims have not been verified in any state seeking to shield information concerning execution drug suppliers from the public, either through prosecution, litigation, or other publicly available evidence. If credible evidence of such threats does come to light, there are civil and criminal remedies available. Furthermore, courts are well-suited to craft narrowly-tailored remedies that protect names and identifying information from entering the public record while still allowing prisoners to bring meaningful challenges to execution protocols.

**IV. Conclusion**

For the reasons discussed in this Report and because of the ABA’s commitment to meaningful due process and fair administration of the death penalty, this Recommendation calls upon each jurisdiction that imposes capital punishment to ensure that it has execution protocols that are subject to public review and commentary, and include all major details regarding the procedures to be followed, the qualifications of the execution team members, and the drugs to be used. Without this information, the analysis called for by the U.S. Supreme Court in *Baze* to determine whether an execution protocol poses a substantial risk that inmates will face severe and needless suffering, cannot be done.

Additionally, these principles require the ABA to support access by media representatives and other citizen witnesses to view the entirety of an execution process while it is in progress and

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have access to the contemporaneous records created to document an execution. Only when executions in every state provide witnesses full access to the entire procedure will the public have independent information about the manner in which states are actually carrying out executions. Finally, to ensure our ability to study and prevent other sentinel events, there should be an immediate, thorough, and independent review anytime there is prolonged, botched, or otherwise flawed execution.

These important indicia of transparency will bolster our collective confidence in our justice system’s fairness, accuracy, and impartiality and will better ensure that there is meaningful due process available to individuals facing the death penalty in this country. Society’s interest in the fair administration of the death penalty is significant—and far outweighs any jurisdiction’s asserted governmental interest in secrecy regarding their execution drugs and procedures.

Respectfully submitted,
Virginia E. Sloan, Chair
Death Penalty Due Process Review Project
February 2015

Robert L. Rothman, Chair
Death Penalty Representation Project
February 2015

Mark I. Schickman, Chair
Section of Individual Rights and Responsibilities
February 2015
108B

GENERAL INFORMATION FORM

Submitting Entity: Death Penalty Due Process Review Project, with Co-sponsors: Death Penalty Representation Project, Section of Individual Rights and Responsibilities

Submitted By: Virginia Sloan, Chair, Steering Committee, Death Penalty Due Process Review Project; Robert L. Rothman, Chair, Steering Committee, Death Penalty Representation Project; Mark I. Schickman, Chair, Section of Individual Rights and Responsibilities

1. **Summary of Resolution(s).**

   This resolution seeks to ensure that all death penalty jurisdictions’ lethal injection procedures fully comport with the ABA’s longstanding position that the death penalty be administered only when performed in accordance with constitutional principles. Because proper evaluations of the death penalty can only occur when execution processes are transparent, this resolution calls on jurisdictions to make detailed information available to the public about lethal injection drug protocols and execution procedures, to protect media and witness rights to view the entirety of the execution process, to conduct and make publicly available contemporaneous records of the minute-to-minute events of executions, and to provide for independent investigations of all flawed or troubled executions.

2. **Approval by Submitting Entity.**

   Yes, the Steering Committee of the Death Penalty Due Process Review Project and the Steering Committee of the Death Penalty Representation Project have each approved the Recommendation, on November 18, 2014 and November 19, 2014, respectively. The Council of the Section of Individual Rights and Responsibilities approved the Recommendation on November 8, 2014 at the Section’s Fall Meeting in Snowbird, Utah.

3. **Has this or a similar resolution been submitted to the House or Board previously?**

   No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

   The American Bar Association has no existing policies that pertain to execution policies and procedures. However, this resolution complements current ABA policy that seeks to protect the constitutional rights of persons facing possible death sentences, including the 1997 ABA Policy Supporting a Temporary Halt on Executions in the United States and the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.
5. **If this is a late report, what urgency exists which requires action at this meeting of the House?**

N/A. The report is not late filed, but the Recommendation should be considered at the 2015 Mid-Year meeting so that the ABA is able to engage in the ongoing policy discussions on these issues, respond to legislation to be introduced in 2015, and participate as *amicus curiae*, if a case reaches the U.S. Supreme Court this year with relevant claims.

6. **Status of Legislation.**

There is no relevant legislation pending in Congress. However, several states have passed laws limiting access to information about lethal injection protocols in the past few years, including Arizona, Georgia, Missouri, Oklahoma, South Dakota, and Tennessee. Additionally, legislatures in other death penalty states like Ohio and Alabama will likely be considering new lethal injection secrecy laws in their 2015 sessions.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

If this recommendation and resolution are approved by the House of Delegates, the sponsors will use that approval to provide information to policymakers and other stakeholders about the need for transparency in lethal injection protocols. The policy will support the filing of amicus briefs in cases that present issues of transparency in execution procedures. The sponsors will also use the policy to consult on issues related to lethal injection transparency when called upon to do so by judges, lawyers, government entities, and bar associations.

8. **Cost to the Association.** (Both direct and indirect costs)

None.

9. **Disclosure of Interest.** (If applicable)

N/A.

10. **Referrals.**

By copy of this form, the Resolution will be referred to the following ABA entities that may have an interest in the subject matter:

- Criminal Justice Section
- Government and Public Sector Lawyers Division
- Section of International Law
- Section of Litigation
- Section of State and Local Government Law
- Tort Trial and Insurance Practice Section
Judicial Division
Law Student Division
Solo, Small Firm and General Practice Division
Senior Lawyers Division
Young Lawyers Division
Center for Racial & Ethnic Diversity
Standing Committee on Legal Aid and Indigent Defense
Committee on Bioethics and the Law

11. Contact Name and Address Information (prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

Walter White, Delegate
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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

This resolution seeks to ensure that states’ lethal injection procedures fully comport with the ABA’s longstanding position that the death penalty be administered only when performed in accordance with constitutional principles. The resolution aims to accomplish this goal by calling on jurisdictions to make detailed information available to the public about lethal injection drug protocols and execution procedures, to protect media and witness rights to view the entirety of the execution process, to conduct and make publicly available contemporaneous records of the minute-to-minute events of executions, and to provide for independent investigations of all flawed or troubled executions.

2. **Summary of the Issue that the Resolution Addresses**

In 2011, the sole U.S.-based manufacturer of sodium thiopental, a key component in lethal injection protocols across the country, ceased producing the drug. Since that time, death penalty states have been experimenting with new and untested lethal injection drug combinations and dosages. The results of this experimentation have been troubling. In recent years there has been a marked increase in the number of botched executions, and states’ lethal injection procedures have been questioned by death row prisoners, experts, advocates, and the public. Death penalty states responded to this scrutiny by implementing measures that undermine important constitutional protections. Many states have enacted secrecy laws that prohibit disclosure of information about the drugs used in lethal injection protocols, including the identity of the drug manufacturers, and the types, dosages, and expiration dates of the drugs. These secrecy laws prevent prisoners from obtaining the information necessary to determine if the drugs will cause death in a humane manner that comports with Eighth Amendment standards. Secrecy laws also violate prisoners’ due process rights and First Amendment rights by withholding information essential to a constitutional claim. In addition to enacting secrecy laws, states are moving toward only allowing witnesses and the media to view certain parts of the execution process, rather than the whole procedure. Like the secrecy laws, these measures pose a significant threat to fundamental First Amendment freedoms.

3. **Please Explain How the Proposed Policy Position Will Address the Issue**

States’ secrecy laws and limitations on information about execution protocols and access to viewing execution procedures create a grave risk that executions will be carried out in a manner that fails to comport with important U.S. constitutional and public policy principles. Condemned prisoners need access to the types of information detailed in the resolution in order to challenge the constitutionality of the procedures in state and federal court. The public needs this information so that it can properly evaluate death penalty procedures and decide whether or not they comport with current standards of decency. This resolution will encourage all death penalty jurisdictions to provide the type of information about execution protocols and drugs that is essential for our society and legal system to be able to evaluate death penalty cases and ensure that they are administered fairly and impartially, in accordance with due process, and not in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.
4. **Summary of Minority Views**

There has been no opposition raised or minority views expressed within the American Bar Association to this Recommendation. However, externally, proponents of lethal injection drug secrecy laws have asserted the contentions that state officials want to provide confidentiality for drug suppliers in order to protect those suppliers from purported threats or harassment and to prevent anti-death penalty advocates from pressuring them to stop selling the drugs.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact civil protection order statutes that extend protection to minor and adult victims of sexual assault, rape, and stalking, outside of the context of an intimate partner relationship, and without the requirement of any relationship between the parties.
INTRODUCTION

Sexual assault and rape are endemic throughout the United States. Nearly 1 in 5 women aged 18 and older report having been raped in their lifetime (18.3%), with almost half of all women having experienced some other form of sexual violence in their lifetime (44.6%).1 Despite increased public awareness and discussion about sexual violence, however, prevalence rates have remained largely unchanged since the 1980s, when the first studies indicated that more than a quarter of college-aged women had experienced rape.2 While the lifetime prevalence of rape among men is relatively low (1.4%), nearly a quarter (22.2%) of men aged 18 and older report experiencing some form of sexual violence over the course of their lifetime.3

Disaggregation of sexual assault and rape prevalence data by race/ethnicity and sexual orientation only underscores the gravity of the epidemic. American Indian and Alaska Native women experience rape at one and a half to two times the national average, and women who identify as “multiracial” experience both rape and sexual assault at rates higher than the national average (33.5% compared to 18.3% and 58.0% compared to 44.6%, respectively).4 This translates to approximately 1 in 3 Native American and 1 in 2 “multiracial” women experiencing assault in their lifetimes, compared to a rate of 1 in 5 among non-Native women.5

While the prevalence of rape and sexual violence among lesbian women does not differ significantly from heterosexual women, bisexual women report rape (46.1%) and sexual violence (74.9%) at rates significantly higher than that experienced by either heterosexual (17.4% and 43.3%, respectively) or lesbian (13.1% and 46.4%, respectively) women.6 The Centers for Disease Control and Prevention similarly found that the prevalence of general sexual violence

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among gay and bisexual men is nearly twice that of heterosexual men (40.2% and 47.4%, respectively, compared to 20.8%).

Similarly, high rates of stalking experienced by women and men in the United States remain an issue of public health concern. The Centers for Disease Control and Prevention report that 1 in 6 women and 1 in 19 men in the U.S. have experienced some type of stalking behavior over their lifetime, causing them to fear for their safety or the safety of someone close to them. The prevalence of stalking among different racial or ethnic groups varied slightly, as 1 in 5 Black Non-Hispanic women, 1 in 7 Hispanic women, 1 in 3 multiracial women, and 1 in 4 American Indian or Alaskan Native report having experienced stalking at some point over their lifetime.

Importantly, research indicates that the perpetrators of both sexual violence and stalking are generally known to – but not intimate partners with – their victims. While more than half of female victims of rape report that at least one perpetrator was a current or former intimate partner (51.1%), nearly 80% of female rape victims report that they were assaulted by a non-intimate partner (40.8 percent of women report being raped by an acquaintance, 12.5% by a family member, 2.5% by a person in a position of authority and 13.8% by a stranger). Similarly, the overwhelming majority of female victims of sexual violence other than rape were assaulted by someone other than a current or former intimate partner. Likewise between 80 and 90% of stalking victims report being stalking by either a current or former intimate partner or acquaintance.

This research runs counter to the stereotyped and “conventional” depiction of rape as perpetrated by a stranger with a weapon, but it more clearly delineates the relationship between a perpetrator and a victim. However, despite knowing the majority of their perpetrators, victims of rape and sexual assault rarely report the crime to the police. A 2011 report by the Bureau of Justice Statistics indicates that just over a quarter (27%) of rape and sexual assault cases are ever reported to the police, representing a 25 percent decline in reporting since 2002, and even fewer cases are fully investigated by the police or prosecuted by U.S. States Attorneys. The

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[9] Black, M., et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report.* Rates of stalking among Black Non-Hispanic men (1 in 17) and White Non-Hispanic and Hispanic men (1 in 20) were similar to the national average of stalking experienced by all men. Rates among multi-racial and American Indian and Alaskan Native populations were too low to estimate.


CIVIL PROTECTION ORDERS FOR VICTIMS OF DOMESTIC AND INTIMATE PARTNER VIOLENCE

All fifty states and the District of Columbia have enacted civil protection order statutes designed to offer victims of domestic and intimate partner violence a measure of protection from future acts of violence and control.16 A majority of states also provide protection for victims of sexual assault and rape, but only if the perpetrator is a current or former intimate partner or family member.17 Most states also explicitly provide protection for victims of stalking.18


18 Thirty-seven states and the District of Columbia provide access to civil protection orders for victims of stalking.

Protection orders are designed to provide limited safety to victims of domestic and intimate partner violence and abuse. Though protection orders vary state by state, protection orders generally include the following provisions: (1) stay away order directing the perpetrator to keep a minimum distance from the victim at all times; (2) no abuse or assault order directing the perpetrator to refrain from any future acts of violence; and (3) no contact order directing the perpetrator not to contact the victim for any reason and by any means. Protection orders might also include other protections for the victim, including child custody and support, ouster, various forms of restitution, parenting and domestic violence classes for the perpetrator, and a firearms provision requiring the perpetrator to turn in any firearms to the police. Civil protection orders might also include other protections for the victim, including child custody and support, ouster, various forms of restitution, parenting and domestic violence classes for the perpetrator, and a firearms provision requiring the perpetrator to turn in any firearms to the police. 21

Increasingly, states are beginning to realize the value that civil protection orders may play in access to justice for victims of sexual assault, rape, and stalking. Nineteen states authorize the issuance of protection orders against perpetrators of sexual assault, rape, and harassment, irrespective of whether the parties ever shared an intimate partner or familial relationship. As prosecution of sexual assault, rape, and stalking cases remains low throughout the United States, ensuring equal access to civil protection orders for all victims of sexual violence and stalking can provide a step toward safety and justice, even in the absence of formal criminal proceedings against the perpetrator.

**General Applicability and Appropriateness of Civil Protection Orders in Providing a Civil Remedy for Victims of Sexual Violence and Stalking**

As noted, though sexual violence and stalking is widespread throughout the United States, rates of reporting incidents of sexual assault and rape to the police are at an historic low, and only half of all incidents of stalking are reported to the police. Only approximately one quarter of sexual assaults nationwide are ever reported to the police, and an even smaller fraction are fully

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investigated and/or prosecuted. Among stalking cases, only between a fifth and a quarter of cases reported to the police are prosecuted. This is particularly troublesome in light of recent research indicating that most sexual predators are repeat offenders. This generality holds true for both perpetrators who randomly assault strangers as well as those who target victims with whom they are acquainted or share a more intimate relationship. In fact, psychologist and researcher David Lisak notes that, “[T]he majority of [sexual] violence is committed by predatory individuals who tend to be serial and multi-faceted offenders.”

In an eight-year study of 1,882 men on college campuses in Massachusetts, researchers found that almost two-thirds of previously “undetected” rapists were repeat offenders, a majority of whom had also committed other acts of interpersonal violence. This is particularly troubling with respect to sexual assault occurring on college campuses. Investigative reports indicate that few colleges and universities respond to allegations of sexual assault and rape by expelling the perpetrator. Rather, the trend is for university administrators to view the on-campus judicial process as a “teachable moment” useful for instructing a perpetrator who made a one-time mistake. Research indicates, however, that the majority of perpetrators are repeat offenders, thus a minimal consequence (such as counseling, temporary suspension, or classes) fails to adequately address the severity of the crime of sexual violence or the likelihood of recidivism.

Additionally, as perpetrators on college campuses are often other students, inadequate judicial response to sexual assault leaves victims even more vulnerable to future harassment, stalking, physical or sexual attack, and trauma. As a victim is likely to know the perpetrator, even if they did not share an intimate relationship or friendship, the civil protection order process offers access to the judicial system for a victim concerned about his or her physical safety and well-being. For victims who may harbor fear of or reluctance to become involved in the criminal justice system, civil protection orders may also provide some safety even if the perpetrator is never criminally prosecuted. Finally, while particularly appropriate for the university or college setting, protection orders can provide the same level of added security and safety to any victim who may anticipate future contact with a perpetrator of sexual assault or rape.


26 Tjaden, P. & Thoennes, N., “Stalking in America: Findings From the National Violence Against Women Survey.”


28 Lisak, D., “Understanding the Predatory Nature of Sexual Violence.”

29 Lisak, D. & Miller, P.M., “Repeat Rape and Multiple Offending Among Undetected Rapists.”


31 Lisak, D., “Understanding the Predatory Nature of Sexual Violence;” Lisak, D. & Miller, P.M., “Repeat Rape and Multiple Offending Among Undetected Rapists;” Shapiro, J., “Campus Rape Victims: A Struggle for Justice;” Center for Public Integrity. Sexual Assault on Campus: A Frustrating Search for Justice.

In the context of stalking, civil protection orders are particularly well-suited to address the tactics most often used by stalkers to harass and control their victims. Three-quarters of all stalking victims report receiving unwanted telephone calls, text messages, or other forms of written or spoken correspondence, more than half of all female victims and just under half of all male victims report being approached by their stalkers, and approximately one-third of all victims report being watched, followed, or tracked. Traditional civil protection orders, which include no contact, no harass, and stay away provisions, directly address the behavior perpetrated by stalkers against their victims.

Though civil protection orders are not a substitute for criminal prosecution of perpetrators, and access to civil protection orders alone will not resolve the poor response of the justice system to sexual assault, rape, and stalking, increasing availability of these remedies to all victims of sexual violence and stalking grants victims an additional tool for protecting their safety and their journey toward healing.

CONCLUSION

Sexual violence is a widespread phenomenon throughout the United States, and ensuring access to justice for victims of sexual assault and rape is a necessary step in the cultural shift away from victim-blaming and toward the recognition of perpetrators as sexual predators. Ensuring adequate access to civil protection orders for victims of stalking is similarly important in bolstering the legal response to harassing and threatening conduct by perpetrators. Though access to civil protection orders alone will not hold all perpetrators accountable for their crimes, protection orders do provide victims with a tool for improving their safety and security in the aftermath of sexual assault, rape, and stalking. By recognizing the importance of all federal, state, territorial, local, and tribal governments establishing civil protection order statutes to protect victims of non-intimate partner sexual violence and stalking, the ABA will continue its legacy of urging protection for all victims of inter-personal violence and crime.

Respectfully Submitted,

Angela Vigil, Chair
ABA Commission on Domestic & Sexual Violence
February 2015

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GENERAL INFORMATION FORM

Submitting Entity:  Commission on Domestic & Sexual Violence
Submitted By:  Angela Vigil, Chair

1. Summary of Resolution(s).
The Resolution urges federal, state, local, territorial, and tribal governments to enact civil protection order statutes that provide protection to victims of sexual assault and rape, outside of the context of intimate partner, and in the absence of any formal qualified relationship between the parties.

2. Approval by Submitting Entity.
The Commission voted to support the resolution and report on March 8, 2013, and voted to support revisions on May 3, 2013.

3. Has this or a similar resolution been submitted to the House or Board previously?
No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?
The Association adopted policy #115 (Midyear 2010) which provides, in relevant part:

[The] Association urges Congress to re-authorize and fully fund [...] legislation that:
Enhances judicial, legal and law enforcement tools to combat domestic violence, dating violence, sexual assault, and stalking; [...]  

This policy would not be adversely affected by the adoption of the proposed resolution.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a

6. Status of Legislation. (If applicable) n/a

7. Brief explanation regarding plans for implementation of the policy, if adopted.
Upon adoption, the Commission on Domestic & Sexual Violence will develop programming and training for attorneys who represent sexual assault and stalking victims, so as to increase their access to protection, and will advocate for laws that reflect this policy recommendation.

8. Cost to the Association. (Both direct and indirect costs) None.

9. Disclosure of Interest. (If applicable) n/a

10. Referrals.
Commission on Youth at Risk
Commission on Sexual Orientation and Gender Identity
Commission on Law and Aging
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)
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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address)
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EXECUTIVE SUMMARY

1. Summary of the Resolution.
The Resolution urges federal, state, territorial, local, and tribal governments to enact civil protection order statutes that provide protection to victims of sexual assault, rape, and stalking, outside of the context of intimate partner, and without the requirement of any relationship between the parties.

2. Summary of the issue that the resolution addresses.
Though some states permit sexual assault, rape, and stalking victims to access civil protection orders for their safety and protection, not all jurisdictions provide for protection orders in cases of sexual assault, unless there is an intimate partner relationship between the parties. This resolution seeks to expand access to civil protection orders so as to better protect sexual assault, rape, and stalking victims.

3. Please explain how the proposed policy position will address the issue.
The proposed policy position will urge federal, state, territorial, local, and tribal governments to expand civil protections available to victims of sexual assault, rape, and stalking.

4. Summary of any minority views.
None to date.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments and regulators to amend existing laws and regulations, or to enact new laws or regulations, to:

(1) ensure that victims of domestic violence, dating violence, sexual assault, and stalking have meaningful access to safety and autonomy in their homes (whether owned, leased, subsidized, offered incident to work or school, or otherwise), including prompt access to the criminal and civil justice systems, by—

a. providing options such as no-penalty early lease termination, lease bifurcation, lease transfer, eviction defense, and lock changes; and

b. prohibiting retaliation, discrimination, or penalties in housing due to perpetrator behavior or status as a victim; and

c. preserving privacy and confidentiality to the greatest extent possible; and

(2) enable public and assisted housing agencies, tribally designated housing entities, private landlords, property management companies, campus housing administrators and other housing providers and agencies to respond appropriately to victims and perpetrators of domestic violence, dating violence, sexual assault, and stalking, while maintaining a safe environment for all housing residents;

consistent with the Congressional findings and policies expressed at 42 U.S.C. 14043e et seq. ("Addressing the Housing Needs of Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking").
In 2003, this body adopted (and in 2013, retained) a policy opposing discrimination in housing against victims of domestic violence:

**RESOLVED,** That the American Bar Association supports federal, state, local and territorial legislation to prohibit discrimination in housing against victims of domestic violence;

**FURTHER RESOLVED,** That the American Bar Association urges all relevant federal, state, local and territorial administrative agencies to adopt and vigorously enforce regulations to combat such discrimination.

The 2003 policy report noted that "Difficulties in finding adequate and affordable housing are a significant factor in domestic violence victims' decision to stay with or return to abusers," and that "Until we stop asking women to choose between being beaten and being able to feed and shelter their children, we cannot expect to rid our society of domestic violence."

Two years later, Congress passed, and President Bush signed, legislation protecting survivors living in public and Section 8 subsidized housing, as part of the Violence Against Women Act ("VAWA") of 2005.\(^1\) At that time, Congress found that:

1. There is a strong link between domestic violence and homelessness. Among cities surveyed, 44 percent identified domestic violence as a primary cause of homelessness.
2. Ninety-two percent of homeless women have experienced severe physical or sexual abuse at some point in their lives. Of all homeless women and children, 60 percent had

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\(^1\) This part of VAWA, 42 U.S.C. 14043e et seq., entitled "Addressing the Housing Needs of Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking," provides in part:

The purpose of this subpart is to reduce domestic violence, dating violence, sexual assault, and stalking, and to prevent homelessness by—

1. protecting the safety of victims of domestic violence, dating violence, sexual assault, and stalking who reside in homeless shelters, public housing, assisted housing, tribally designated housing, or other emergency, transitional, permanent, or affordable housing, and ensuring that such victims have meaningful access to the criminal justice system without jeopardizing such housing;
2. creating long-term housing solutions that develop communities and provide sustainable living solutions for victims of domestic violence, dating violence, sexual assault, and stalking;
3. building collaborations among victim service providers, homeless service providers, housing providers, and housing agencies to provide appropriate services, interventions, and training to address the housing needs of victims of domestic violence, dating violence, sexual assault, and stalking; and
4. enabling public and assisted housing agencies, tribally designated housing entities, private landlords, property management companies, and other housing providers and agencies to respond appropriately to domestic violence, dating violence, sexual assault, and stalking, while maintaining a safe environment for all housing residents.
been abused by age 12, and 63 percent have been victims of intimate partner violence as adults.

(3) Women and families across the country are being discriminated against, denied access to, and even evicted from public and subsidized housing because of their status as victims of domestic violence.

(4) A recent survey of legal service providers around the country found that these providers have responded to almost 150 documented eviction cases in the last year alone where the tenant was evicted because of the domestic violence crimes committed against her. In addition, nearly 100 clients were denied housing because of their status as victims of domestic violence.

(5) Women who leave their abusers frequently lack adequate emergency shelter options. The lack of adequate emergency options for victims presents a serious threat to their safety and the safety of their children. Requests for emergency shelter by homeless women with children increased by 78 percent of United States cities surveyed in 2004. In the same year, 32 percent of the requests for shelter by homeless families went unmet due to the lack of available emergency shelter beds.

(6) The average stay at an emergency shelter is 60 days, while the average length of time it takes a homeless family to secure housing is 6 to 10 months.

(7) Victims of domestic violence often return to abusive partners because they cannot find long-term housing.

(8) There are not enough Federal housing rent vouchers available to accommodate the number of people in need of long-term housing. Some people remain on the waiting list for Federal housing rent vouchers for years, while some lists are closed.

(9) Transitional housing resources and services provide an essential continuum between emergency shelter provision and independent living. A majority of women in transitional housing programs stated that had these programs not existed, they would have likely gone back to abusive partners.

(10) Because abusers frequently manipulate finances in an effort to control their partners, victims often lack steady income, credit history, landlord references, and a current address, all of which are necessary to obtain long-term permanent housing.

(11) Victims of domestic violence in rural areas face additional barriers, challenges, and unique circumstances, such as geographical isolation, poverty, lack of public transportation systems, shortages of health care providers, under-insurance or lack of health insurance, difficulty ensuring confidentiality in small communities, and decreased
access to many resources (such as advanced education, job opportunities, and adequate childcare).

(12) Congress and the Secretary of Housing and Urban Development have recognized in recent years that families experiencing domestic violence have unique needs that should be addressed by those administering the Federal housing programs.

Over the 8 years since their enactment, VAWA’s housing protections have preserved housing and prevented homelessness for thousands of survivors and their families. In early 2013, Congress expanded VAWA protections to include nearly all federally subsidized housing units, including HUD funded housing, USDA rural housing, and housing funded through the Low Income Housing Tax Credit (LIHTC) program.

Protections apply to survivors of domestic/dating violence, sexual assault, and stalking, as well as to family or household members of the survivor. Protections include defense from eviction based on acts of the perpetrator, lease bifurcation to allow eviction of a perpetrator, confidentiality of victim information, and protection from discrimination. These are important provisions which already apply to nearly all public and many private landlords throughout the nation.

However, a survivor’s ability to preserve both housing and safety should not depend on their status as a public or subsidized housing tenant. Consequently, this resolution urges that all governments enacting housing laws aim to mirror VAWA’s housing provisions. This would help save lives, and have the added benefit of ensuring uniform treatment for all tenants and their landlords, without regard for how the rent gets paid.

**Trends in State Legislation**

Survivors of domestic violence, dating violence, sexual assault and stalking can often face a terrible choice: the choice between staying in their housing and potentially subjecting themselves to ongoing and repeated violence; or fleeing to preserve their safety, but in the process losing their housing and often becoming homeless. At the very least, survivors who leave to preserve their health and safety often face economic hardship because of lease break fees and ongoing rent obligations for homes they cannot safely live in. Others are evicted from or denied access to new housing because of the violence perpetrated against them.

According to the National Law Center on Homelessness and Poverty, “…1 in 4 homeless adults reported that domestic violence was a cause of their homelessness, and between 50% and 100% of homeless women have experienced domestic or sexual violence at some point in their lives.”

But states are beginning to respond, in varied and important ways. Of the more than 28 states

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(rural, urban, southern, northern, eastern, western, “liberal” and “conservative”) that have adopted landlord-tenant provisions protecting survivors, many have included additional protections beyond those provided in VAWA:

- 80% of states permit a perpetrator of violence to be excluded from the survivor’s residence;
- 76% of states have passed legislation to protect the confidentiality of a survivor’s personal information in housing;
- 44% of states offer survivors and their families either relocation assistance or a right to emergency shelter;
- 42% of states permit survivors to terminate their lease early;
- 30% of states have enacted lock change statutes that protect the safety of survivors;
- 10% of states permit survivors to bifurcate a lease in order to early-terminate themselves or to exclude the perpetrator from the lease. 4

This resolution recommends that governments and regulators adopt these and other similar provisions, in order to protect survivor safety and privacy, while also providing landlords with reasonable and uniform instructions on how to meet the needs of survivor-tenants and protect their own interests.

** Discrimination, Retaliation, Penalties

Unfortunately, it is not at all uncommon, even in jurisdictions that allow for early lease termination and/or lease bifurcation, for victim-tenants to be held accountable for the bad acts of a perpetrator, often with heavy financial costs, eviction, or denial of new housing as a result. In many instances, perpetrators know this, and intentionally create dangerous or destructive conditions as a means of further harming the victim-tenant.

One example is the perpetrator who intentionally damages the dwelling, whether during a violent incident aimed at injuring or controlling the victim-tenant; as a means of creating an unavoidable “signature” for the victim-tenant to live with, reinforcing the perpetrator’s power and control; or even to intentionally render the home uninhabitable for the victim-tenant. Another is the perpetrator who is invited in for a legitimate purpose (e.g. pick-up or drop-off of children, exchange of household items or financial support) and then exceeds the bounds of the invitation and creates a damaging or dangerous situation for the victim or for other tenants. Alternatively, it could be that the trauma for a victim of remaining in the home where she or he was raped, stalked, or beaten is simply too much to bear.

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3 See, e.g., Alabama Title 30, Chapter 5, Protection from Abuse Section 30-5-2; Arkansas Code Title 9, Chapter 15, Subchapter 1. General Provisions, 9-15-103(5); Colorado Title 26, Part 8, Section 18-6-800.3; Idaho Code Title 39, Chapter 63, 39-6303; Merged Iowa Code Chapter 236.2(e); New York Family Court Act Article 1, Part 1, Section 812; Oregon ORS 90.100(9); Pennsylvania Title 23, Part VII, Chapter 61; Washington RCW 26.50.010 (2), (6)(B), (7)(C)).

4 See note 2, p. 6. Note: the information in this report was current as of October 2012.
In all of these cases, the tenant is a victim of crime, and, as a matter of public policy, should not be held accountable (via damage fees, "strikes" or warnings, increased rents or security deposits, eviction, or other penalties) for the perpetrator’s criminal acts under the terms of the lease. Victims of rape, assault or stalking can no more control the behavior of their assailants than can victims of burglary, and should not be held to a higher standard of responsibility. As the 2003 policy states; “Legislatures and housing authorities should make clear...that the criminal activity of domestic violence against a tenant cannot be a justifiable cause for eviction or other discrimination.”

**Local Trends**

Unlike trends in state law, which are moving toward offering more protections for victims, some local ordinances are growing more punitive toward survivors of domestic and sexual violence. Hundreds of municipalities across the country have enacted “nuisance” ordinances, originally intended to help communities respond to blight caused by the drug trade. However, these same ordinances are now frequently being used against victims of crime who seek police assistance, resulting in fees and even eviction for calling 911.\(^5\)

**Judicial Trends**

In June of 2013, the U.S. Supreme Court granted *certiorari* in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action*, in which the question was whether disparate impact claims are cognizable under the Fair Housing Act.\(^6\) The FHA prohibits housing discrimination on the grounds of race, color, religion, sex, familial status or national origin. Lower courts and the Department of Housing and Urban Development have agreed that because most victims of domestic and sexual violence are women, disparate impact claims may be brought under the FHA against landlords who discriminate against domestic or sexual violence victims. *Mount Holly* settled and *certiorari* was dismissed two weeks before oral arguments.\(^7\)

However, in October 2014 the Court again granted cert in another FHA disparate impact case, *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*.\(^8\) It seems the Court is determined to offer a ruling on the issue in the near future. And, in a

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\(^7\) Similarly, the Court granted *certiorari* for a case presenting the same question in 2012; it too settled before argument. (See [http://www.scotusblog.com/case-files/cases/magner-v-gallagher/](http://www.scotusblog.com/case-files/cases/magner-v-gallagher/))

surprising ruling on November, 2014, a federal district judge held, against the tide of 11 other circuits, that disparate impact claims are not, in fact, cognizable under the FHA.9

What all of this means for victims of domestic and sexual violence is that it is possible, given the current legal landscape, that while VAWA will continue to offer housing protections for victims in most types of public housing, victims who live in unsubsidized housing could be left with no federal legal cover when faced with eviction, penalties, or refusal to rent as a result of perpetrator actions. This makes the premise of this policy all the more urgent.

Conclusion

In order to ensure safety and autonomy for those terrorized by domestic violence, sexual assault and stalking, we cannot ask them to choose between continued trauma, or a roof over their head. By providing real and viable options to staying put and tolerating violence, such as no-penalty early lease termination, lease bifurcation, lease transfer, and lock changes; as well as no-penalty access to law enforcement and the courts, we can create a safer environment for all residents.

Sincerely,

Angela Vigil, Chair
Commission on Domestic & Sexual Violence
February 2015

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GENERAL INFORMATION FORM

Submitting Entity: Commission on Domestic & Sexual Violence

Submitted By: Ángela Vigil

1. Summary of Resolution(s). This policy seeks to expand housing protections for victims of domestic violence, dating violence, sexual assault and stalking, using the federal Violence Against Women Act, as well as some emerging state practices, as a model.

2. Approval by Submitting Entity. The Commission voted to approve this policy November 19, 2014.

3. Has this or a similar resolution been submitted to the House or Board previously? No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This policy would supplement a 2003 policy opposing discrimination against victims of domestic violence in housing (http://www.americanbar.org/content/dam/aba/directories/policy/2003_my_106b.authcheckdam.pdf) as well as the 2010 policy supporting the Violence Against Women Act and similar legislation (http://www.americanbar.org/content/dam/aba/directories/policy/2010_my_115.authcheckdam.pdf).

5. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a

6. Status of Legislation. (If applicable) n/a

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. We plan to implement the policy by using it as a basis for potential letters to Congress, as well as educational outreach to state and local bar associations.

8. Cost to the Association. (Both direct and indirect costs) none

9. Disclosure of Interest. (If applicable) n/a

10. Referrals. Real Property, Trust & Estate Law; Forum on Affordable Housing & Community Development Law; Tort Trial & Insurance Practice; State & Local Government Law; Commission on Women in the Profession; Solo, Small Firm & General Practice Division; Individual Rights & Responsibilities

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address) Rebecca Henry, Deputy Chief Counsel, ABA CDSV, 1050 Connecticut Avenue NW, Washington DC, 20036, 202-662-1737, rebecca.henry@americanbar.org

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.) Angela Vigil, Baker & McKenzie, 1111 Brickell Ave., Miami, FL 33131, (305) 789-8904, angela.vigil@bakermckeenzie.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

This policy seeks to expand housing protections for victims of domestic violence, dating violence, sexual assault and stalking, using the federal Violence Against Women Act, as well as some emerging state practices, as a model.

2. **Summary of the Issue that the Resolution Addresses**

Survivors of domestic violence, dating violence, sexual assault and stalking can often face a terrible choice: the choice between staying in their housing and potentially subjecting themselves to ongoing and repeated violence; or fleeing to preserve their safety, but in the process losing their housing and often becoming homeless.

VAWA’s housing protections have preserved housing and prevented homelessness for thousands of survivors and their families. In early 2013, Congress expanded VAWA protections to include nearly all federally subsidized housing units, including HUD funded housing, USDA rural housing, and housing funded through the Low Income Housing Tax Credit (LIHTC) program.

However, a survivor’s ability to preserve both housing and safety should not depend on their status as a public or subsidized housing tenant. Consequently, this resolution urges that all governments enacting housing laws aim to mirror VAWA’s housing provisions. This would help save lives, and have the added benefit of ensuring uniform treatment for all tenants and their landlords, without regard for how the rent gets paid.

3. **Please Explain How the Proposed Policy Position will address the issue**

This policy supports specific types of housing protections for survivors, modelled on VAWA and as well as some emerging state practices.

4. **Summary of Minority Views**

None reported.
RESOLVED, That the American Bar Association urges federal, state, local, tribal and territorial authorities to identify and address the special needs of vulnerable populations, including but not limited to individuals with disabilities, children, the frail, elderly, the impoverished, and persons with language barriers, when planning for and responding to disasters.

FURTHER RESOLVED, That Congress, state legislatures, territorial legislatures, tribal and local authorities should adequately fund departments and entities charged with responding to and assisting disaster survivors to cover the increased and unique needs of and disparate impact upon vulnerable populations in planning for, responding to, and recovering from major disasters.

FURTHER RESOLVED, That lawyers should participate in community-wide disaster planning activities to ensure that plans comply with legal and regulatory requirements applicable to the provision of government services and benefits to all disaster survivors, and to identify and help address gaps in policy, practice, and regulation that disproportionately and adversely affect vulnerable populations in times of major disaster.
Virtually every major disaster, by definition, harms persons and damages homes, infrastructure, and businesses in affected communities. The disaster affects the lives and livelihood of everyone in the community to some degree. But for some, the harms are more severe and the ability to recover is substantially more difficult. These include the impoverished, who lack private transportation to evacuate, hotels to fall back on, and resources and disposable income to get them back on their feet; the frail and elderly, who are trapped in high rise apartment buildings unable to leave or get assistance when the elevators go down; the disabled, who may seek temporary shelter in a facility not equipped to handle their special needs; the non-English speaking, who cannot follow directions from first responders or understand their rights to assistance; the medically fragile, who are often left without their medications, ventilators, or other critical medical devices; and infants and children, who may be separated from their caregivers. Together these and others who are vulnerable or disadvantaged, individually and collectively, need help from lawyers, both before and after a disaster strikes.

The lawyer’s role to help the vulnerable and disadvantaged following a disaster is clear. Lawyers advocate for disaster victims to help overcome legal obstacles. They assist in obtaining Federal Emergency Management Agency (FEMA) and other public benefits and private insurance, help in landlord tenant disputes, intervene when there are fraudulent consumer practices, and help when critical vital documents are destroyed. This role has long been at the forefront of the organized bars’ commitment to serve the community following a disaster. The ABA Young Lawyers Division (YLD), through a Memorandum of Understanding (MOU) with FEMA, coordinates Disaster Legal Services (DLS). DLS is one of the individual assistance services offered under the Stafford Act, which is the statutory authority for most federal disaster response activities especially as they pertain to FEMA and FEMA programs.¹ Through this MOU, when invoked by FEMA following a major disaster, the ABA YLD sets up and ensures staffing of a disaster legal services hotline and works with local bar associations, attorneys, pro bono programs, law schools, legal services entities and others to make available and often train lawyers to assist disaster victims.

After a disaster, lawyers may also advocate for the collective needs of disadvantaged populations. For example, following Hurricane Katrina, a large number of elderly, low-income, and minority groups were without adequate housing. Yet, the media reported that nearly $600 million of Mississippi’s federal disaster grants were being reallocated to expand the state port at Gulfport. The Mississippi Center for Justice filed suit on behalf of community groups and individuals against the U.S. Department of Housing and Urban Development, resulting in a settlement with $132 million set aside to assist low-income households.²

² Mississippi Center for Justice, http://mscenterforjustice.org/our-work/disaster-
A lawyer’s ability to help the vulnerable and disadvantaged prior to a disaster may be less clear, but is equally if not more important. The more prepared a community is for a disaster, especially for the disadvantaged, the more manageable the after-effects will be. A community’s failure to incorporate in its disaster planning the special needs of its most vulnerable residents and visitors places them at an added risk of injury and even death, should disaster strike. Indeed, federal judges across the county have confirmed that a community’s failure to incorporate the needs of vulnerable populations in their community disaster plan violates federal law. Lawyers should be at the table as advocates, community leaders, and problem solvers as their communities develop, test, and update community-wide emergency management plans, with special attention to the disadvantaged, who are the most in need of a lawyer’s advocacy skills.

Attorneys and other community advocates cannot alone safeguard the well-being of the disadvantage and vulnerable following a disaster. Governments, especially state, local, and territorial, must execute its primal duty of helping those most in need. Toward this end, governments can and must: survey and pre-understand the prevalence of different vulnerable populations in the community; coordinate interagency and intergovernmental implementation of emergency plans related to the vulnerable and disadvantaged; consider and plan for the needs of their own public employees who are at risk; allocate sufficient resources so that shelters can accommodate persons with special needs or those without ready access to transportation such as the homeless; ensure hospital patients and nursing home residents are evacuated and emergency notification and communication methods are accessible to those with vision and hearing impairments and in languages prevalent in the community; increase awareness level of first responders and emergency managers on issues relating to individuals with disabilities and other vulnerable populations; and ensure that relevant laws, such as the Americans with Disabilities Act are followed, and where necessary, ensure new laws are enacted or regulations and policies implemented to cover gaps in services and protections to vulnerable disaster survivors. 3

Problems Faced by Disadvantaged and Vulnerable Populations

A great deal of public awareness and attention to the importance of planning for vulnerable populations can be traced back to Hurricane Katrina, when the public’s attention was riveted by images of individuals who were already vulnerable and as a result were unable to protect themselves. The aftermath of Superstorm Sandy served as a painful reminder. Both events focused public attention on the plight of our most vulnerable populations and the realities they confront during and after a disaster. Among the biggest challenges faced by these vulnerable populations is transportation, short and

recovery/hurricane-katrina (last visited Dec. 10, 2014).

long-term shelter, post-disaster housing, food, accessibility, communication, medical care, and supervision. Individuals without access to a car or who are physically unable to drive will need help through public transportation. However, public transportation systems are often damaged or overtaxed following a disaster. Limited hearing, vision, speech, and English proficiency can restrict an individual’s ability to receive and appropriately respond to important information in times of emergency. Some conditions, particularly mental illness or disorder, will require supervision and many of these people are pushed aside because of the higher level of complication or difficulty of their situation or because their behavior is misunderstood and can make people uncomfortable.

Images of disaster survivors in makeshift shelters with limited food and water and rapidly deteriorating sanitation are seared in our memories. Not to be forgotten is that most of those trapped in the Superdome were the impoverished and lacked the means to escape the city or find other accommodations. Post mortems of Katrina are replete with statistics and stories of how the storm devastated the most vulnerable – and how much of this devastation could have been avoided. For example, around 75% of reported deaths in New Orleans occurred among the city’s elderly, many of whom were unable to escape the storm. Yet, according to aftermath reports, the majority of nursing homes remained full even though school buses were available to transport the patients as the storm approached. Tragically, however, there were not enough bus drivers or enough buses equipped to transport patients in need of wheelchairs or other medical devices.

While incredible strides have been made since Katrina, Superstorm Sandy reminded us that much remains to be done. Like Katrina, the Sandy aftermath reports provide stories and statistics of its disproportionate impact on disadvantaged and other vulnerable populations. One such report by the New York Women’s Foundation described the immediate and long term (one year later) impacts of the storm: undocumented immigrants were unable to understand storm “surge” warnings, children were traumatized by multiple school transfers, jobs and wages were lost among those least able to recover, subsidized housing dried up, the instances of rent gouging and evictions rose, homophobic violence increased in shelters, homebound seniors were overlooked and left isolated in their apartments, and low-income residents were fearful of abandoning their homes because they were uncertain of where to go or whether they could return.

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4 Nat’l Council on Disability, Effective Communications for People with Disabilities: Before, During, and After Emergencies 40-48 (2014), http://www.ncd.gov/publications/2014/05272014 (This report shares some of the common, overlooked problem areas, such as televised emergency announcements by officials that do not include American Sign Language (ASL) interpreters, inaccessible emergency notification systems, inaccessible evacuation maps, websites with emergency information that is not accessible to screen readers used by people who are blind or who have low vision, shelters at which no one is able to communicate with people who are deaf or hard of hearing. Key to its findings and recommendation is the engagement of the disabled and advocates in the planning process).

5 Martha S. Wingate ET AL., Identifying and Protecting Vulnerable Populations in Public Health Emergencies: Addressing Gaps in Education and Training (2007), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1847489/ (Referenced in this report are several other post-Katrina studies that address the disparate impact of the storm on different vulnerable populations).

York City’s own after-action report highlights the needs of vulnerable populations and includes recommendations to address this issue, such as “better coordination of relief to affected areas and to vulnerable or homebound populations, including more efficient deployment of volunteers and donations to residents and business owners” and improved pre-storm communication to vulnerable areas such as public housing.\(^7\)

**Attorney Involvement in Community Planning**

Successful management of a disaster begins at the local level. A decade ago such planning was the near exclusive domain of emergency managers, but contemporary thinking calls for a community wide approach involving all segments of the community. FEMA now actively encourages citizens to join forces with community planning agencies to prepare for disaster. As part of this effort, FEMA hosts a program called the Community Emergency Response Team (CERT) that helps to educate citizens on this role.\(^8\)

Despite the growth and acceptance of community-wide disaster planning and response efforts, the needs of vulnerable and disadvantaged populations are not always anticipated and addressed sufficiently.\(^9\) Often missing is a lack of education, training and guidance on how to include vulnerable populations at the planning stage, lack of consumer-oriented aids and resources for these populations, and lack of guidelines and testing of how to promote collaboration among agencies and entities that serve the vulnerable.\(^10\)

To address these shortcomings, disadvantaged and vulnerable populations must have their voices heard and needs anticipated and addressed as part of this planning. Yet there are barriers to their participation. Many times they are reluctant to advocate for themselves. Undocumented immigrants risk deportation if they come forward because they may be turned over to immigration authorities. Domestic violence victims may not wish to expose themselves in a public setting, even though a disaster can place them at even greater risk when courts shut down, police are diverted, and their security systems and safety net worsen. Opportunistic predators may seize upon the comparative chaos and lack of security to rape and assault. The impoverished feel voiceless. Others, by definition – the very young, the mentally ill, the declining senior – may need advocates to speak for or with them. Lawyers can help to fill this role. They often represent these constituencies and understand their needs. They know how to advocate and be heard in the community planning process. And they can ensure that the plans anticipate and comport with applicable laws and regulations, and offer practical solutions.

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\(^10\) Wingate, supra, at note 4.
One such law, the Americans with Disabilities Act (ADA), is particularly germane to a large segment of the vulnerable population. While the ADA does not mention disasters and emergency preparedness per se, Title II which prohibits public entities from discriminating against disabled individuals through services or programs would cover local government emergency preparedness and response programs. These activities and programs must be accessible to people with disabilities and can cover a wide range of activities. For example, shelters must be ADA compliant and even able to accommodate service dogs, emergency evacuation transportation must be wheelchair accessible, and emergency responders directions must be intelligible to the sight or sound impaired.

Disasters neither excuse nor mitigate the government’s obligations to plan for and protect its most vulnerable citizens. In numerous ways the federal government has acknowledged the ADA’s applicability to disasters and issued orders or guidance. For example, the Department of Justice has issued an ADA guide for local governments regarding community emergency preparedness and response programs and accessibility. FEMA has offered guidance on planning for functional needs support services in shelter plans (i.e. services that enable individuals to maintain their independence) for state emergency planners; President Bush, in 2004, issued Executive Order 13347, “Individuals with Disabilities in Emergency Preparedness,” affirmed the policy “to ensure that the Federal Government appropriately supports safety and security for individuals with disabilities in situations involving disasters....” The Order also created the Interagency Coordination Council on Emergency Preparedness and Individuals with Disabilities. And finally, as part of the Post-Katrina Emergency Management Reform Act of 2006 a disability coordinator to FEMA position was created, reporting directly to the FEMA administrator with a detailed list of responsibility.

This view is also supported by the American Bar Association. At the 2007 annual meeting, the House of Delegates adopted a set of principles, “Rule of Law in Times of Major Disaster.” These 12 principles collectively support the proposition that the rule of law, justice, and rights must be preserved and safeguarded, even in times of major disaster. Additionally, these principles recognize and support the proposition that only by lawyer engagement in advance proactive planning can the rule of law be preserved. In the preamble to the principles, the observation is made that “the legal system cannot create a plan to insure the safety of incarcerated arrestees [a vulnerable population] when all the jail personnel have been stricken with avian flu.”

Notwithstanding the growing acceptance of ADA as applied to emergency planning, response, and recovery, there is still failure to follow its requirements or anticipate the many ways it can be implicated post disaster. In *CALIF v. City of Los Angeles*, a federal district court concluded that the City of Los Angeles had violated federal and state disability laws—including the Americans with Disabilities Act (ADA) and the California Disabled Persons Act (CDPA)—by failing to consider the needs of over 800,000 disabled residents in its emergency preparedness program.

In a groundbreaking case that began shortly after Hurricane Irene (2011) but was amplified by the Sandy experience, a federal district court found that New York City’s emergency plans violated the ADA, leaving almost 900,000 residents in danger. In late 2014, the parties agreed to a stipulation of settlement that covers a broad array of remedial actions the City must take to comport with the ADA. These actions include emergency shelter accessibility, post disaster canvassing and services for persons with disabilities, training of staff on the needs of persons with disabilities, ensuring accessible transportation and training of operators of communicating with and serving the disabled, and the creation of a Disability and Access Functional Needs Coordinator and a broad based Disability Community Advisory Panel.

The ADA and its state and local counterparts admittedly do not cover all vulnerable populations disproportionately affected by disasters. Lawyers can utilize other laws and regulations to buttress their advocacy, on behalf of the vulnerable, through the community emergency planning process, including a call for increased funding and specialized services. Where no defining law or regulation exists, the legal profession’s participation in community planning is even more critical. State and local bar associations, as well as individual lawyers, using traditional notions of equal protection and fairness which may be buttressed by state constitutional and statutory civil rights provisions, can lobby, and if necessary litigate, argue for services, programs, and funding. The ABA has already adopted a policy that one type of service – civil legal assistance to help meet the needs of low income disaster survivors – receive increased funding from all levels of government. Professor Sharona Hoffman, in her 2009 law review article, “Preparing for Disaster: Protecting the Most Vulnerable in Emergencies,” argues that “existing legal and ethical frameworks entitle vulnerable populations to significant protection.” At the same time she notes the shortcomings in existing laws and urges for legislative solutions, which can be another opportunity for lawyers to have meaningful impact in community planning.

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15 *Communities Actively Living Independent and Free Et Al v. City of Los Angeles*, CV 09-0287 CBM (RZx) U.S. Dist. Ct., Central Dist. CA (2011).
18 Resolution and Report #104, February 2009
19 42 U. Cal Davis LR 1491-1547 (2009).
Aside from using law, regulation, and policy to advocate for the needs of vulnerable populations, lawyers can bring practical law or policy-related insights and suggestions to the planning deliberations. For example, lawyers could advocate for mechanisms to suspend in the event of a disaster any existing cooperative agreements between federal and local authorities that refer undocumented immigrants to federal authorities for deportation. Lawyers can also promote proactive policies that reassure all individuals that if they report to shelters or seek other disaster assistance their immigration status will not be questioned. Also, lawyers can work to ensure that allocating resources (e.g., food, blankets, and other rations) are not restricted to “heads of household” so that victims of domestic violence are not made even more dependent on and vulnerable to the abuser.

**Conclusion**

Much of this resolution and report relies on information arising from Hurricanes Katrina and Sandy, but its importance should not be seen as addressing isolated needs. Even the casual observer cannot escape concluding that tornados, hurricanes, floods, wild fires, earthquakes and other disasters are an almost everyday occurrence, different only by scope and scale of destruction. Every community must engage in disaster planning and hope that it is never needed. Lawyers, in their historic professional role of giving back to the community and protecting the rights of the most vulnerable, must engage in this planning process.

Respectfully submitted,

Anthony Barash, Chair
Standing Committee on Disaster Response and Preparedness
February 2015
1. **Summary of Resolution(s).** This resolution urges federal, state, local, tribal, and territorial authorities and legislative bodies to proactively identify and address the special needs of vulnerable populations that are disproportionately affected by disasters and to provide appropriate funding. It also urges lawyers to participate in community planning to help ensure that plans comport with legal requirement applicable to services and benefits offered disaster survivors, especially for the most vulnerable.

2. **Approval by Submitting Entity.** This resolution was approved by the Standing Committee at its business meeting on October 24, 2014.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

   The House of Delegates over the past decade has adopted several policies related to disaster response and preparedness. This Resolution does not conflict with these policies but is rather a natural extension, building upon the concepts of disaster planning, respect for rule of law in times of disaster, and funding of legal services to meet legal needs of disaster survivors. Specifically these policies urge lawyers and law firms to undertake their own disaster planning (August 2011), advocate for increased funding to legal services, pro bono programs, and bar associations to address the unmet civil legal needs of disaster survivors (February 2009), and a set of 12 principles supporting the continuation of the rule of law in times of major disaster (August 2007).

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** N/A

6. **Status of Legislation.** (If applicable) N/A

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The Committee will support this policy, if adopted, primarily through educational efforts. This will include, for example, workshops at the Equal Justice Conference, inclusion in trainings the Committee periodically does for state and local bar associations, and incorporation into its existing training "simulation" program on impact of disaster on low income survivors that is offered in communities throughout the country. The Committee will also be prepared, working
with the President's Office, Media Relations, and Government Affairs Office to "educate the public" on this topic in the aftermaths of a major disaster. Unfortunately, the media and public's attention to disaster planning is often greatest following a major disaster, at which time a Presidential Op-Ed or letters to Congress, especially to members in affected areas, will resonate strongly.

8. **Cost to the Association.** (Both direct and indirect costs) none

9. **Disclosure of Interest.** (If applicable) NA

10. **Referrals.** A draft of the resolution has been circulated to Commissions who address legal issue representative of the vulnerable populations identified in this resolution and report, including the Commissions on Domestic and Sexual Violence, Homelessness and Poverty, Immigration, Disability Rights, and Youth at Risk, and to the Section of Individual Rights and Responsibilities.

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

   Anthony Barash, Chair  
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   Chicago, IL 60611-2396  
   864-915-2150  
   barashah@earthlink.net

   Robert Horowitz, Staff Director  
   Standing Committee on Disaster Response and Preparedness  
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12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

   Anthony Barash, Chair  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges federal, state, local, tribal, and territorial authorities and legislative bodies to proactively identify and address the special needs of vulnerable populations that are disproportionately affected by disasters and to provide appropriate funding. It also urges lawyers to participate in community planning to help ensure that plans comport with legal requirements applicable to services and benefits offered disaster survivors, especially for the most vulnerable.

2. Summary of the Issue that the Resolution Addresses

This resolution seeks to address and remediate the tragic, devastating and disproportionate impact of major disasters on disadvantaged and vulnerable populations. Examples of such impact are many: The disabled may have difficulty or be unable to access services and benefits, the frail and elderly may be isolated from emergency responders, the poor do not have disposable income or means to find alternative housing or replace lost wages, the non-English speaker may not understand evacuation instructions or have service providers fluent in their language, children may experience multiple and disruptive school changes.

3. Please Explain How the Proposed Policy Position will address the issue

There is widespread consensus in the emergency management community that the best way to address problems that may be caused by a disaster is to eliminate or alleviate the problem beforehand, through disaster planning. This Resolution addresses the human tragedies identified above by urging all levels of government to identify populations in their communities most vulnerable and to plan for their need should disaster strike. Additionally, the resolution, mindful of the important contributions lawyers can make in advocating for the legal protections and rights of the most vulnerable and in serving their communities, urges lawyers to participate in these planning processes.

4. Summary of Minority Views

We are unaware of any minority views or opposition to this Resolution.
RESOLVED, That the American Bar Association adopts all of the recommendations contained in the Indian Law and Order Commission’s November 2013 Report to the President and Congress of the United States, entitled A Roadmap for Making Native America Safer, ("Commission’s Report");

FURTHER RESOLVED, That the American Bar Association urges the Administration, Congress, state governments, and tribal governments to promptly implement the recommendations of the Commission’s Report; and

FURTHER RESOLVED, That the American Bar Association, through its appropriate bodies, should work with governmental entities, law schools, bar associations, and legal service providers to promote improvements to criminal justice in Indian country, and help implement and promote the recommendations proposed in the Commission’s Report.
1.1 Congress should clarify that any Tribe that so chooses can opt out immediately, fully or partially, of Federal Indian country criminal jurisdiction and/or congressionally authorized State jurisdiction, except for Federal laws of general application. Upon a Tribe’s exercise of opting out, Congress would immediately recognize the Tribe’s inherent criminal jurisdiction over all persons within the exterior boundaries of the Tribe’s lands as defined in the Federal Indian Country Act. This recognition, however, would be based on the understanding that the Tribal government must also immediately afford all individuals charged with a crime with civil rights protections equivalent to those guaranteed by the U.S. Constitution, subject to full Federal judicial appellate review as described below, following exhaustion of Tribal remedies, in addition to the continued availability of Federal habeas corpus remedies.

1.2 To implement Tribes’ opt-out authority, Congress should establish a new Federal circuit court, the United State Court of Indian Appeals. This would be a full Federal appellate court as authorized by Article III of the U.S. Constitution, on par with any of the existing circuits, to hear all appeals relating to alleged violations of the 4th, 5th, 6th, and 8th, Amendments of the U.S. Constitution by Tribal courts; to interpret Federal law related to criminal cases arising in Indian country throughout the United States; to hear and resolve Federal questions involving the jurisdiction of Tribal courts; and to address Federal habeas corpus petitions. Specialized circuit courts, such as the U.S. Court of Appeals for the Federal Circuit, which hears matters involving intellectual property rights protection, have proven to be cost effective and provide a successful precedent for the approach that the Commission recommends. A U.S. Court of Indian Appeals is needed because it would establish a more consistent, uniform, and predictable body of case law dealing with civil rights issues and matters of Federal law interpretation arising in Indian country. Before appealing to this new circuit court, all defendants would first be required to exhaust remedies in Tribal courts pursuant to the current Federal Speedy Trial Act, 18 U.S.C. § 3161, which would be amended to apply to Tribal court proceedings to ensure that defendants’ Federal constitutional rights are fully protected. Appeals from the U.S. Court of Indian Appeals would lie with the United States Supreme Court according to the current discretionary review process.

1.3 The Commission stresses that an Indian nation’s sovereign choice to opt out of current jurisdictional arrangements should and must preclude a later choice to return to partial or full Federal or State criminal jurisdiction. The legislation implementing the opt-out provisions must, therefore, contain a reciprocal right to opt back in if a Tribe so chooses.

1.4 Finally, as an element of Federal Indian country jurisdiction, the opt-out would necessarily include opting out from the sentencing restrictions of the Indian Civil rights Act (ICRA). Critically, the rights protections in the recommendation more appropriately circumscribe Tribal

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1 INDIAN LAW AND ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES (2013), found at: www.aisc.ucla.edu/iloc/report/. Please note that all of the recommendations of the Indian Law and Order Commission (ILOC) Report are listed here, and that this ABA resolution adopts all of these recommendations. However, notes and other commentary to these recommendations, which can be found in the ILOC Report, have been omitted here.
sentencing authority. Like Federal and State governments do, Tribal governments can devise sentences appropriate to the crimes they define. In this process of Tribal code development, Tribes may find guidance in the well-developed sentencing schemes at the State and Federal levels.

Chapter 2 – Reforming Justice for Alaska Natives: The Time is Now

2.1 Congress should overturn the U.S. Supreme Court’s Decision in Alaska v. Venetie Tribal Government, by amending ANCSA to provide that former reservation lands acquired in fee by Alaska Native villages and other lands transferred in fee to Native villages pursuant to ANCSA are Indian Country.

2.2 Congress and the President should amend the definitions of Indian country to clarify (or affirm) that Native allotments and Native-owned town sites in Alaska are Indian country.

2.3 Congress should amend the Alaska Native Claims Settlement Act to allow a transfer of lands from Regional Corporations to Tribal governments; to allow transferred lands to be put into trust and included within the definition of Indian country in the Federal criminal code; to allow Alaska Native tribes to put tribally owned fee simple land similarly into trust; and to channel more resources directly to Alaska Native tribal governments for the provision of governmental services in those communities.

2.4 Congress should repeal Section 910 of Title IX of the Violence Against Women Reauthorization Act of 2013 (VAWA Amendments), and thereby permit Alaska Native communities and their courts to address domestic violence and sexual assault, committed by Tribal members and non-Natives, the same as now will be done in the lower 48.

2.5 Congress should affirm the inherent criminal jurisdiction of Alaska Native tribal governments over their members within the external boundaries of their villages.

Chapter 3 – Strengthening Tribal Justice: Law Enforcement, Prosecution, and Courts

3.1 Congress and the executive branch should direct sufficient funds to Indian country law enforcement to bring Indian country’s coverage numbers into parity with the rest of the United States. Funding should be made equally available to a) Tribes whose lands are under Federal criminal jurisdiction and those whose lands are under State jurisdiction through P.L. 82-280 or other congressional authorization; b) Tribes that contract or compact under P.L. 93-638 and its amendments or not; and c) Tribes that do or do not opt out (in full or in part) from Federal or State criminal jurisdiction as provided in Recommendation 1.1 of this report.

3.2 To generate accurate crime reports for Indian country; especially in Tribal areas subject to P.L. 83-280, Congress should amend the Federal Bureau of Investigation (FBI) Criminal Justice Information Services reporting requirements for State and local law enforcement agencies’ crime data to include information about the location at which a crime occurred and on victims’ and offenders’ Indian status. Similarly, it should require the U.S. Department of Justice (DOJ) to provide reservation-level victimization data in its annual reports to Congress on Indian country
111A

crime. Congress also should ensure the production of data and data reports required by the Tribal Law and Order Act of 2010, which are vital to Tribes as they seek to increase the effectiveness of their law enforcement and justice systems, by allowing Tribal governments to sue the U.S. Departments of Justice and the Interior should they fail to produce and submit the required reports.

3.3 The Attorney General of the United States should affirm that federally deputized Tribal prosecutors (that is, those appointed as Special Assistant U.S. Attorneys or “SAUSAs” by the U.S. Department of Justice pursuant to existing law) should be presumptively and immediately entitled to all Law Enforcement Sensitive information needed to perform their jobs for the Tribes they serve.

3.4 The U.S. Attorney General should clarify the ability and importance of Federal officials serving as witnesses in tribal court proceedings and streamline the process for expediting their ability to testify when subpoenaed or otherwise directed by Tribal judges.

3.5 To further strengthen Tribal justice systems, the Commission suggests that Federal public defenders, who are employees of the judicial branch of the Federal government within the respective judicial districts where they serve, consider developing their own program modeled on Special Assistant U.S. Attorneys.

3.6 Congress and the executive branch should encourage U.S. District Courts that hear Indian country cases to provide more judicial services in and near Indian country. In particular, they should be expected to hold more judicial proceedings in and near Indian country. Toward this end, the U.S. Supreme Court and the Judicial Conference of the United States should develop a policy aimed at increasing the Federal judicial presence and access to Federal judges in and near Indian country.

3.7 Congress and the executive branch should consider commissioning a study of the usefulness and feasibility of creating Special Federal Magistrate Judges.

3.8 Congress should eliminate the Office of Justice Services (OJS) within the Department of the Interior Bureau of Indian Affairs, consolidate all OJS criminal justice programs and all Department of Justice Indian country programs and services into a single "Indian country component" in the U.S. Department of Justice (including an appropriate number of FBIJ agents and their support resources), and direct the U.S. Attorney General to designate an Assistant Attorney General to oversee this unit. The enacting legislation should affirm that the new agency retains a trust responsibility for Indian country and requires Indian preference in all hiring decisions; amend P.L. 93-638 so that Tribal governments have the opportunity to contract or compact with the new agency; and authorize the provision of direct services to Tribes as necessary. Congress also should direct cost savings from the consolidation to the Indian country agency and continue to appropriate this total level of spending over time.

3.9 Congress should end all grant-based and competitive Indian country criminal justice funding in DOJ and instead pool these monies to establish a permanent, recurring base funding system for tribal law enforcement and justice services, administered by the new Tribal agency in DOJ. Federal base funding for Tribal justice systems should be made available on equal terms to all
federally recognized Tribes, whether their lands are under Federal jurisdiction or congressionally
authorized State jurisdiction and whether they opt out of Federal and/or State jurisdiction (as
provided in Recommendation 1.1). In order to transition base funding, the enacting legislation
should:

a. Direct the U.S. Department of Justice to consult with tribes to develop a formula for
the distribution of base funds (which, working from a minimum base that all federally
recognized Tribes would receive, might additionally take account of tribes’ reservation
populations, acreages, and crime rates) and develop a method for awarding capacity-
building dollars.

b. Designate base fund monies as “no year” so that tribes that are unable to immediately
qualify for access do not lose their allocations.

c. Authorize the U.S. Department of Justice to annually set aside five (5) percent of the
consolidated former grant monies as a designated Tribal criminal justice system capacity-
building fund, which will assist Tribes in taking maximum advantage of base funds and
strengthen the foundation for Tribal local control.

3.10 Congress should enact the funding requests for Indian country public safety in the National
Congress of American Indians (NCAI) “Indian Country Budget Request FY 2014,” and
consolidate these funds into appropriate programs within the new DOJ Tribal agency. Among
other requests, NCAI directs Congress to fully fund each provision of the Tribal Law and Order
Act of 2010 that authorizes additionally funding for Tribal nation law and order programs, both
for FY 2014 and future years; to finally fund the Indian Tribal Justice Act of 1993, which
authorized an additional $50 million per year for each of seven (7) years for Tribal court base
funding; and to create a seven (7) percent Tribal set-aside from funding for all discretionary
Office of Justice Programs (OJP) programs, which at a minimum should equal the amount of
funding that Tribal justice programs received from OJP in FY 2010. In this spirit of NCAI’s
recommendations, Congress also should fund the Legal Services Corporation (LSC) at a level
that will allow LSC to fulfill Congress’ directives in the Tribal Law and Order Act of 2010 and
Violence Against Women Act 2013 reauthorization.

Chapter 4 – Intergovernmental Cooperation: Working Relationships that
Transcend Jurisdictional Lines

4.1 Federal policy should provide incentives for States and Tribes to increase participation in
deputation agreements and other recognition agreements between State and Tribal law
enforcement agencies.

Without limitation, Congress should:

a. Support the development of a model Tribal-State law enforcement agreement program
that addresses the concerns of States and Tribes equally; to help State legislature and
Governors to formulate uniform laws to enable such MOUs and agreements, in both P.L.
83-280 and non-P.L. 83-280 States;

b. Support the training costs and requirements for Tribes seeking to certify under State
agencies to qualify for peace officer status in a State in a deputation agreement;
c. Create a federally subsidized insurance pool or similar affordable arrangement for tort liability for tribes seeking to enter into a deputization agreement for the enforcement of State law by Tribal police;

d. For Tribal officers using a SLEC, amend the Federal Tort Claims Act to include unequivocal coverage (subject to all other legally established guidelines concerning allowable claims under the Act), not subject to the discretion of a U.S. Attorney or other Federal official; and

e. Improve the SLEC process by shifting its management to the U.S. Department of Justice and directing DOJ to streamline the commissioning process (while retaining the requirements necessary to ensure that only qualified officers are provided with SLECs). (Also see Recommendation 4.8)

4.2 Federal or State authorities should notify the relevant Tribal government when they arrest Tribal citizens who reside in Indian country.

4.3 When any Tribal citizen resident in Indian country is involved as a criminal defendant in a State or Federal proceeding, the Tribal government should be notified at all steps of the process and be invited to have representatives present at any hearing. Tribes should similarly keep the Federal or State authorities informed of the appropriate point of contact within the Tribe. These mutual reporting requirements will help ensure the effective exercise of concurrent jurisdiction, when applicable, and the provision of wrap-around and other governmental services to assist the offender, his or her family, as well as the victims of the crime.

4.4 All three sovereigns—Federal, State, and Tribal—should enter into voluntary agreements to provide written notice regarding any Tribal citizens who are reentering Tribal lands from jail or prison. This requirement should apply regardless if that citizen formerly resided on the reservation. This policy will allow the Tribe to determine if it has services of use to the offender, and to alert victims about the offender’s current status and location.

4.5 Congress should provide specific Edward J. Byrne Memorial Justice Assistance Grants (Byrne grants) or COPS grants for data-sharing ventures to local and State governments, conditioned on the State or local government entering into agreements to provide criminal offenders’ history records with federally recognized Indian Tribes with operating law enforcement agencies that request to share data about offenders’ criminal records; any local, State, or Tribal entity that fails to comply will be ineligible for COPS and Byrne grants.

Chapter 5—Detention and Alternatives: Coming Full Circles, From Crow Dog to TLOA and VAWA

5.1 Congress should set aside a commensurate portion of the resources (funding, technical assistance, training, etc.) it is investing in reentry, second-chance, and alternatives to incarceration monies for Indian country, and in the same way it does for State governments, to help ensure that Tribal government funding for these purposes is ongoing. In line with the Commissions’ overarching recommendations on funding for Tribal justice, these resources should be managed by the recommended Indian country unit in the U.S. Department of Justice and administered using a base funding model. Tribes are specifically encouraged to develop and enhance drug courts, wellness courts, residential treatment programs, combined substance abuse
treatment-mental health care programs, electronic monitoring programs, veterans’ courts, clean
and sober housing facilities, halfway houses, and other diversion and reentry options, and to
develop data that further inform the prioritization of alternatives to detention.

5.2 Congress should amend the Major Crimes Act, General Crimes Act, and P.L. 83-280 to
require both Federal and State courts exercising transferred Federal jurisdiction 1) to inform the
relevant Tribal government when a Tribal citizen is convicted for a crime in Indian country; 2) to
collaborate if the Tribal government so chose, in choices involving corrections placement or
community supervision, and 3) to inform the Tribal government when that offender is slated for
return to the community.

5.3 Recognizing that several Federal programs support the construction, operation, and
maintenance of jails, prisons, and other corrections programs that serve offenders convicted
under Tribal law, appropriate portions of these funds should be set aside for Tribal governments
and administered by a single component of the U.S. Department of Justice. This includes any
funds specifically intended for Tribal jails and other Tribal corrections programs (e.g., those
available through the Bureau of Indian Affairs) and a commensurate Tribal share of all other
corrections funding provided by the Federal government (e.g., Bureau of Prisons funding and
Edward J. Byrne Memorial Justice Assistance Grants/JAG program funding). To the extent that
alternatives to detention eventually reduce necessary prison and jail time for Tribal-citizen
offenders, savings should be reinvested in Indian country corrections programs and not be used
as a justification for decreased funding.

5.4 Given that even with a renewed focus on alternatives to incarceration, Tribes will continue to
have a need for detention space:

a. Congress and the U.S. Department of Justice should provide incentives for the
development of high-quality regional Indian country detention facilities, capable of
housing offenders in need of higher security and providing programming beyond
“warehousing,” by prioritizing these facilities in their funding authorization and
investment decisions; and,

b. Congress should convert the Bureau of Prisons pilot program created by the Tribal Law
and Order Act into a permanent programmatic option that Tribes can use to house
prisoners.

Chapter 6—Juvenile Justice: Failing the Next Generation

6.1 Congress should empower Tribes to opt out of Federal Indian country juvenile jurisdiction
totally and/or congressionally authorized State juvenile jurisdiction, except for Federal laws of
general application.

6.2 Congress should provide Tribes with the right to consent to any U.S. Attorney’s decision
before Federal criminal charges against any juvenile can be filed.

6.3 Because resources should follow jurisdiction, and the rationale for Tribal control is especially
compelling with respect to Tribal youth, resources currently absorbed by the Federal and State
systems should flow to Tribes willing to assume exclusive jurisdiction over juvenile justice.
6.4 Because Tribal youth have often been victimized themselves, and investments in community-oriented policing, prevention, and treatment produce savings in costs of detention and reduced juvenile and adult criminal behavior, Federal resources for Tribal juvenile justice should be reorganized in the same way this Commission has recommended for the adult criminal justice system. That is, they should be consolidated in a single Federal agency within the U.S. Department of Justice, allocated to Tribes in block funding rather than in unpredictable and burdensome grant programs, and provided at a level of parity with non-Indian systems. Tribes should be able to redirect funds currently devoted to detaining juveniles to more demonstrably beneficial programs, such as trauma-informed treatment and greater coordination between Tribal child welfare and juvenile justice agencies.

6.5 Because Tribal communities deserve to know where their children are and what is happening to them in State and Federal justice systems, and because it is impossible to hold justice systems accountable without data, both Federal and State juvenile justice systems must be required to maintain proper records of Tribal youth whose actions within Indian country brought them in to contact with those systems. All system records at every stage of proceedings in State and Federal systems should include a consistently designated field indicating Tribal membership and location of the underlying conduct within Indian country and should allow for tracking of individual children. If State and Federal systems are uncertain whether a juvenile arrested in Indian country is in fact a Tribal member, they should be required to make inquiries, just as they are for dependency cases covered by the Indian Child Welfare Act.

6.6 Because American Indian/Alaska Native children have an exceptional degree of unmet need and the Federal government has a unique responsibility to these children, a single Federal agency should be created to coordinate the data collection, examine the specific needs, and make recommendations for American Indian/Alaska Native youth. This should be the same agency within the U.S. Department of Justice referenced in Recommendation 6.4. A very similar recommendation can be found in the 2013 Final Report of the Attorney General’s National Task Force on Children Exposed to Violence.

6.7 Whether they are in Federal, State, or Tribal juvenile justice systems, children brought before juvenile authorities for behavior that took place in Tribal communities should be provided with trauma-informed screening and care, which may entail close collaboration among juvenile justice agencies, Tribal child welfare and behavioral health agencies. A legal preference should be established in State and Federal juvenile justice systems for community-based treatment of Indian country juveniles rather than detention in distant locations, beginning with the youth’s first encounters with juvenile justice, Tribes should be able to redirect Federal funding for construction and operation of juvenile detention facilities to the types of assessment, treatment, and other services that attend to juvenile justice.

6.8 Where violent juveniles require treatment in some form of secure detention, whether it be through BOP-contracted State facilities, State facilities in P.L. 83-280 or similar jurisdiction, or BIA facilities, that treatment should be provided within a reasonable distance from the juvenile’s home and informed by the latest and best trauma research as applied to Indian country.
6.9 The Federal Delinquency Act, 18 U.S.C. § 5032, which currently fosters Federal consultation and coordination only with States and U.S. territories, should be amended to add “or tribe” after the word “state” in subsections (1) and (2).

6.10 The Federal Delinquency Act, 18 U.S.C. § 5032, should be amended so that the Tribal election to allow or disallow transfer of juveniles for prosecution as adults applies to all juveniles subject to discretionary transfer, regardless of age or offense.

6.11 Federal courts hearing Indian country juvenile matters should be statutorily directed to establish pretrial diversion programs for such cases that allow sentencing in Tribal courts.

6.12 The Indian Child Welfare Act should be amended to provide that when a State court initiates any delinquency proceeding involving an Indian child for acts that took place on the reservation, all of the notice, intervention, and transfer provisions of ICWA will apply. For all other Indian children involved in State delinquency proceedings, ICWA should be amended to require notice to the Tribe and a right to intervene.
Introduction

In July 2010, the Indian Law and Order Commission, an independent national advisory commission, was created as part of the Tribal Law and Order Act ("TLOA") of 2010. The Commission was extended by the Violence Against Women Reauthorization Act ("VAWA") of 2013. The Commission was charged with conducting a comprehensive study of law enforcement and criminal justice in tribal communities, including criminal jurisdiction, the tribal jail and Federal prisons systems, tribal and federal juvenile justice systems, and the impact of the Indian Civil Rights Act on tribes, defendants, and the overall tribal criminal system.

As part of that comprehensive study, the Commission was charged with assessing justice in Indian country and developing long-term recommendations on necessary modifications and improvements to justice systems at the tribal, federal, and state levels. In November 2013, after months of hearings and listening sessions around the country, the Indian Law and Order Commission’s findings and recommendations were released as a single report, entitled A Roadmap for Making Native America Safer: Report to the President & Congress of the United States ("ILOC Report"). The ILOC Report contains six chapters, addressing: (1) Jurisdiction; (2) Reforming Justice for Alaska Natives; (3) Strengthening Tribal Justice; (4) Intergovernmental Cooperation (5) Detention and Alternatives; and (6) Juvenile Justice.

Many of the recommendations made by the Commission are directly aligned with policies previously approved by the American Bar Association House of Delegates. For this reason, the ABA urges prompt implementation of all of the forty recommendations of the ILOC Report as a policy matter and as a signal of their importance. All forty recommendations of the ILOC Report are timely and significant; each is specifically referenced in Appendix I. This report highlights major themes found within the recommendations, focusing on recommendations closely tied to ABA work and existing policies. However, the resolution associated with this report adopts all of the ILOC recommendations as ABA policy.

Importance of Locally-Controlled Criminal Justice Systems

A major theme of the ILOC Report is that public safety in Indian country can improve dramatically once Native nations and tribes have greater freedom to build and maintain their own criminal justice systems. In contrast to the majority of American communities, federal or state governments control the vast majority of criminal justice services over local tribal governments in Indian country. Through a 200 year old exceedingly complicated web of jurisdictional rules and sentencing limitations, tribes lack meaningful decision making about their own criminal justice.

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5 ILOC REPORT, 1.
Jurisdiction over a crime in Indian country currently depends upon the Indian status of the offender, the Indian status of the victim, the location of the crime, the nature of the crime, and within what state the tribe is located. Even if a tribe does have jurisdiction over a crime, sentencing limitations prevent tribes from meting out sentences appropriate for major crimes. Tribes are subsequently forced to cede prosecution to a concurrent jurisdictional sovereign, oftentimes encountering a lack of accountability and an unwillingness to prosecute. Parties must often travel far outside of their communities to access criminal justice; Native defendants are often not tried by a jury of their peers; and tribal community members and outsiders lack confidence in tribal governments' ability to maintain law and order in Indian country. The result is that Indian people today experience disproportionate rates of violent crime in their communities.

The ILOC Report recommends that tribes, as sovereigns, should have the option to fully or partially opt out of this jurisdictional maze. Upon a tribe so doing, Congress would immediately recognize, much like all other local governments, the tribe's inherent criminal jurisdiction over all persons within the tribe's territory without any sentencing limitations. In furtherance of informed, localized justice, the Commission further recommends that in order to implement this opt-out authority Congress should establish a new federal circuit court, the United States Court of Indian Appeals. This specialized circuit court would offer a more consistent, uniform, and predictable body of case law dealing with civil rights issues and matters of federal law interpretation arising in Indian country.

As part of the recommendation to create a specialized federal circuit court, the Commission recommends that the Federal Speedy Trial Act, 18 U.S.C. § 3161, be amended to also apply to

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6 The General Crimes Act, 18 U.S.C. § 1152 (providing that federal courts have jurisdiction over interracial crimes committed in Indian country); the Assimilative Crimes Act, 18 U.S.C. § 1; the Major Crimes Act, 18 U.S.C. § 1153 (providing federal criminal jurisdiction over ten enumerated major crimes committed in Indian country that is exclusive of the states); Public Law 83-280, 18 U.S.C. § 1162 (delegating federal jurisdiction to six states over most crimes throughout most of Indian country within their state borders); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that tribes lack criminal jurisdiction over non-Indian defendants); Violence Against Women Reauthorization Act of 2013, S. 47, 113th Congress, Title IX (2013) (expanding tribal criminal jurisdiction to non-Indians for the crimes of domestic violence, dating violence and the violation of protection orders so long as the defendant has certain ties to the community and the tribe provides certain due process protections).

7 ILOC REPORT, 21. Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304 (limiting a tribe’s sentencing authority to a term of imprisonment of 1 year, or up to 3 years so long as the tribe provides five additional due process protections).


9 ILOC REPORT 21.

10 Id. at 3.

11 ILOC REPORT; 23; Recommendation 1.1.

12 ILOC REPORT; 23.

13 Id. at 25.

14 Id. at 23-24.

15 Id.
tribal court proceedings.\(^{16}\) As part of the recommended “opt-out” authority, the Commission recommends that opt-out tribes provide all defendants (Indian and non-Indian) protections equivalent to those guaranteed by the U.S. Constitution, in contrast to the current protections guaranteed by the Indian Civil Rights Act. To buttress these added due process protections, the additional statutory protection of the Federal Speedy Trial Act would provide further assurances that all defendants receive their day in court. Additionally, the Commission recommends that before defendants can appeal their convictions to this new federal circuit court, they be required to first exhaust tribal court remedies, just as Indian defendants are currently required to do.\(^ {17}\) The Federal Speedy Trial Act does not provide constitutional protections.

These recommendations fall in step with the ABA’s long history of supporting tribal justice systems as the primary and most appropriate institutions for maintaining order in tribal communities. In August 2013, the ABA passed a resolution to urge the full implementation of, and compliance with, the Indian Child Welfare Act (25 U.S.C. §§ 1901-63),\(^ {18}\) noting that “Tribal-State Collaborations, and Tribal capacity-building are critical to ensuring that the Act aids tribes and state governments in meaningfully carrying out its intentions and edicts.”\(^ {19}\) In an August 2008 resolution, the ABA urged Congress to “support quality and accessible justice by ensuring adequate, stable, and long-term funding for tribal justice systems.”\(^ {20}\) The report to the resolution specifically noted that

> Tribal courts play an important role in Native American communities, confronting not only issues of self-determination and sovereignty, but also many of the same problems as state and federal courts, but often with considerably fewer resources. In fact, the federal, state, and tribal court systems are interconnected, and when tribal courts are unable to deal with tribal jurisprudence, some of these matters end up being adjudicated in either the state or federal courts, sometimes with disparate results for Native Americans.\(^ {21}\)

The ABA provided support for the enactment of the Tribal Law and Order Act,\(^ {22}\) which aimed to provide greater freedom for Indian tribes and nations to design and run their own justice systems by, among other provisions, enhancing tribal sentencing limitations.\(^ {23}\) Similarly, the ABA passed a resolution in 2012\(^ {24}\) to support the inclusion of the tribal provisions within the Violence

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16 ILOC REPORT, 23-24; Recommendation 1.2.

17 National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (holding that exhaustion of tribal remedies is required before federal courts may exercise federal question jurisdiction over matters arising in Indian country) and Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 13, 18 (1987) (holding that exhaustion of tribal remedies is required before federal courts may exercise diversity jurisdiction over matters arising in Indian country).


19 Id. at 13.


21 Id. at 2.

22 See Letter to House Representatives, from Thomas Susman, Director of the Governmental Affairs Office of the ABA (July 20, 2010) (urging all House Representatives to vote YES for Senate Amendments to H.R. 725, specifically because it “provide[s] tools to tribal justice officials to fight crime in their own communities.”).

23 Tribal Law and Order Act (TLOA), Public Law 111-211, 25 U.S.C. § 2801, et. seq. (among other provisions, extending tribal sentencing limitations from 1 year imprisonment to 3 years imprisonment, if the tribe provides certain due process protections).

24 ABA Recommendation, Report No. 301 (Aug. 2012) (urging Congress to strengthen tribal jurisdiction to address crimes of gender-based violence on tribal lands that are committed by non-Indian perpetrators who have specific ties to the tribe, while ensuring that due process rights are provided).
Against Women Reauthorization Act. Those provisions expanded tribal criminal jurisdiction to non-Indian offenders, for the first time since 1978, for the crimes of domestic violence, dating violence, and the violation of protection orders. These expressions of support are the latest iterations of a long line of ABA policy supporting tribal sovereignty and the ability of tribes to improve justice in Indian country.

In addition to supporting tribal justice, the Commission also draws attention to the federal and state justice systems that operate concurrently in Indian country. In noting the numerous instances in which these sovereigns interact to serve Indian communities, the Commission highlighted several small areas in which federal and state officials can assist the facilitation of justice, including encouraging Federal officials to serve as witnesses in tribal court proceedings, and that U.S. District Courts should be expected to hold more judicial proceedings in and near Indian country. Justice, regardless of its sovereign origin, should be more accessible to Indian peoples.

Enable Tribes to Effectively Addresses Gender-Based Violence

The ILOC Report, created as part of the Tribal Law and Order Act (TLOA), and extended by the Violence Against Women Reauthorization Act (VAWA) of 2013, stems directly from concerns of the devastating and disproportionate effects of gender-based violence in Indian country. One of TLOA’s six purposes is “to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women”. Similarly, an entire title of VAWA is devoted to combatting the inability of tribal governments to effectively address gender-based violence due to jurisdictional limitations. Within this context, the ILOC Commission found that gender-based violence continues to afflict Indian country in part because “criminal jurisdictional in Indian country is an indefensible maze.
of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions, and without the consent of Tribal nations.\(^{33}\)

The ABA has a long history of supporting legislation (1) addressing domestic, sexual and stalking violence,\(^{34}\) and (2) supporting tribal sovereignity and providing tribes with every available resource and tool needed to improve justice in Indian country to hold perpetrators accountable.\(^{35}\) In 2010, the ABA provided vigorous support for the enactment of TLOA, with then-ABA President Carolyn B. Lamm stating “there are numerous ways the [Tribal Law and Order Act] will work against gender-based violence, including the promise of better funding, community based projects and efforts that better hold perpetrators accountable.”\(^{36}\) In 2012, the ABA then supported the inclusion of the tribal provisions within VAWA, expanding tribal criminal jurisdiction to non-Indian offenders for gender-based violence.\(^{37}\)

Unfortunately, VAWA 2013 only expanded tribal criminal jurisdiction over non-Indian offenders for the crimes of domestic violence, dating violence, and the violation of protection orders. The ILOC Report recommendations, however, would extend tribal criminal jurisdiction over non-Indians to cover a more broad range of criminal actions, including, most importantly, the crimes of sexual violence, which were regrettably not included in the initial VAWA 2013 expansion of tribal criminal jurisdiction.

Furthermore, the Commission draws special attention to Alaska Natives, who were excluded from the protections provided in Title IX of VAWA, including most disturbingly, the ability to enforce a tribal civil protection order. The Commission specifically calls for this reprehensible exclusion to be repealed.\(^{38}\) Similarly, the Commission calls for equality in the tools that are provided to tribes in order to more effectively and competently address gender-based violence in all of Indian country.\(^{39}\)

\(^{33}\) Id. at 15.

\(^{34}\) See ABA Recommendation, Report No. 115 (Feb. 2010) (urging Congress to re-authorize and fully fund VAWA); ABA Commission on Domestic Violence and Commission on Immigration, Recommendation, Report No. 109 (Aug. 2008) (urging federal, state, and tribal governments to strengthen protection and assistance for victims of gender-based violence); ABA Section of Criminal Justice, Recommendation, Volume 103 (Feb. 1978) (supporting efforts to combat family violence).

\(^{35}\) See note 24.


\(^{37}\) ABA Recommendation, Report No. 301 (Aug. 2012) (urging Congress to strengthen tribal jurisdiction to address crimes of gender-based violence on tribal lands that are committed by non-Indian perpetrators who have specific ties to the tribe, while ensuring that due process rights are provided).

\(^{38}\) ILOC Recommendation 2.4, calling for Congress to permit Alaska Native communities and their courts to address domestic violence and sexual assault, committed by Tribal members and non-Natives.

\(^{39}\) These include equal funding as compared to states for law enforcement (ILOC Recommendation 3.1); require the U.S. Department of Justice to provide reservation-level victimization data in its annual reports to Congress (ILOC Recommendation 3.2); entitle tribal prosecutors to Law Enforcement Sensitive information that federal prosecutors currently receive (ILOC Recommendation 3.3); encourage federal officials to serve as witnesses in tribal court (ILOC Recommendation 3.4); encourage U.S. District courts to provide more judicial services in and near Indian country (ILOC Recommendation 3.6); encourage agreements between sovereigns to provide notice when a tribal citizen is reentering tribal lands from jail or prison (ILOC Recommendation 4.4 and 5.2); and condition state grants on State or local governments entering into agreements to provide criminal offenders’ history records with tribes (ILOC Recommendation 4.5).
Particular Needs of Alaska Natives

The Commission specifically highlights the unique needs of tribes within the State of Alaska. Alaska Natives represent 229 of the 566 federally recognized tribes in the country. However, most Alaska Native communities, meaning half of tribes generally, lack regular access to police, courts, and related services. At least 75 communities lack any law enforcement presence whatsoever. Alaska Natives are subsequently disproportionately affected by crime. The Commission found that due to the State of Alaska’s centralized criminal justice system and to outdated conceptions of tribal sovereignty, Alaska Native regions suffer from a dramatic under-provision of criminal justice services.

The Commission therefore makes several Alaska-specific recommendations. First, Congress should take legislative action to ensure that Alaska Native lands are treated as Indian country, like most other tribal land in the United States. Secondly, the Commission recommends that Alaska Native tribal governments enjoy the same inherent criminal jurisdiction as other tribes in the lower 48 states, including the ability to opt out of the current Indian country criminal jurisdiction scheme. These changes would allow tribes to locally and immediately attend to violence and criminal activity.

While the ABA has not enacted policy specific to Alaska Natives, the ABA has repeatedly identified Alaska Natives as distinct peoples in possession of inherent sovereignty. In synchrony with ABA support for tribal sovereignty, the ABA has been a long-time advocate for local justice generally. In 2012, the ABA called for support, including tribal support, to address the decline in the number of attorneys practicing in rural America. In 2011, the ABA drew attention to the devastating financial burden on local and state courts due to the recession, stating that “[s]trong, effective, and independent justice systems are a core element of our democracy.” Bringing local justice to Alaska Natives is the necessary next step.

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40 ILOC REPORT, 35.
41 Id. at 39.
42 Id. at 41 (noting that Alaska Native women are over-represented in the domestic violence victim population by 250 percent; Alaska Natives were 2.5 times more likely to die by homicide than non-Native Alaskans; and that Alaska Natives’ representation in the Alaska prison and jail population is twice their representation in the general population).
43 Id. at 43 (noting that the Alaska State government is more centralized than any other U.S. state).
44 ILOC Recommendations 2.1, 2.2, and 2.3.
45 ILOC Recommendations 2.4 and 2.5.
46 See ABA, Recommendation, Report No. 108B (Feb. 2006) (supporting federal recognition for a native Hawaiian governing entity by arguing for Hawaiian self-determination and self-governance at least equal to that which Alaska Native governments possess under the Constitution to govern and provide for the health, safety, and welfare of their members). See also ABA, Recommendation, Report. No. 103C (2004) (identifying the United States trust responsibility to Indians to include obligations to Alaska Natives).
47 See note 22.
Due Process Protections Are Prioritized

In assessing the effectiveness of criminal justice in Indian country, the Commission examined the Indian Civil Rights Act. Tribes, as distinct sovereigns, are not bound by the due process protections guaranteed by the Bill of Rights. Rather, tribes are bound by the Indian Civil Rights Act (ICRA). ICRA requires due process protections similar to, but not exactly the same as the Bill of Rights. These protections include the free exercise of religion, free speech, press, and the right to assemble, a right against double jeopardy, and the right to a speedy trial. However, the ICRA does not require the right to a jury trial in civil cases, or, at least for tribes that have not adopted TLOA’s enhanced sentencing provisions, the right of indigent defendants to appointed counsel in criminal cases.

The ICRA has recently undergone several amendments that have included substantial due process protection additions. The ABA has expressed explicit support for all of these added due process protections for defendants in tribal court. However, in recommending that tribes should have the choice to opt out of the current criminal jurisdictional maze, the Commission notes that this opt-out should “be based on the understanding that the Tribal government must also immediately afford all individuals charged with a crime with civil rights protections equivalent to those guaranteed by the U.S. Constitution, subject to full Federal judicial appellate review.” Essentially, in what is described as the “great bargain,” the Commission recommends that in exchange for full territorial criminal jurisdiction, tribes should be held to the same due process standards as federal and state courts, despite not having been members of the Constitutional Convention.

This leap in due process accountability extends far beyond current ABA policy that supports tribal criminal jurisdiction under ICRA. Moreover, it is not only in line with American civil rights law for federal and state courts, but it is also in line with numerous ABA policies.

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51 ICRA, 25 U.S.C. § 1302(a)(1), (3), and (6).
52 In order for tribes to sentence a criminal defendant to a term of imprisonment longer than one year, up to three years, a tribal court must (1) provide the defendant the right to counsel at least equal to that guaranteed by the Constitution; (2) provide indigent defendants licensed defense counsel; (3) require that the presiding judge is licensed and has sufficient legal training; (4) ensure the criminal laws are made publicly available; and (5) maintain a record of the criminal proceeding. ICRA, 25 U.S.C. § 1302(c), as amended by the TLOA of 2010, Public L. No. 111-211. In order for tribes to prosecute a non-Indian defendant for domestic violence, dating violence, or the violation of protection order, the tribal court, in addition to the added due process protections required above, must additionally provide (1) the right to a trial by an impartial jury that reflects a fair cross section of the community and does not systematically exclude any distinctive group, and (2) all other rights whose protection is necessary under the Constitution. ICRA, 25 U.S.C. § 1304(d), as amended by VAWA of 2013, Pub. L. No. 113-4, tit. IX, § 904.
53 See Letter to House Representatives, from Thomas Susman, Director of the Governmental Affairs Office of the ABA (July 20, 2010) (urging all House Representatives to vote YES for Senate Amendments to H.R. 725 (TLOA) see note 37). Also see ABA Recommendation, Report No. 301 (Aug. 2012) (urging Congress to extend tribal criminal jurisdiction to non-Indian perpetrators, so long as the defendants are provided the due process protections required by TLOA, and are provided a right to a jury trial that reflects a fair cross section of the community and does not systematically exclude any distinctive group.).
54 ILOC Recommendation 1.1
55 See note 37.
supporting indigent defense, well trained judges, prosecutors, and defense counsel, appellate
review of sentences, access to a speedy trial, access to a jury trial, and so forth.\textsuperscript{56}

Need for Consistent and Equal Funding

The Commission makes alarming findings regarding the funding of tribal justice systems. Indian
country data in 2010 show a need for at least 2,991 additional law enforcement officers—a 50
percent staffing shortfall.\textsuperscript{57} Federal investment in tribal justice systems under state criminal
jurisdiction has been even more limited than elsewhere in Indian country.\textsuperscript{58} The Commission
recommends that Congress should direct funds for Indian country law enforcement, and that
these funds should be made equally available to all tribes, regardless of their jurisdictional
nuances.\textsuperscript{59}

The Department of Justice has become a major funder of Indian country criminal justice
infrastructure, in addition to the Department of Interior. However, their use of short-term,
competitive grants for specific activities is not a good match for Indian country’s needs.\textsuperscript{60}
Further, the Department of Justice and the Department of Interior do not appear to coordinate
their funding efforts, creating costly duplication, confusion, and wasteful outcomes.\textsuperscript{61} The
Commission recommends that tribal justice system funding should be consolidated, that
competitive grants should be substituted for recurring base funding, and that the Indian Tribal
Justice Act of 1993 should finally be funded.\textsuperscript{62}

The ABA has provided explicit support for adequate tribal justice system funding.\textsuperscript{63} In the
ABA’s 2008 resolution supporting adequate funding for tribal justice systems, the report
specifically noted that

\begin{quote}
Since Congress enacted the Indian Tribal Justice Act in 1993, the needs of tribal court systems have
continued to increase, but there has been no corresponding increase in funding for tribal court systems. In
fact, the Bureau of Indian Affairs funding for tribal courts has actually decreased substantially since the
Indian Tribal Justice Act was enacted in 1993.\textsuperscript{64}
\end{quote}

This specific support for funding in Indian country is in addition to the ABA’s long-standing
support for the need for consistent and reliable justice system funding generally.\textsuperscript{65}

\textsuperscript{56} See ABA, \textit{STANDARDS FOR CRIMINAL JUSTICE, 3RD ED.: PROSECUTION FUNCTION AND DEFENSE FUNCTION} (1993);
\textsuperscript{57} ILOC REPORT 67.
\textsuperscript{58} ILOC REPORT, 69.
\textsuperscript{59} ILOC Recommendation 71.
\textsuperscript{60} ILOC REPORT, 83. The Commission found that the competitive nature of grant writing often excluded tribes with
fewer resources, was too inconsistent to be relied upon, and did not allow tribes the freedom to determine their own
spending priorities.
\textsuperscript{61} ILOC REPORT, 85.
\textsuperscript{62} ILOC Recommendations 3.8, 3.9, and 3.10.
\textsuperscript{63} ABA Section of Individual Rights and Responsibilities, Coalition for Justice, and National Native American Bar
justice by ensuring adequate, stable, long-term funding for tribal justice systems).
\textsuperscript{64} Id. at 5-6.
\textsuperscript{65} ABA, \textit{Recommendation, Report No. 302 17} (2011) (urging state, territorial, and local governments to recognize
their constitutional responsibilities to fund their justice systems adequately).
Alternatives to Incarceration

Like other aspects of American criminal justice, the Commission found a need for new and updated detention facilities in Indian country, while also finding unique opportunities for alternatives to incarceration. The Commission called for increased resources for reentry, second-chance, and alternative to incarceration programs, “in the same way [Congress] does for State governments.” The ILOC Report highlights both the “considerable amount of data demonstrat[ing] the effectiveness of some alternatives to detention” as well as the “strong similarity between alternative sentencing and tribes’ traditional approaches to justice—which, ... focus on making reparations, healing victims and offenders, and restoring community.”

The ABA has an extensive policy collection supporting alternatives to incarceration. In 2004, the ABA urged states, territories, and the federal government to ensure that sentencing systems provide appropriate punishment without over-reliance on incarceration as a criminal sanction. This included that alternatives to incarceration be provided when offenders pose minimal risk to the community and appear likely to benefit from rehabilitation efforts. In 2007, the ABA furthered this resolve, urging governments to develop, implement, and fund programs that enable an offender to be placed under community supervisions, including sentencing/diversion options, community-based treatment, and in-patient treatment. Also in 2007, the ABA supported policies and programs that use targeted evidence-based programs that provide juveniles family-focused, and strength-based early intervention and pre-court prevention services and treatment, including programs provided by tribal governments. The ABA has continued this support for more and more alternatives to incarceration programming.

Juvenile Justice

The Federal court system has no juvenile division, yet Native youth are disproportionately incarcerated in the Federal system. Between 1999 and 2008, 43-60 percent of juveniles held in Federal custody were American Indian. While those numbers are staggering, the added context of frequent declinations from U.S. Attorneys means there are even more Native youth who receive no form of intervention from the state or federal systems. The jurisdictional maze is even more troubling in the juvenile context, given that Native youth in the Federal adult system are not receiving any classroom teaching or other educational instruction or services.

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66 ILOC Recommendation 5.1.
67 ILOC REPORT, 129.
68 Id. at 131.
73 ILOC REPORT, 155.
74 Id. at 151.
75 Id. at 155. See also note 7.
76 ILOC REPORT, 156.
The Commission’s recommendation that tribes be empowered to opt out of this jurisdictional maze would allow for a meaningful intervention. For juveniles that remain in the federal and state systems, the Commission recommends that tribes at least be able to find and communicate with these youths. Finally, like adults, the Commission recommends that governments should seek to provide alternatives to incarceration for youth, and that all youths should be provided trauma-informed screening and care.

The ABA has made similar findings. In 2013, the ABA supported the implementation of the December 2012 Report of the U.S. Attorney General’s National Task Force on Children’s Exposure to Violence. That report highlighted the importance of early and culturally-competent interventions with youths in the juvenile justice system. Among its 56 recommendations, the Attorney General’s Task Force recommended trauma-informed youth screening, consideration of a child’s ethno-cultural background, and the importance of utilizing juvenile facilities. The ABA resolution notes

Thousands of youths are tried as adults and held in adult prisons every year in the United States. But adult prisons are not appropriately equipped to address the safety or needs of juvenile offenders. Youth in adult prisons are significantly more likely to commit suicide and are five times as likely to be sexually abused or raped compared to a juvenile facility.

Due to the particular issues facing American Indian and Alaska Native youth, the Task Force was compelled to recommend that a distinct federal task force or commission be established to examine the needs of American Indian/Alaska Native children exposed to violence. In direct response to this recommendation, Attorney General Eric Holder announced the creation of the Attorney General’s Task Force on American Indian and Alaska Native Children Exposed to Violence. The Task Force will conduct four hearings, with the fourth and final hearing scheduled for Anchorage, AK on June 11-12, 2014. The Advisory Committee on American Indian Alaska Native Children Exposed to Violence will issue a final report to the Attorney General presenting its findings and comprehensive policy recommendations in the fall of 2014.

Also in 2013, the ABA passed a resolution urging legislation for increased programming for youth in the juvenile justice system with co-occurring mental health and substance abuse disorders. The resolution notes that as opposed to centralized systems, young people with co-

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77 ILOC Recommendation 6.1.
78 ILOC Recommendation 6.2 (recommending that tribes have the right to consent with U.S. Attorneys before Federal criminal charges against any juvenile is filed); and ILOC Recommendation 6.5 (recommending that state and federal juvenile justice systems be required to maintain records of which youths are tribal members).
79 ILOC Recommendation 6.7.
83 Id., Recommendation 1.2.
85 See www.justice.gov/defendingchildhood/aian.html.
occurring disorders require “locally-accessed treatment” that “avoids the costly and potentially detrimental effect of removing a juvenile from family and community to provide access to more comprehensive treatment...”87 Like its support for due process, the ABA has extensive policy supporting meaningful and culturally-appropriate intervention, support, and under-reliance on incarceration for juveniles.88

Conclusion

The recommendations of the ILOC Report regarding justice in Indian country seek to make Native America safer and more just, as well as to save taxpayers’ money by replacing outdated and top-down bureaucracies with locally based approaches. These approaches align with ABA policy that has long stood for both robust civil rights and meaningful tribal self-determination. These recommendations address ills that have afflicted Indian country for over 200 years. It is incumbent that we enable tribal governments to provide justice in their own communities in order to address the disproportionate amount of violence occurring in Indian country today.

Respectfully Submitted,

Mark I. Schickman
Chair, Section of Individual Rights and Responsibilities

James Felman and Cynthia Orr, Chairs
Criminal Justice Section

Mary Smith
President, National Native American Bar Association

February 2015

87 Id. at 5.
88 See ABA Recommendation, Report No. 104D (2011) (urging the use of electronic monitoring for juvenile offenders); ABA Recommendation, Report No. 107A (2011) (urging school official to discourage inappropriate referral of youths to the juvenile justice system and inappropriate use of expulsion and out-of-school suspension); and ABA Recommendation, Report No. 105B (2011) (urging the federal government to cut funding to any detention facility that does not protect the life, health, safety, and human dignity of its prisoners, or facilitate prisoners’ successful reintegration into their communities).
1. **Summary of Resolution(s).**

This Resolution urges the United States Administration, the United States Congress, state governments, and tribal governments to promptly implement all the recommendations contained in the Indian Law and Order Commission's November 2013 Report to the President and Congress of the United States, entitled *A Roadmap for Making Native America Safer*, and urges the American Bar Association to work with governmental entities, law schools, bar associations, and legal service providers to promote improvements to criminal justice in Indian country, and help implement and promote the recommendations proposed in the Commission’s Report.

2. **Approval by Submitting Entity.**

The Council of the Section of Individual Rights and Responsibilities approved the filing of this Resolution and Report on November 8, 2014.

The Council of the Criminal Justice Section approved the filing of this Resolution and Report on October 22, 2014.

The Board of the National Native American Bar Association approved the filing of this Resolution and Report on November 20, 2014.

3. **Has this or a similar resolution been submitted to the House or Board previously?**

No.

4. **What existing Association policies are relevant to this resolution and how would they be affected by its adoption?**

Although this Resolution will not affect any existing ABA policies, it is consistent with and builds upon: the ABA’s history of supporting tribal justice systems as the primary and most appropriate institutions for maintaining order in tribal communities; the ABA’s...
history of supporting legislation addressing domestic, sexual and stalking violence; the
ABA’s identification of Alaska Natives as distinct peoples in possession of inherent
sovereignty; ABA policy that supports tribal criminal jurisdiction under the Indian Civil
Rights Act; the ABA’s explicit support for adequate tribal justice system funding; the
ABA’s extensive policy supporting alternatives to incarceration; and the ABA’s
extensive policy supporting meaningful and culturally-appropriate intervention, support,
and under-reliance on incarceration for juveniles.

5. If this is a late report, what urgency exists which requires action at this meeting of the
House?

The report is not late filed, but the Resolution should be considered at the 2015 Midyear
meeting because many of the recommendations made by the Indian Law and Order
Commission in its report are directly aligned with policies previously approved by the
ABA’s House of Delegates and prompt implementation of the forty recommendations
would serve as a signal of their importance.

6. Status of Legislation. (If applicable)

There is no relevant legislation pending.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the
House of Delegates.

The sponsoring entities will work with the ABA’s Governmental Affairs Office to
actively engage in federal and state legislative activities related to this issue.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

There are no known conflicts of interest.

10. Referrals.

By copy of this form, the Resolution and Report will be referred to the following entities:

Section of Administrative Law and Regulatory Practice
Section of Business Law
Section of Family Law
Section of Litigation
Section of State and Local Government Law
Government and Public Sector Lawyers Division
Judicial Division
Law Practice Division
Law Student Division
Senior Lawyers Division
Solo, Small Firm and General Practice Division
Young Lawyers Division
Center for Racial and Ethnic Diversity
Commission on Law and Aging
Commission on Disability Rights
Commission on Racial and Ethnic Diversity in the Profession
Commission on Women in the Profession
Native American Bar Association

11. Contact Name and Address Information. (Prior to the meeting)

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12. **Contact Name and Address Information.** (Who will present the report to the House?)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges the United States Administration, the United States Congress, state governments, and tribal governments to promptly implement all the recommendations contained in the Indian Law and Order Commission’s November 2013 Report to the President and Congress of the United States, entitled *A Roadmap for Making Native America Safer*, and urges the American Bar Association to work with governmental entities, law schools, bar associations, and legal service providers to promote improvements to criminal justice in Indian country, and help implement and promote the recommendations proposed in the Commission’s Report.

2. Summary of the Issue that the Resolution Addresses

In July 2010, the Indian Law and Order Commission, an independent national advisory commission, was created as part of the Tribal Law and Order Act ("TLOA") of 2010. The Commission was extended by the Violence Against Women Reauthorization Act of 2013. The Commission was charged with conducting a comprehensive study of law enforcement and criminal justice in tribal communities, including criminal jurisdiction, the tribal jail and Federal prisons systems, tribal and federal juvenile justice systems, and the impact of the Indian Civil Rights Act on tribes, defendants, and the overall tribal criminal system.

As part of that comprehensive study, the Commission was charged with assessing justice in Indian country and developing long-term recommendations on necessary modifications and improvements to justice systems at the tribal, federal, and state levels. In November 2013, after months of hearings and listening sessions around the country, the Indian Law and Order Commission’s findings and recommendations were released as a single report, entitled *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States* ("ILOC Report"). The ILOC Report contains six chapters, addressing: (1) Jurisdiction; (2) Reforming Justice for Alaska Natives; (3) Strengthening Tribal Justice; (4) Intergovernmental Cooperation (5) Detention and Alternatives; and (6) Juvenile Justice.

3. Please Explain How the Proposed Policy Position will address the issue

This Resolution will encourage Congress, as well as state, local, and tribal governments, to promptly implement all the recommendations offered in the Indian Law and Order Commission’s 2013 Report, which should directly lead to improvements in criminal justice in Indian country.

4. Summary of Minority Views

No minority views or opposition have been identified at this time.
RESOLVED, That the American Bar Association urges the United States Congress to enact legislation that supports the following principles regarding consumer data privacy:

1. Individual Control: Consumers have a right to exercise control over what personal data companies collect from them and how they use it.

2. Transparency: Consumers have a right to easily understandable and accessible information about privacy and security practices.

3. Respect for Context: Consumers have a right to expect that companies will collect, use, and disclose personal data in ways that are consistent with the context in which consumers provide the data.

4. Security: Consumers have a right to secure and responsible handling of personal data.

5. Access and Accuracy: Consumers have a right to access and correct personal data in usable formats, in a manner that is appropriate to the sensitivity of the data and the risk of adverse consequences to consumers if the data is inaccurate.

6. Focused Collection: Consumers have a right to reasonable limits on the personal data that companies collect and retain.

7. Accountability: Consumers have a right to have personal data handled by companies with appropriate measures in place to assure they adhere to the Consumer Privacy Bill of Rights.

FURTHER RESOLVED, That the American Bar Association urges state, local, territorial and tribal governments to enact legislation, regulations and practices that are consistent with and supportive of these principles.
1. Introduction

American consumers are exposed to data privacy violations through gaps in the coverage offered by federal consumer privacy law in the United States. The law is comprised of sector-specific statutes, leaving some areas of consumer privacy well-protected and others entirely exposed. Some statutes protect types of consumer data – for example, certain types of health data and credit data. Other statutes protect types of consumers – for example, children under the age of 13 and students. Some federal privacy statutes overlap in their protections, and some privacy statutes cover only a tiny fraction of consumer interactions. The methods of enforcement and the means of redress vary across the statutes, depriving consumers of a consistent baseline of privacy protections.

While other countries have dedicated data privacy commissions, the United States lacks even a core set of data privacy rules with which businesses must comply. In response to this void, the White House proposed in 2012 a Consumer Privacy Bill of Rights (“CPBR”), based on the widely known Fair Information Practices ("FIPs"). FIPs appear in various privacy laws and frameworks, such as the Organization for Economic Cooperation and Development (OECD) Privacy Guidelines, the Privacy Act of 1974, and the European Commission’s recent Data Protection Regulation and the Federal Trade Commission’s reports.

The CPBR is the most significant formulation of the FIPs in the United States. The CPBR is a comprehensive framework that lists seven substantive privacy protections for consumers: Individual Control, Transparency, Respect for Context, Security, Access and Accuracy, Focused Collection, Accountability. When the CPBR was first published, the White House stated that the executive would:

work to advance these principles and work with Congress to put them into law. With this Consumer Privacy Bill of Rights, we offer to the world a dynamic model of how to offer strong privacy protection and enable ongoing innovation in new information technologies.

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2 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, available at http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html.
3 Privacy Act of 1974, 5 USC § 552a.
6 Id.
7 CPBR Report, Introduction.
By enacting the CPBR and making it into law, Congress could ensure that the personal data of consumers is protected throughout the data’s lifecycle. More importantly, Congress could put in place the baseline privacy standards that are widely recognized around the world and necessary to protect the interests of consumers.

2. Data Privacy Statutes in the United States

Data privacy law in the United States is a patchwork of sector-specific statutes. There is no general federal privacy legislation; instead, specific types of data are subject to one or more federal statutes. These statutes are briefly summarized below.

A. The Children’s Online Privacy Protection Act

The Children’s Online Privacy Protection Act8 (“COPPA”) took effect in April 2000. COPPA specifically protects the privacy of children under the age of 13.9 COPPA requires that website operators acquire verifiable parental consent prior to collection of personal information from a child under the age of 13. It also gives parents the right to revoke consent and have children’s information deleted.10 The Act requires that website operators incorporate detailed privacy policies that describe the information collected from users, disclosure to parents of any information collected on their children by the website, limits to the collection of personal information when a child participates in online games or contests, and a general requirement to protect the confidentiality, security, and integrity of any personal information that is collected online from children.11 COPPA focuses on a narrow segment of consumers, limiting the scope to children under the age of 13. It does not protect children aged 13-17.

B. The Health Insurance Portability and Accountability Act

The Health Insurance Portability and Accountability Act12 (“HIPAA”) was passed in August 1996 with the goals of increasing efficiency in health care delivery and increasing health coverage insurance among Americans.13 The Act itself is split into three main sections including “portability provisions,” “tax provisions,” and “administrative simplification provisions.”14 The HIPAA Privacy Rule15 is found in the administrative simplification section, and it focuses on protecting the “electronic transmission of health information.”16

HIPAA serves as the floor for health data protection in that it does not supersede more protective State laws.17 Within the Act, “protected health information” is defined broadly to

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14 Id.
16 Id.
17 http://epic.org/privacy/medical/
include individually identifiable health information related to past, present, or future payments for providing health care to individuals. The Rule establishes a federal mandate for individual rights in health information, imposes restrictions on uses and disclosures of individually identifiable health information, and provides for civil and criminal penalties for violations.

Complementary to the Privacy Rule is the HIPAA Security Rule that provides standards for protection of health information in electronic form. This Rule lays out the technical security standards that health care providers must implement to ensure the protection of protected health information.

C. The Telephone Consumer Protection Act

The Telephone Consumer Protection Act of 1991 ("TCPA") provides certain prohibitions and regulations, addresses specific aspects of telemarketing and authorizes the FTC to issue Telemarketing Sales Rules, and gives the FCC authority to collect complaints and institute enforcement actions against violators. Among other provisions, the TCPA provides certain prohibitions and regulations on commercial telemarketing. The TCPA requires that telemarketers include accurate date, time, and sending telephone number information in the margin of the message of all commercial facsimile messages. TCPA also creates a private right of action allowing individuals, businesses, and state officials to bring a case in court where telemarketers knowingly or willfully violated the Act.

D. The Video Privacy Protection Act

The Video Privacy Protection Act of 1988 ("VPPA") was passed in response to the disclosure of a Supreme Court nominee's video rental records, and was amended in 2011 due to pressure from online video companies, like Netflix. The Act in its original form prevents the disclosure of personally identifiable rental records unless one of the following occurs: (1) consumer consents, or (2) police officers obtain a warrant or court order. The Act further empowers consumers to opt out of their information being sold or used for marketing, and it requires that video stores destroy rental records within a year of account termination. The Act provides civil remedies, including possible punitive damages and attorney's fees, not less than $2,500.

19 Id.
21 Id.
23 Id.
27 Id.
E. The Drivers Privacy Protection Act

The Drivers Privacy Protection Act of 199431 ("DPPA") was enacted to protect the privacy of personal information assembled by State Departments of Motor Vehicles ("DMVs"). It prohibits the release or use of any personal information about an individual obtained by the State DMVs in connection with a motor vehicle record. It sets penalties for violations and makes violators liable for a civil action to be brought by the individuals whose information was released.

The DPPA was passed in response to a number of murder, robbery, and stalking cases where the criminals used information pulled from individuals' DMV records to commit the crimes.32 Congress amended the law to give drivers additional privacy protections in 1999.33 This amendment, known at the Shelby Amendment, changed the DPPA to require that states obtain a driver's express consent before releasing any personal information, regardless of whether the request is made for a particular individual's information or in bulk for marketing purposes.34

The purpose of the DPPA is to limit the use of a DMV record to certain purposes.35 These limits include: legitimate government agency functions, use in matters of motor vehicle safety, insurance activities, motor vehicle market research and surveys, notice for impounded vehicles, and use in connection with a civil, criminal, administrative, or arbitral proceeding.36 DMV information may also be used in research activities and statistical reports, so long as personal information is not disclosed or used to contact individuals.37 In certain other enumerated circumstances, DMV information can be released with the express consent of the individual.38

Like the other statutes listed in this section, the DPPA provides a floor for protection and is of very limited scope as it only applies to DMV records.

F. The Gramm-Leach-Bliley Act

The Gramm-Leach-Bliley Act39 ("GLBA"), also known as the Financial Services Modernization Act of 1999,40 provides limited privacy protections against the sale of private financial information. The GLBA permitted the merger of banks, brokerage companies, and insurance companies, all of which used to be separate entities.41 These mergers led to privacy

33 Id.
34 Id.
36 Id.
37 Id.
38 Id.
40 Id.
41 See EPIC: Gramm-Leach-Bliley Act, https://epic.org/privacy/glba/
risks because these new amalgamated financial institutions would have access to a vast trove of personal data.\textsuperscript{42} 

The GLBA’s privacy protections only regulate financial institutions, which are defined as “businesses engaged in banking, insuring, stocks and bonds, financial advice, and investing.”\textsuperscript{43} The GLBA requires that these institutions develop security measures to protect consumer information, provide notice to consumers of their information sharing policies, and give consumers the right to opt out of this information sharing.\textsuperscript{44} The GLBA also prohibits disclosing access codes or account numbers to any non-affiliated party for marketing purposes; however, consumers have no right under the GLBA to stop financial institutions from sharing nonpublic personal information among affiliates.\textsuperscript{45}

However, the GLBA’s protections are limited in scope and application. First, the burden is still placed on consumers to opt out of policies they do not wish to apply to them.\textsuperscript{46} Second, consumers have no control over how their information is shared among affiliates.\textsuperscript{47} Third, the notices of information practices required under the GLBA are too confusing for many consumers to understand how their records are kept.\textsuperscript{48} Finally, the GLBA lacks significant enforcement or compensation mechanisms.\textsuperscript{49}

**F. The Fair Credit Reporting Act**

The Fair Credit Reporting Act\textsuperscript{50} (“FCRA”) was enacted in 1970 to promote accuracy, fairness, and the privacy of personal information assembled by credit reporting agencies. Credit reporting agencies collect information and assemble reports on individuals, and sell them to businesses like credit card companies, banks, employers, and landlords.\textsuperscript{51} These reports are used by the businesses to evaluate the creditworthiness of individuals. The FCRA requires credit reporting agencies to follow “reasonable procedures” to assure the confidentiality, accuracy, and relevance of credit information.\textsuperscript{52} The FCRA was amended in 1996, and again in 2003, both times including a number of improvements to credit reporting law.\textsuperscript{53}

The FCRA limits who can access individuals’ credit reports and protects consumers by giving them a right to correct inaccurate information and providing procedures to report and recover from identity theft.\textsuperscript{54} However, the scope of the Act is limited to credit reporting agencies, and consumers continue to be largely ignorant of the collection and use of their data. For instance, consumers are not notified when adverse actions occur on their account or when

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\textsuperscript{42} Id.
\textsuperscript{48} Id.
\textsuperscript{51} https://www.epic.org/privacy/fcra/
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
inquiries are made on their account. Further, FCRA established an opt-out standard for credit prescreening, although the opt-out standard has been widely recognized as an ineffective form of privacy protection. Finally, consumers cannot access their entire file, including the names of sources of negative information. Overall, FCRA is too limited in scope to provide the broader consumer privacy protections that are necessary in the digital age.

3. Overview of Fair Information Practices

A. The HEW Report and the Privacy Act of 1974

The Fair Information Practices are proscriptive rules that have been broadly accepted as the guidelines for the way that consumer information should be treated in the electronic marketplace. The FIPS were first articulated in a 1973 report drafted by an advisory committee from the Department of Health, Education, and Welfare. The report, entitled *Records, Computers and the Rights of Citizens*, predicted the rise of computers in recordkeeping. The report cautioned that any institution that keeps records on individuals must safeguard the rights of each individual to his or her information. The HEW Report noted:

An individual's personal privacy is directly affected by the kind of disclosure and use made of identifiable information about him in a record. A record containing information about an individual in identifiable form must, therefore, be governed by procedures that afford the individual a right to participate in deciding what the content of the record will be, and what disclosure and use will be made of the identifiable information in it. Any recording, disclosure, and use of identifiable personal information not governed by such procedures must be proscribed as an unfair information practice unless such recording, disclosure or use is specifically authorized by law.

55 Id.
56 Id. See also Paul M. Schwartz & Joel R. Reidenberg, Data Privacy Law: A Study of United States Data Protection 329-30 (1996) ("The industry itself recommends the use of only vague notices that do not offer meaningful disclosure of practices."); Privacy Rights Clearinghouse Second Annual Report 21 (1995), cited in Jerry Kang, Information Privacy in Cyberspace Transactions, 50 STAN. L. REV. 1193, 1253 n.255 (1998) ("Many consumers are unaware of personal information collection and marketing practices. They are misinformed about the scope of existing privacy law, and generally believe there are far more safeguards than actually exist").
57 Id.
60 Id.
61 Id. at 40-41.
The HEW Report recommended that institutions should adhere to a set of core principles in furtherance of this philosophy. They called these core principles the "Code of Fair Information Practices."62

The Code consisted of five tenets:

- There must be no personal-data record-keeping systems whose very existence is secret.
- There must be a way for an individual to find out what information about him is in a record and how it is used.
- There must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent.
- There must be a way for an individual to correct or amend a record of identifiable information about him.
- Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take reasonable precautions to prevent misuse of the data.63

The next year, these principles were incorporated into the Privacy Act of 1974.64 The Privacy Act implemented the FIPs in federal executive agencies that kept "systems of records" about individuals.65 Under the Privacy Act, an individual has many of the rights — and federal agencies have many of the obligations - outlined in the HEW Report. For example, the individual has the right to access any records an agency maintains on that individual;66 the agency is restricted from disseminating records on individuals except under limited circumstances;67 the agency must keep accurate accounts of when and to whom it has disclosed personal records, to promote accountability and facilitate auditing;68 the agency must maintain in its records only the minimum amount of information "relevant and necessary" to accomplish its purposes;69 the agency is restricted from sharing information about individuals with other agencies except under limited circumstances;70 and the individual has a means of redress.71

B. The Federal Trade Commission and the Consumer

While other statutes have incorporated the FIPs since the passage of the Privacy Act in 1974,72 these statutes governed only administrative agency behavior. The FIPs were not

62 Id. at 41.
63 Id.
65 Id. at § 552a(a)(8)(A)(i).
66 Id. at § 552a(d).
67 Id. at § 552a(b).
68 Id. at § 552a(c).
69 Id. at § 552a(e)(1).
70 Id. at § 552a(e)(1).
71 Id. at § 552a(g).
72
specifically recommended as a set of baseline consumer protections for American businesses until the FTC’s 1998 report to Congress, Privacy Online. In that report, the Commission identified “five core principles of privacy protection: (1) Notice/Awareness; (2) Choice/Consent; (3) Access/Participation; (4) Integrity/Security; and (5) Enforcement/Redress.” In a follow-up report to Congress in 2000, the Federal Trade Commission formally recommended that commercial websites that collect personal identifying information from or about consumers online should be required to comply with “the four widely-accepted fair information practices.” These four practices were Notice, Choice, Access, and Security. The FTC’s analysis of these four practices is excerpted below.

1. Notice

“[T]he Notice principle states that consumers should be given clear and conspicuous notice of an entity’s information practices before any personal information is collected from them, including: identification of the entity collecting the data, the uses to which the data will be put, and the recipients of the data; the nature of the data collected and the means by which it is collected; whether provision of the requested data is voluntary or required; and the steps taken by the data collector to ensure the confidentiality, integrity and quality of the data. Notice, then, requires more than simply making an isolated statement about a particular information practice.”

2. Choice

“The Choice principle relates to giving consumers options as to how any personal information collected from them may be used for purposes beyond those necessary to complete a contemplated transaction. Under the Choice principle, data collectors must afford consumers an opportunity to consent to secondary uses of their personal information, such as the placement of consumers names on a list for marketing additional products or the transfer of personal information to entities other than the data collector.”

3. Access

“The third core principle, Access, refers to an individual’s ability both to access data about him or herself i.e., to view the data in an entity’s files and to contest that data’s accuracy and completeness. Access is essential to improving the accuracy of data collected, which benefits both data collectors who rely on such data, and consumers who might otherwise be harmed by adverse decisions based on incorrect data. It also makes data collectors accountable to consumers for the information they collect and maintain about consumers, and enables consumers to confirm that Web sites are following their stated practices.”

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74 Id. at 7.
75 2000 FTC Report.
76 Id. at 14.
77 Id. at 15. It is worth noting again that opt-out has been proven ineffective as an assessment of consumers’ preferences. See footnote 56, supra.
4. Security

"The fourth fair information practice principle, Security, refers to a data collector's obligation to protect personal information against unauthorized access, use, or disclosure, and against loss or destruction. Security involves both managerial and technical measures to provide such protections. The Commission believes that Security, like Access, presents unique implementation issues and that the security provided by a Web site should be adequate in light of the costs and benefits." 79

IV. The Role of the Consumer Privacy Bill of Rights

If enacted, the Consumer Privacy Bill of Rights would provide a foundation of privacy rights for online consumers. It would codify an expanded version of the FIPs, incorporating several practices that initially appeared in the HEW Report, and several other practices that appear in other countries' data protection mandates. The CPBR, attached, is composed of seven core practices:

1. **Individual Control**: Consumers have a right to exercise control over what personal data companies collect from them and how they use it.

2. **Transparency**: Consumers have a right to easily understandable and accessible information about privacy and security practices.

3. **Respect for Context**: Consumers have a right to expect that companies will collect, use, and disclose personal data in ways that are consistent with the context in which consumers provide the data.

4. **Security**: Consumers have a right to secure and responsible handling of personal data.

5. **Access and Accuracy**: Consumers have a right to access and correct personal data in usable formats, in a manner that is appropriate to the sensitivity of the data and the risk of adverse consequences to consumers if the data is inaccurate.

6. **Focused Collection**: Consumers have a right to reasonable limits on the personal data that companies collect and retain.

7. **Accountability**: Consumers have a right to have personal data handled by companies with appropriate measures in place to assure they adhere to the Consumer Privacy Bill of Rights.

The White House Report stated, "Congress should act to protect consumers from violations of the rights defined in the Administration's proposed Consumer Privacy Bill of Rights. These rights provide clear protection for consumers and define rules of the road for the rapidly growing marketplace for personal data. The legislation should permit the FTC and State Attorneys General to enforce these rights directly. The legislation will need to state companies'
VI. CONCLUSION

The Consumer Privacy Bill of Rights would not supercede the existing sector-specific laws. Instead, it would provide a set of protections for all consumer interactions on the internet, some of which are already encoded in federal consumer privacy legislation. Enactment of the CPBR would strengthen the existing federal statutes. Those statutes would provide an extra layer of protection for the types of data and the types of consumers that Congress has designated as particularly important.

This floor of protections will ensure that consumers will be granted not only the basic fair information rights established more than 40 years ago in the United States but never enacted, but also the confidence that arises from a consistent, uniform articulation of those rights.

Respectfully Submitted,

Mark I. Schickman, Chair
ABA Section of Individual Rights and Responsibilities
February 2015

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80 CPBR, footnote 1, supra.
1. Summary of Resolution(s).

This Resolution urges the United States Congress to enact legislation that supports the principles set forth in the Consumer Privacy Bill of Rights contained in the 2012 White House Report *Consumer Data Privacy In a Networked World* and urges state, local, territorial and tribal governments to enact legislation, regulations and practices that are consistent with and supportive of these principles.

2. Approval by Submitting Entity.

The filing of this Resolution and Report was approved by the Council of the Section of Individual Rights and Responsibilities on November 8, 2014.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

Although this Resolution will not affect any existing ABA policies, it is consistent with and builds upon ABA policy adopted in 1992 on the Use of Information in Electronic Form, which “[s]upport[ed] actions designed to facilitate and promote the orderly development of legal standards to: . . . encourage the use of appropriate and properly implemented security techniques, procedures and practices to assure authenticity of information in electronic form.”

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

The report is not late filed, but the Resolution should be considered at the 2015 Midyear meeting because, as is evident from the growing number of sector-specific statutes addressing data privacy law, there is an increasing need for general federal privacy legislation to provide a floor of protections that will ensure a consistent and uniform articulation of data privacy rights.

6. Status of Legislation. (If applicable)

There is no relevant legislation pending.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The sponsoring entity, subject to consultation with the ABA’s Governmental Affairs Office and with its assistance, plans on sending copies of the Resolution and the report to the Judicial Conference of the United States and to similar U.S. state judicial conferences, as well as to the American and Federal Judges Association and to similar U.S. state bodies.

8. Cost to the Association. (Both direct and indirect costs)

There are no known costs to the Association.

9. Disclosure of Interest. (If applicable)

There are no known conflicts of interest.

10. Referrals.

By copy of this form, the Resolution will be referred to the following entities:

- Section of Administrative Law and Regulatory Practice
- Section of Business Law
- Criminal Justice Section
- Section of Litigation
- Section of State and Local Government Law
- Government and Public Sector Lawyers Division
- Judicial Division
- Law Practice Division
- Law Student Division
- Senior Lawyers Division
- Solo, Small Firm and General Practice Division
- Young Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges the United States Congress to enact legislation that supports the principles set forth in the Consumer Privacy Bill of Rights contained in the 2012 White House Report *Consumer Data Privacy In a Networked World* and urges state, local, territorial and tribal governments to enact legislation, regulations and practices that are consistent with and supportive of these principles.

2. Summary of the Issue that the Resolution Addresses

American consumers are exposed to data privacy violations through gaps in the coverage offered by federal consumer privacy law in the United States. The law is comprised of sector-specific statutes, leaving some areas of consumer privacy well-protected and others entirely exposed. The methods of enforcement and the means of redress vary across the statutes, depriving consumers of a consistent baseline of privacy protections.

While other countries have dedicated data privacy commissions, the United States lacks even a core set of data privacy rules with which businesses must comply. In response to this void, the White House proposed in 2012 a Consumer Privacy Bill of Rights ("CPBR"), based on the widely known Fair Information Practices ("FIPs"). Despite being articulated as long ago as 1973, the FIPs have not been incorporated into legislation that addresses baseline consumer protections directed at American businesses. To date, the FIPs have been incorporated only into statutes that address administrative agency behavior, leaving the United States without a general floor of privacy protection for consumers.

The CPBR is the most significant formulation of the FIPs in the United States. It provides a comprehensive framework that lists seven substantive privacy protections for consumers: Individual Control, Transparency, Respect for Context, Security, Access and Accuracy, Focused Collection, Accountability.

3. Please Explain How the Proposed Policy Position will address the issue

By enacting the CPBR and making it into law, Congress could ensure that the personal data of consumers is protected throughout the data’s lifecycle. More importantly, Congress could put in place the baseline privacy standards that are widely recognized around the world and necessary to protect the interests of consumers. This Resolution will encourage Congress, as well as state, local, territorial and tribal governments, to enact legislation that establishes a floor of consumer privacy protections and thus enables a consistent and uniform articulation of data privacy rights within the United States.

4. Summary of Minority Views

No minority views or opposition have been identified at this time.
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal
governments to continue to enforce and to enact rules or legislation that strengthen consumer
protections regarding deceptive or fraudulent loan foreclosure rescue practices;

FURTHER RESOLVED, That the American Bar Association supports ongoing efforts of state
courts and lawyer disciplinary agencies to investigate allegations of deceptive or fraudulent loan
foreclosure rescue practices by lawyers and, when appropriate, to prosecute and discipline law-
yers who commit this type of misconduct;

FURTHER RESOLVED, That the American Bar Association supports programs by federal,
state, local, territorial, and tribal bar associations to educate lawyers and consumers about decept-
tive or fraudulent foreclosure rescue practices, including those involving lawyers.
REPORT

In response to the economic downturn and foreclosure crisis, companies have formed and thrived by offering services to struggling homeowners. Services are generally called mortgage assistance relief services which have been defined as any service, plan, or program, offered or provided to the consumer in exchange for consideration, that is represented, expressly or implied to assist or attempt to assist the consumer with negotiating, obtaining, or arranging a modification of any term of a dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments or fees. The offered services vary but have generally fit into one of four categories: loan modifications, foreclosure rescue, forensic audits or mass joinder suits. Almost all derivations of these services have seen accompanying scams that follow one model: they make promises, collect money and offer little, if any, meaningful assistance to homeowners who are in desperate financial circumstances and vulnerable to schemes to save their homes.

In a traditional loan modification scam a person or company will offer to negotiate with the homeowner's lender to favorably change the original terms of the mortgage. These individuals or companies generally collect an up-front fee, often ranging from $1,500 to $3,000. The loan modification scams have advanced and deviated as some companies have created fraudulent documents which are being sent to the homeowner which purport to approve the homeowner for a modification. The letter will approve the homeowner for a lower monthly payment and give instructions as to where to send future payment. The payments are not going to the lender as the homeowner believes, but rather are being routed to the scammer. Therefore, the homeowners are unknowingly not paying their mortgage and are therefore at risk of losing their home. Many times after months of inaction, the homeowner will end up negotiating their own modification after being frustrated with the loan modification company.

The typical foreclosure rescue scam targets homeowners who are in default of their mortgage by offering to help save their home from foreclosure for a fee. The most prevalent version of the foreclosure rescue scam is a lease buyback agreement. In this scam the homeowner will transfer the deed of their property to the foreclosure consultant in order to save the home from foreclosure. In return, the foreclosure consultant will allow the homeowner to remain living in the property under a lease agreement. The arrangement as it is explained to the homeowner is that the rent will go towards their eventual repurchase of the property. However, this generally ends with the homeowner losing all rights to the property as the rent is either set at a price that the homeowner cannot afford or the buy-back price is set far above the current fair market value. Often, the homeowner does not

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1 16 C.F.R. § 322.2(I)(2), recodified as 12 C.F.R. § 1015.2

realize that they are transferring their interest in the property due to the promises of the foreclosure consultant coupled with the dire situation of the homeowner.

Another frequent scam is the purported offer to join a mass joinder suit whereby so-called specialized law firms are sending direct mail solicitations to desperate homeowners urging them to join in a lawsuit against their lender with other individuals who are similarly situated. The promise is that this is an effective way to obtain a loan modification or stop the foreclosure process. The firms collect advance fees to join the suit, which range from a couple thousand dollars to up to $10,000.

The last major scam is the offering of forensic audits. Individuals or companies offer to perform a forensic audit, complete with a report for a couple hundred dollars upfront. These companies tout the training and expertise of their forensic auditor and sometimes claim that a forensic attorney will complete the review. The homeowner is told that the forensic auditor will review the homeowner’s mortgage documents to determine whether their lender complied with state and federal laws. The companies suggest that if noncompliance is found then the use of the forensic audit report will allow the homeowner to either, obtain a loan modification, reduce their principal balance, stop foreclosure or eliminate their entire mortgage. In 2010, the Federal Trade Commission and its law enforcement partners issued an advisory to homeowners stating that there is no evidence that a forensic audit will assist a homeowner in obtaining a loan modification or any other foreclosure relief.3

ABA RESPONSE TO PREDATORY MORTGAGE LENDING PRACTICES

In 2002, the ABA took a measured stand against predatory mortgage lending. The policy noted and warned against lending practices that we now know pervaded the subprime lending market, and the effects of which are now felt far beyond the individual predatory loans. The nation faces unprecedented foreclosures and broader economic consequences. Unfortunately, in the midst of the foreclosure crisis, certain actors, including some lawyers, are exploiting families’ economic stress and desire to stay in their homes by engaging in mortgage assistance rescue scams.

The 2002 ABA policy resolved to urge Congress to “enact uniform national legislation that, without reducing access to legitimate home mortgage loans for consumers, provides objective standards to define and curb lending practices that are abusive, deceptive, or fraudulent” and to urge “national, state, and local bar associations to establish and support bar programs to educate consumers about and protect them from practices that are abusive, deceptive, or fraudulent.” In support of the resolution, the ABA’s report specifically noted practices such as:

- lending without regard to a borrower’s ability to repay,
• flipping, i.e. refinancing without any net tangible benefit to the borrower,
• packing unnecessary and excessive fees into the loan amount, and
• outright fraud and abuse.

The report warned of the devastating impacts of such practices on individual borrowers, as well as neighborhoods and cities, since such predatory loans tended to increase the likelihood of foreclosures.

ABA activity underway at that time to protect consumers included the project “SafeBorrowing.org,” an initiative of the ABA Business Law Section to help consumers get information about how to avoid predatory mortgage loans. The report concluded that because predatory lending was an issue of national concern, and the lack of federal legislation combined with the fact that “problems associated with predatory lending involve the victimization of underserved populations such as elderly and minority borrowers,” it was necessary for the ABA to lend support to protect consumers.

Since the passage of the 2002 resolution and report, there is confirmation in the ABA’s prescience of the scope and consequences of predatory mortgage lending practices. There is also now state and national legislation that seeks to address them.

Data available about the mortgage market show the widespread presence of the practices noted in the 2002 report. For example, in regards to making loans without regards to a borrower’s ability to repay, from 2000 to 2005 the number of subprime loans without full documentation grew from 26% in 2000 to 44% in 2005. As an example of packing excessive and unnecessary fees into the loan amount was the pervasive use of yield spread premiums (YSPs), which were extra payments lenders paid to brokers for putting borrowers into more expensive loans. While YSPs did not increase the cost of the loan in the form of actual fees, their presence created brokers’ economic incentive to drive up the loan cost. YSPs resulted in borrowers paying up to $3,000 more for a loan. More than 90% of subprime loans carried YSPs. Borrowers were locked into these higher cost loans due to prepayment penalties that discouraged or prohibited affordable refinancing. Inside Mortgage Finance found that 67% of subprime loans securitized from 2005–2007 had prepayment penalties.


As predicted by the 2002 ABA resolution, these practices typically, and often disproportionately, impacted financially vulnerable populations—elderly, borrowers of color, and lower-income consumers. An analysis of the subprime lending market found that borrowers 65 and older have five times greater odds of receiving a subprime loan than borrowers younger than 35.7 Nationally, there was frequent incidence of racially disparate pricing: African-Americans and Latinos received higher interest, riskier loans even when their credit risks were identical to whites.8 Although predatory lending disproportionately impacts borrowers and communities of color, the Community Reinvestment Act is not to blame. Over 94% of subprime loans that caused the subprime meltdown were not counted under the CRA, and the majority of subprime loans did not go to minorities.9

The United States has experienced an unprecedented number of foreclosures since the time of the ABA’s predatory lending policy. As noted in 2002, the impact of foreclosures reaches far beyond the families’ losing their homes, with costs spilling over to neighbors and communities as a whole. Among homeowners who received loans between 2004 and 2008, 2.7 million (6.4%) had already lost their home due to foreclosure as of February 2011.10 An estimated additional 3.6 million (8.3%) were still at risk of losing their homes.11 The great majority of homes lost were owner-occupied, as are those at imminent risk of being lost. Foreclosure patterns are closely linked with patterns of risky lending. Foreclosure rates are consistently worse for borrowers with high-risk loan products such as loans with prepayment penalties and ARMs.

The effort to stem the tide of these foreclosures has been multi-pronged, such as federal, state, and local government responses for foreclosure prevention12 and neighborhood sta-
The response also includes mobilization within the legal community to provide pro bono representation to families facing foreclosure or to serve as judges in special foreclosure proceedings. In February 2012, 49 state attorneys general reached a nationwide settlement with the five largest mortgage servicers to address abuses such as signing foreclosure documents en masse. Despite these efforts, foreclosures far outpace loan modifications that could help prevent unnecessary foreclosures.

See generally, National Mortgage Settlement, www.nationalmortgagesettlement.com
Outreach and Regulation

The spread of mortgage assistance relief scams has led to various educational efforts for consumers and lawyers by both state and federal government agencies, as well as educational and enforcement efforts by both state and federal government agencies. The Department of Treasury in partnership with Housing and Urban Development, Fannie Mae, Freddie Mac and NeighborWorks created the Homeowner's Hope hotline (888-995-HOPE, which provides free foreclosure assistance and housing counselor services. By offering free assistance to homeowners, the government is providing homeowners an alternative to hiring for-profit companies to assist them with their mortgage. Additional data, to support enforcement actions as well as education and outreach, were necessary to combat the mortgage related scam epidemic, therefore, the Lawyers' Committee for Civil Rights Under Law collaborated with non-profit and government agencies to form the Loan Modification Scam Prevention Network (LMSPN). The LMSPN leads a large scale complaint gathering process and mobilization of pro bono legal resources in a national campaign to support federal, state and local efforts to stop scammers. Their efforts include a national complaint and data collection network, empowering local organizations, increased private and public enforcement actions, and public education. From 2010 to March 2014, the LMSPN compiled over 40,000 complaints into the national Loan Modification Scam database managed by the Lawyers’ Committee with total reported losses of $90 million from homeowners.16

Due to the economic climate and prevalence of mortgage rescue scams many states and the federal government prohibit the collection of upfront fees in exchange for mortgage rescue services. However, many states have included attorney exemptions from the statutory limitations. The attorney exemptions vary but generally allow for attorneys to offer mortgage rescue services or loan modifications if the work is done in their normal course of business, meaning that if the lawyer is only offering foreclosure rescue or loan modifications then the exemption would not apply. The purpose of the attorney exemption was to allow attorneys representing clients in bankruptcy or foreclosure to not be subject to mortgage rescue services laws. Generally, the statutory limitations include a ban on upfront fees. When attorneys offer these services, under the exemption they are permitted to collect the upfront fees so long as they place the fees in their client trust account and withdraw the funds only as fees are earned.17


17 Furthermore, in 2010 the Federal Trade Commission “FTC” enacted the Mortgage Assistance Relief Services “MARS” (16 C.F.R. Part 322) advance fee ban. As of January 31, 2011, companies that offer to help homeowners get their loans modified or sell them other mortgage assistance relief services are no longer allowed to charge up-front fees. Federal Trade Commission, Mortgage Assistance Relief Services Advance Fee Ban Takes Effect, http://www.ftc.gov/opa/2011/02/mars.shtm (Feb. 10, 2011). Under the rule, a mortgage
Enforcement

In addition to statutory provisions, enforcement efforts have increased. The CFPB filed its first ever civil enforcement action in Federal court in July of 2012. According to the complaint filed by the CFPB, a lawyer and his law firm lured distressed homeowners to pay upfront fees by promising to obtain loan modifications.\(^\text{18}\) Additionally, the law firm created a bifurcated business model that involved a fee-based forensic audit coupled with pro bono legal services in an effort to avoid the laws that prohibit advance fees and deception by mortgage relief operations\(^\text{19}\). In the end, the homeowners were provided with little to no assistance. Lastly, the complaint alleges that the law firm used consumers’ last dollars to fund their own lavish lifestyles which included cars, expensive dinners and visits to nightclubs.\(^\text{20}\)

Due to the economic downturn, some lawyers as well as foreclosure consultant are attempting to create successful businesses based on offering services to struggling homeowners. Often times the attorneys are approached by the foreclosure consultants who propose a business model that they suggest will be widely successful by offering loan modifications, short sales or other foreclosure related services on behalf of distressed homeowners. Like the distressed homeowners who are tempted by scams that promise to

\(\text{Id.} \) Attorneys are generally exempt from the rule, if the mortgage assistance relief services are offered as part of the practice of law, the attorney is licensed in the state where the consumer or home is located, and complies with state laws and regulations governing attorney conduct.\(^\text{Id.}\) To be exempt from the advance fee ban, attorneys must also place any collected advance fees into a client trust account and abide by applicable rules of professional conduct and other laws regarding such accounts. \(^\text{Id.}\) The FTC MARS rule has been recodified with the Consumer Fraud Protection Bureau “CFPB” as the Mortgage Assistance Relief Services (Regulation O, 12 CFR 1015). Although the MARS rule places restrictions on attorneys offering mortgage assistance relief, there has not been a complete ban. Therefore, some attorneys are continuing to offer such services to distressed homeowners. There is evidence that some foreclosure consultants are partnering with attorneys in an effort to avoid the statutory prohibition on collecting fees prior to services being rendered.

\(^\text{18}\) Consumer Financial Protection Bureau v. Chance Edward Gordon, et al. (Filed in United States District Court, Central District of California on Jul. 18, 2012)

\(^\text{19}\) \(\text{Id.}\)

help them save their homes, some attorneys are also being lured by a seemingly lucrative business model. When lawyers partner or collaborate with non-lawyer foreclosure consultants they risk violating applicable professional conduct rules, including, but not limited to jurisdictional equivalents of Rules 5.4 (Professional Independence of Lawyers), 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), 7.2(b) Advertising) and 8.4 (Misconduct) of the ABA Model Rules of Professional Conduct. Lawyers who individually offer services should similarly take care to comport their conduct to applicable rules and laws, including the rules of professional conduct.

Due to the numerous ethical risks associated with mortgage rescue services a number of attorneys have faced discipline, including the loss of their law license due to their involvement with mortgage rescue businesses. The Office of Chief Trial Counsel (OCTC) in California created a task force in February of 2009 to address the problem of attorneys being involved in mortgage rescue scams. Between 2009 and 2012, the OCTC has received a total of 11,449 complaints regarding loan modifications with 8,724 of those being formally investigated. The OCTC has pursued disciplinary charges related to loan modification services in approximately 1,344 cases that involved roughly 169 licensed California attorneys. Of those cases, approximately 959 cases have resulted in discipline, involving 114 attorneys, and 292 cases have resulted in disbarment, involving 22 attorneys. As of September 2012, there were 371 cases involving 64 attorneys which

21 Martha Niel, ABA Journal, “Tempted by Foreclosure Crisis, Some Lawyers Overcharge and Underpay,” (Oct. 2009), (noting that the Florida Bar received 100 complaints in a six months’ time concerning lawyers involved in loan modifications and the state attorney general’s office got 756 complaints, up from 61 complaints the year before. The California State Bar made public the names of 16 attorneys accused of misconduct concerning loan modification matters.)

22 Id.

23 E-mail from Laura Ernde, Acting Communications Director for the State Bar of California, to Erin McCarthy Naylor, Maryland Director of Mortgage Fraud, California Loan Modification Fraud Stats (Sep. 19, 2012).

24 Id.

25 Id.
are pending before the State Bar Court with another 335 matters, involving 145 attorneys, under active investigation by the OCTC.

As described above, some lawyers have engaged in deceitful and unlawful practices when offering foreclosure rescue or loan modification services. Lawyers who collaborate with non-lawyer foreclosure consultants risk having their law license used by the consultant as a stamp of legitimacy as well as a way for the consultant to evade the statutory limitations on the collection of upfront fees. By marketing to consumers that an attorney is participating in the business, the consultants are able to request a higher fee. The Lawyers’ Committee found that when an attorney is involved in the offered services, the average loss per homeowner is $3,601, higher than the average loss reported in complaints that do not involve attorneys ($2,871). Analysis of complaints in the database also indicates these costs are greater for certain groups: Hispanics on average lost $4,020 when an attorney is alleged to be involved, followed by Asians with an average loss of $3,792, followed by African Americans with an average loss of $3,079 and lastly Caucasian with an average loss of $2,826.

More troubling is the increase of attorney involvement in mortgage rescue cases over the last three years. According to the data collected by LMSPN, complaints of rescue scams involving attorneys has risen every year since 2010, and by 2013, attorney-involved complaints were a shocking 59% of all complaints received. A number of state bars and lawyer disciplinary agencies have developed and post online ethics alerts for lawyers to help lawyers recognize fraudulent schemes when they are approached by non-lawyer consultants. Those jurisdictions, include, but are not limited to Florida, Illinois, California and Washington State.

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26 Id.


Respectfully Submitted,

Mark I. Schickman, Chair
Section of Individual Rights and Responsibilities

Theodore W. Small, Jr., Chair
Commission on Homelessness and Poverty

Christopher A. Zampogna, President
The Bar Association of the District of Columbia

Stephanie Powers Skaff, President
Bar Association of San Francisco

February 2015
GENERAL INFORMATION FORM

Submitting Entities: Section of Individual Rights and Responsibilities
The Bar Association of the District of Columbia
Bar Association of San Francisco
Commission on Homelessness and Poverty

Submitted By: Mark I. Schickman, Chair
Section of Individual Rights and Responsibilities

Christopher A. Zampogna, President
The Bar Association of the District of Columbia

Stephanie Powers Skaff, President
Bar Association of San Francisco

Theodore W. Small, Jr., Chair
Commission on Homelessness and Poverty

1. Summary of Resolution(s).

The Resolution urges federal, state, local, territorial and tribal governments to continue to enforce and enact rules or legislation that strengthen consumer protections regarding deceptive or fraudulent loan foreclosure rescue practices; supports ongoing efforts of state courts and lawyer disciplinary agencies to investigate allegations of deceptive or fraudulent loan foreclosure rescue practices by lawyers and, when appropriate, to prosecute and discipline lawyers who commit this type of misconduct; and encourages national, state, local, territorial, and tribal bar associations to establish and support programs to educate lawyers and consumers about deceptive or fraudulent foreclosure rescue practices, including those involving lawyers.

2. Approval by Submitting Entity.

The Council of the Section of Individual Rights and Responsibilities approved the filing of this Resolution and Report on November 8, 2014.

The Board of The Bar Association of the District of Columbia approved the filing of this Resolution and Report on November 19, 2014.

The Board of the Bar Association of San Francisco approved the filing of this Resolution and Report on November 19, 2014.

The Commission on Homelessness and Poverty approved the filing of this Resolution and Report on November 14, 2014.
3. Has this or a similar resolution been submitted to the House or Board previously?

An earlier version of this resolution was filed for the August 2014 House of Delegates meeting but was withdrawn by the sponsors to allow time to discuss proposed changes offered by other ABA entities.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

This recommendation is consistent with and builds upon existing ABA policy adopted in 2002 that resolved to urge Congress to “enact uniform national legislation that, without reducing access to legitimate home mortgage loans for consumers, provides objective standards to define and curb lending practices that are abusive, deceptive, or fraudulent” and to urge “national, state, and local bar associations to establish and support bar programs to educate consumers about and protect them from practices that are abusive, deceptive, or fraudulent.” The 2002 policy warned against lending practices which we now know pervaded the subprime lending market, and the effects of which are now felt far beyond the individual predatory loans.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

In January 2014, Senate Commerce Committee Chairman John D. (Jay) Rockefeller IV began an investigation of several companies that offer consumer mortgage modification services and that have been the subject of a substantial number of consumer complaints. In his letters requesting information from the companies, the Chairman pointed out that despite ongoing vigorous efforts by enforcement agencies in this area, consumer complaints remain high regarding false and deceptive practices by foreclosure rescue companies, and recent reports indicate that companies are engaging in increasingly complex schemes to elude enforcement actions.

In Fall 2014, Chairman Rockefeller plans to hold Congressional hearings on the issue of fraudulent mortgage loan modification practices. Adoption of the proposed resolution will enable the ABA to participate in these and future proceedings.

6. Status of Legislation. (If applicable)

None pending, however, the U.S. Congress and several states are investigating the proliferation of fraudulent mortgage loan scams. On July 23, 2014, the Consumer Financial Protection Bureau (CFPB), the Federal Trade Commission (FTC), and 15 states announced a sweep against foreclosure relief scammers that used deceptive marketing tactics to defraud distressed homeowners across the country. The Bureau is filing three lawsuits against companies and individuals that collected more than $25 million in illegal advance fees for services that falsely promised to prevent foreclosures or renegotiate troubled mortgages. The CFPB is seeking compensation for victims, civil fines, and injunctions against the scammers. Separately, the FTC is filing six lawsuits, and the states are taking 32 actions.
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

The sponsoring entities will work with the ABA Governmental Affairs Office to actively engage in federal and state legislative activities related to this issue.

8. **Cost to the Association.** (Both direct and indirect costs)

There are no known costs to the Association.

9. **Disclosure of Interest.** (If applicable)

There are no known conflicts of interest.

10. **Referrals.** By copy of this form, the Resolution will be referred to the following entities:
- Section of Administrative Law and Regulatory Practice
- Section of Business Law
- Criminal Justice Section
- Section of Litigation
- Section of Real Property, Trust and Estate Law
- Section of State and Local Government Law
- Forum on Affordable Housing & Community Development Law
- Judicial Division
- Law Practice Division
- Law Student Division
- Senior Lawyers Division
- Solo, Small Firm and General Practice Division
- Young Lawyers Division
- Center for Racial and Ethnic Diversity
- Commission on Law and Aging
- Commission on Disability Rights
- Commission on Racial and Ethnic Diversity in the Profession
- Commission on Women in the Profession
- Standing Committee on Ethics and Professional Responsibility
- Standing Committee on Lawyers’ Professional Liability
- Standing Committee on Professional Discipline
- Hispanic National Bar Association
- National Asian Pacific American Bar Association
- National Association of Bar Executives
- National Bar Association Inc.
- National Conference of Bar Presidents
- National Native American Bar Association
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution urges federal, state, local, territorial and tribal governments to continue to enforce and enact rules or legislation that strengthen consumer protections regarding deceptive or fraudulent loan foreclosure rescue practices; supports ongoing efforts of state courts and lawyer disciplinary agencies to investigate allegations of deceptive or fraudulent loan foreclosure rescue practices by lawyers and, when appropriate, to prosecute and discipline lawyers who commit this type of misconduct; and encourages national, state, local, territorial, and tribal bar associations to establish and support programs to educate lawyers and consumers about deceptive or fraudulent foreclosure rescue practices, including those involving lawyers.

2. Summary of the Issue that the Resolution Addresses

In the midst of the current economic turmoil and foreclosure crisis, millions of distressed homeowners have become vulnerable targets to unscrupulous and sometimes criminal third-party scammers posing as "loan modification specialists," an increasing number of whom are lawyers. The alleged "rescuers" employ various scams with disastrous consequences for homeowners: phantom foreclosure counseling, lease-back or repurchase scams, fraudulent refinance, fraudulent loan modification, bankruptcy foreclosure, and reverse mortgage fraud. While waiting for the promised relief, homeowners not only lose their money but often fall deeper into default and lose valuable time.

3. Please Explain How the Proposed Policy Position will address the issue

Since 2010, the Lawyers’ Committee for Civil Rights Under Law and its partners in the Loan Modification Scam Prevention Network (LMSPN) have lead a national complaint and data collection effort to track foreclosure rescue scams. The LMSPN has compiled over 40,000 complaints with total reported losses of $90 million from homeowners. According to the data collected, complaints of rescue scams involving attorneys has risen every year since 2010, and by the end of 2013, attorney-involved complaints were 59% of all complaints received. This percentage continues to climb and is expected to surpass 70% of all complaints by the end of 2014. This resolution will help the ABA and others educate lawyers about the ethical pitfalls of engagement in foreclosure rescue schemes and encourage the enactment and enforcement of rules and legislation to strengthen consumer protections against these fraudulent practices.

4. Summary of Minority Views

No minority views or opposition have been identified.
RESOLVED, That the American Bar Association urges all federal, state, local, and territorial legislative bodies and governmental agencies to:

(a) refrain from enacting Stand Your Ground Laws that eliminate the duty to retreat before using force in self-defense in public spaces, or repeal such existing Stand Your Ground Laws;

(b) eliminate Stand Your Ground Law civil immunity provisions that prevent victims and/or innocent bystanders and their families from seeking compensation and other civil remedies for injuries sustained;

(c) eliminate the Stand Your Ground defense in circumstances where deadly force is used against a law enforcement officer; and

(d) develop strategies for implementing safeguards to prevent racially disparate impact and inconsistent outcomes in the application of Stand Your Ground Laws;

(e) modify existing or proposed Stand Your Ground laws to ensure that the laws do not protect the use of deadly force against a person who is in retreat; and

(f) modify existing or proposed Stand Your Ground laws to ensure that the laws do not protect a person who is the initial aggressor in an encounter.

FURTHER RESOLVED, That the American Bar Association urges that jury instructions be drafted in plain language to enhance clarity and the jurors’ understanding of the applicable Stand Your Ground Laws and their limitations;
FURTHER RESOLVED, that the American Bar Association urges law enforcement agencies to:

(a) develop training materials for officers on best practices for investigating Stand Your Ground cases; and

(b) create or participate in a national database to track Stand Your Ground cases from the investigative stage through prosecution and final disposition;

FURTHER RESOLVED, That the American Bar Association:

(a) implement a national educational campaign to provide accurate information about Stand Your Ground Laws to the general public; and

(b) investigate the impact that gun laws have in Stand Your Ground states.
REPORT

In 2013, the National Task Force on Stand Your Ground Laws was convened by the following American Bar Association entities, to review and analyze the recently enacted Stand Your Ground laws in multiple states and their impact on public safety and the criminal justice system: The Coalition on Racial & Ethnic Justice, the Center for Racial and Ethnic Diversity, the Commission of Racial and Ethnic Diversity in the Profession, Council for Racial and Ethnic Diversity in the Educational Pipeline, the Section on Individual Rights & Responsibilities, the Criminal Justice Section, the Young Lawyer’s Division, the Standing Committee on Gun Violence, and the Commission on Youth at Risk.

The Task Force’s membership includes appointees from those co-sponsoring ABA entities and from strategic partners, including the Association of Prosecuting Attorneys, the National Legal Aid and Defender Association, the Urban Institute, the International Association of Chiefs of Police and the American Psychological Association. Additionally, the Task Force has an Advisory Committee of leading academic and other legal and social science experts as well as victims’ rights advocates.

The National Task Force on Stand Your Ground Laws conducted an expansive investigation of Stand Your Ground laws across the United States. The Task Force explored the broad national landscape of Stand Your Ground laws and how they impact public safety and the criminal justice system. The Task Force analyzed the impact these laws have on an individual’s right of self-defense, as well as a victim’s right to be informed, present, and heard, and a criminal defendant’s right to a fair and just trial. The Preliminary Report & Recommendations further details the Task Force’s investigation, including transcripts and summaries of the testimony received from over 70 witnesses, comprised of policy makers, government officials, state prosecutors and public defenders, private lawyers, legal scholars, victims’ advocates and concerned citizens at the public hearings that were conducted in five regional fora, including a 50 state legal survey of Stand Your Ground laws, and the latest social science data on the efficacy of these laws.

This resolution is based upon the work of that Task force, and the evidence and recommendations contained in its Preliminary Report & Recommendations of the National Task Force on Stand Your Ground Laws, which is accessible online at: http://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_justice/aba_natl_task_force_on_syg_laws_preliminary_report_program_book.authcheckdam.pdf

I. Preliminary Statement

As of 2014, 33 states have Stand Your Ground laws.\(^1\) In these states, an individual has no duty to retreat before using deadly force in self-defense in public. The proposed resolution

\(^1\) Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma,
does not implicate existing self-defense laws relating to the use of force in dwellings, the home, or vehicles. In that regard, all references to “Stand Your Ground” laws are limited in scope to “no duty to retreat” rule in public spaces.

Several empirical studies referenced in this report found that Stand Your Ground laws have no deterrent effect on violent crimes, specifically burglary, robbery, and aggravated assault. They found an increase in homicides in states with Stand Your Ground laws. A marked increase in justified homicides following the enactment of Stand Your Ground laws is a powerful argument for repeal of these laws as proposed by this resolution at issue. Ultimately, the data fails to bear out the crime deterrent/crime-reduction rationale espoused by proponents of Stand Your Ground laws. Rather, the evidence tells a story of mounting problems with the implementation of these laws and unintended, negative implications for racial and ethnic minorities, law enforcement, the criminal justice system and public safety.

The Task Force’s national investigation revealed several important findings: (1) based on recent empirical studies, Stand Your Ground states experienced an increase in homicides; (2) multiple states have attempted to repeal or amend Stand Your Ground laws; (3) the application of Stand Your Ground laws is unpredictable, uneven, and results in racial disparities; (4) an individual’s right to self-defense was sufficiently protected prior to Stand Your Ground laws; and (5) victim’s rights are undermined in states with statutory immunity from criminal prosecution and civil suit related to Stand Your Ground cases.

Perhaps most pressing and relevant to the ABA’s fundamental policy goals is the related problems of routine uneven and overly broad application of Stand Your Ground laws. Consequently, Stand Your Ground laws operate as legitimate threat to the Association’s protection and stewardship of the rule of law. What’s more, by creating additional difficulties for law enforcement, Stand Your Ground laws impede the pursuit of fair and consistent outcomes in self-defense cases. The complex interplay of race and justice is a compelling reason for the ABA to bring its expertise and resources to the dialogue. The clear racial impact of Stand Your Ground laws indicates an increased likelihood of interracial and intraracial tensions and inequitable application of these laws in circumstances involving racial and ethnic minorities. In short, quantitative and qualitative sources question the efficacy of these laws in light of increased recidivism of violent offenders, incidents of violent crime following their passage and statistically significant racial disparities among Stand Your Ground cases. Accordingly, the proposed resolutions seek to adopt policy that is consistent with the established Association goals and objectives set forth in Goal III (preserving racial equality) and Goal IV (promoting the rule of law).

Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.


3 Recent empirical studies discussed here support a preliminary finding that racial disparities exist; one small study, in one state, determined that race was the most significant factor in determining whether a self-defense incident would be labeled as justified, and a larger national study found, that in cases where whites killed blacks it was 281% more likely to be labeled as justified.
A. Defining “Stand Your Ground”

Stand Your Ground laws function as a stark departure from traditional self-defense regimes. Most notably, these laws eliminate the duty to retreat rule in public spaces. Prior to the enactment of Stand Your Ground laws, most states followed the traditional common law self-defense rule, which imposed a duty to retreat before using force in self-defense, if safe retreat was available. The underlying goal of the duty to retreat rule was to reserve the use of force to incidents where there was no other safe alternative to using force.

Under Stand Your Ground law framework, an individual has no duty to retreat prior to using force in self-defense in public spaces, even if a safe route of retreat or escape is available.4 Instead, under Stand Your Ground law, an individual may stand his or her ground and meet force with force, including deadly force. Most Stand Your Ground laws apply the no duty to retreat rule to “anywhere a person has a lawful right to be.” Additionally, some states have statutes that provide immunity from criminal prosecution and civil suit to individuals that use force under Stand Your Ground laws. In states that provide statutory immunity, the immunity is granted or denied by a judge in a pre-trial hearing before the jury hears the case.

B. Current Status of Stand Your Ground Laws


Concerns over the adverse ramifications of the elimination of the duty to retreat in public spaces, such as those highlighted in this Report, coupled with a series of high-profile cases illuminating unanticipated applications of Stand Your Ground laws have led policymakers in at least 10 jurisdictions to explore tempered modifications or outright repeal of Stand Your Ground statutes, including Alabama, Georgia, Indiana, Florida, Kentucky, Louisiana, Michigan, New Hampshire, Pennsylvania and South Carolina. To date, however, no repeal campaign has proved successful. The Preliminary Report & Recommendations provides further detail relating to the numerous movements toward amending certain Stand Your Ground laws.

II. Impact of Stand Your Ground Laws on Combatting Crime

The principal resolution urges the Association to recommend that legislatures refrain from enacting Stand Your Ground Laws, or to repeal existing Stand Your Ground Laws because, as detailed below, empirical evidence shows that states with statutory Stand Your Ground laws

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4 As used here, “Stand Your Ground” laws only concerns whether there is a duty to retreat in public spaces. However, there traditionally is no duty to retreat in the home. This is called the castle doctrine. It is often discussed along with “Stand Your Ground” despite the distinction between public and private spaces.

5 The Preliminary Report & Recommendations contains a listing of the relevant state statutes as well as a more detailed 50 state statute chart detailing the varying scope of each state’s Stand Your Ground law in its References and Resources section.
have not experienced decreased theft, burglary, or assault crimes and have experienced increased homicide rates.

A. Empirical Assessments of Stand Your Ground Laws

The first comprehensive, multi-jurisdictional empirical studies of stand your ground laws have now appeared. While the Task Force expects more studies in the future, the data-based studies of the impact of Stand Your Ground laws that researchers have already completed are instructive, in large part, because states created the current statutes without the benefit of knowing for certain what the impact of the laws would be. Proponents argued that these laws would reduce the rate of serious felonies, particularly homicides. Opponents, however, feared a marked increase in deadly violence. Yet, neither side could rely on solid evidence to support these assertions. Now, with multiple years of data available for analysis, a fact-based picture has emerged. Two studies – one by Chandler McClellan and Erdal Tekin at Georgia State University, the other by Cheng Cheng and Mark Hoeskstra at Texas A&M University – directly contradict the notion that stand your ground laws lead to less violence. A third, by John Roman, Senior Fellow at the Justice Policy Center at the Urban Institute, yields valuable insights into how Stand Your Ground laws may exacerbate existing racial disparities in the criminal justice system. Additionally, a survey of cases by the Tampa Bay Times examines whether the stand your ground laws actually protect law-abiding citizens.

1. Georgia State University Study

Chandler McClellan and Erdal Tekin, two Georgia State University economists, analyzed monthly data from U.S. Vital Statistics records to examine how Stand Your Ground laws impact homicides. The data chosen encompassed mainly firearm related homicides between 2000 and 2009, made available by the National Center for Health Statistics based on death certificates filed in each state. The study focused on firearm related homicides committed by private individuals. Comparing data from different states before and after adoption of Stand Your Ground laws, the study found a significant increase in the homicide rate after the adoption of Stand Your Ground laws. Similar to the limited scope of the proposed resolutions, the study focused its inquiry on states with Stand Your Ground Laws that explicitly extend the right to self-defense with no duty to retreat to “any place where a person has a legal right to be” (i.e., in public).

McClellan and Tekin found that the homicide rate increased among white males. Notably, more white males were being killed per month as a result of Stand Your Ground laws. Numerically, this meant that the homicide rate increased by 7.1 percent overall, but among white males, the rate increased 12.2%, or 8.09 deaths per month.

Interestingly, McClellan & Tekin found that Stand Your Ground laws have “no effect on blacks[.]” Instead, they concluded that Stand Your Ground laws only increase homicides of whites, and in greater number, white males. However, qualitative data from policy makers, law enforcement, legal practitioners, news reports, and those who interact with the criminal justice system on a daily basis contradicts McClellan & Tekin’s findings concerning the lesser impact of

6 John Roman currently serves as a member of the Task Force; however, his studies were completed before the Task Force’s formation or his participation with it.
Stand Your Ground laws on minorities. This data consistently indicates a pervasive concern that racial minorities are more vulnerable to becoming a victim of “misperceived aggression” while unarmed, and ultimately killed in purported self-defense type encounters. Stand Your Ground law operates to insulate the attacker from criminal (or civil) liability. Notwithstanding, the study is thus particularly instructive on the impact of Stand Your Ground Laws on intraracial increases in homicides, which raises important public safety concerns.

2. Texas A&M University Study

Mark Hoekstra, a professor of economics, and Cheng Cheng, a doctoral candidate, both of Texas A&M University, analyzed the impact of Stand Your Ground laws on state-level crime statistics using data obtained from the FBI Uniform Crime Reports from 2000 through 2010. The study queried whether Stand Your Ground laws impacted deterrence and homicide rates. The crimes considered were burglary, robbery, and aggravated assault. Homicides were defined as the sum of murder and non-negligent manslaughter. Using a comparison of effects in states that adopted Stand Your Ground laws versus the effects in states that chose not to adopt such laws, Hoekstra & Cheng study concluded that the laws did not deter crime and, in fact, led to an increase in homicides.

Homicides increased by eight percent, which quantitatively represents 600 additional homicides per year, a statistically significant change. Hoekstra & Cheng also found no deterrent effect on crimes. Hoekstra and Cheng considered possible explanations for this data, including the escalation of violence by criminals, the escalation of violence in otherwise non-lethal conflicts, and an increase in legally justified homicide that is misreported as murder or non-negligent manslaughter. The study noted a minor variation in police classifications of justified homicides, which was not statistically meaningful. Finally, Hoekstra & Cheng suggested that Stand Your Ground laws cause both parties in a conflict to believe that they have the right to shoot, leading to such an escalation of violence. Moreover, the study further found that the increase in homicide rates is connected to the immunity protections in the Stand Your Ground laws that provide a low opportunity cost for exercising deadly force and therefore produce more killings.

3. Urban Institute Study

Dr. John Roman, a Task Force member and Senior Fellow at the Urban Institute, conducted an analysis of how Stand Your Ground laws impact justified homicide rates and whether there are any racial disparities in data measuring justifiable homicide rulings on a national scale. Roman analyzed data from the FBI Supplemental Homicide Reports to conduct a comparative analysis of justified homicide rates from 2005-2010 in Stand Your Ground states and “non-stand your ground” states. Roman specifically isolated the factor of race, which enabled him to readily identify racial disparities in findings of justifiable homicides.

The resulting analysis of the data (see left) indicates statistically significant racial disparities in "non-Stand your ground" states, and increased racial disparities in Stand Your Ground states.

The graph (see right) depicts as its baseline, white on white killings. Thus, although racial disparities in the likelihood of being found to be justified exist, in Stand Your Ground states, the rate is significantly higher, such that a white shooter that kills a black victim is 350% more likely to be found to be justified than if the same shooter killed a white victim.

In short, not only do these empirical studies highlight intraracial increases in homicides among whites, but the substantially decreased rate of exoneration in intraracial black-on-black cases. This demonstrates a systemic devaluation of the use of force in those scenarios and provides preliminary evidence of disparate impact. These studies also show that the racial disparities that already exist in justified homicides in all states are heightened in Stand Your Ground states.
4. **Tampa Bay Times Study**

The *Tampa Bay Times* conducted a study of 235 Stand Your Ground cases, gathering qualitative data from media reports, public records and extensive interviews with prosecutors and defense attorneys. Although the Stand Your Ground statute was designed to permit individuals who were engaged in lawful activity to protect themselves from actual harm, the results of the Times study revealed that Stand Your Ground law was being utilized under circumstances the legislature never expected, benefiting groups the legislative never meant to protect (e.g., habitual violent offenders) and causing large disparities along racial lines in case outcomes.

Interestingly, the *Times* study also revealed an important trend; cases with nearly identical factual circumstances resulted in inconsistent and opposite outcomes. Like the Roman analysis above, the *Times* study also indicated that racial disparities exist in the application of Stand Your Ground laws and that the race of the victim was the most predictive factor in determining the outcome in Florida Stand Your Ground cases. For example, in cases where the victim was white, the suspect claiming self-defense was unlikely to go free. But, in cases in where the victim was black, the suspect claiming self-defense was likely to go free. Specifically, the Times study determined that a defendant in Florida who asserted a Stand Your Ground defense was 73% more likely to achieve dismissal if the victim was black, compared to 59% if the victim was white. Other notable findings include:

- The majority of Stand Your Ground cases are non-deadly cases;
- 60% of the defendants raising the defense had been previously arrested;
- 1 in 3 defendants raising the defense had been previously accused of violent crimes;
- Nearly 70% of individuals that invoke Stand Your Ground receive no punishment;
- Defendants asserting Stand Your Ground are more likely to prevail on the merits if the victim is black;
- Factually similar cases often yield inconsistent results;
- The volume of Stand Your Ground cases drastically increases due to consistent use; and
- 19% of the cases surveyed involved the death of a child or teen and 14% involved young adult victims ages twenty through twenty-one.  

Chris Davis, investigative reporter and editor of the Times study, testified at the Task Force’s Southeast regional hearing that the data the Times’ analyzed was a small pool of data – only 235 cases involving Florida Stand Your Ground law, dating back through its enactment in 2005. Davis also testified that creating an accurate database was challenging in light of the lack of standardized procedure or reporting obligation relating to Stand Your Ground law cases in Florida. The Times study, Davis cautions, although informative, is not conclusive and thus its readers should not draw too many conclusions from it.

**B. Repeat Criminal Defenders**

Supporters of Stand Your Ground laws maintain that these laws afford law-abiding individuals fundamental self-defense rights. A principle legislative purpose of Stand Your

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8 Source: Statewide media, police and court reports [Darla Cameron, *Tampa Bay Times*].
Ground laws is to allow law abiding individuals to defend themselves without the fear of prosecution. Durell Peaden, the former Florida senator who initially sponsored Florida’s Stand Your Ground law, explained that the legislature never intended for people who put themselves in harm’s way to benefit from their use deadly force.

Yet, anecdotal evidence suggests otherwise; it is habitual criminal offenders who are exploiting Stand Your Ground laws to avoid liability for their criminal offenses. On this issue, the Tampa Bay Times study reveals that of the 235 cases it examined, one in three defendants had been previously accused of violent crimes. For example, one defendant successfully invoked Florida’s Stand Your Ground law in connection with drug charges on two separate occasions. Philadelphia District Attorney, R. Seth Williams, explained, “criminals with illegal guns should not be permitted to shoot people on a public street and hide behind self-defense laws. . . . Drug dealers who engage in fire fights in our neighborhoods should not be permitted to escape punishment because they claim they were standing their ground.” In many instances, courts have sanctioned such outcomes as a proper application of Stand Your Ground laws.

In contrast, the broad definition of “unlawful” activity has caused concerns that Stand Your Ground laws unnecessarily exclude legitimate applications simply because of minor violations of criminal statutes or municipal ordinances. Florida Senator Chris Smith explained the rationale behind his legislative efforts to address this issue: “[t]he concern, especially from the immigrant community, and it’s come up in central Florida a lot, is how far do you take that unlawful activity. If you're here as an illegal alien, you're actually involved in unlawful activity so you can't claim "Stand Your Ground." If you're speeding, is that unlawful activity? If your seatbelt is off while you're driving and you defend yourself in the car; is that unlawful activity? It's a very broad term.”

III. Implicit Racial Bias and Stand Your Ground Laws

Implicit racial bias has been identified as a significant factor causing inconsistent outcomes in Stand Your Ground cases. These racial disparities may be reduced or eliminated following exacting amendment, or repeal of Stand Your Ground laws. In addition to the empirical evidence of racial disparities outlined above, existing social psychological research relating to the problems that arise when Stand Your Ground laws are applied in cross-racial situations and anecdotal evidence of the operation of implicit bias in evaluating whether the use of deadly force is appropriate against an individual of a different racial or ethnic group, strongly support the proposed resolutions’ appeal for the development of strategies for implementing safeguards to prevent racially disparate impacts of Stand Your Ground laws.

A. Social Psychological Research of Cross-Racial Situations

Dr. James M. Jones from the University of Delaware, and Dr. Jennifer Eberhardt and Nick Camp, from Stanford University prepared a report for the Task Force entitled Problems that Arise When Stand Your Ground Laws are Applied in Cross-Racial Situations: An Annotated
and Analytical Bibliography of Relevant Social Psychological Research,\(^9\) is excerpted here and referenced in the Preliminary Report & Recommendations.

The above-referenced bibliography identifies psychological mechanisms germane to Stand Your Ground Law and their potential for differential invocation and application across social groups. [Drs. Jones and Eberhardt] argue that the greater leeway Stand Your Ground Laws gives defendants in making decisions of self-defense, the greater the opportunity for biased social influences to govern perception and action. Relevant psychological research shows 1) that basic perceptual and brain processes respond to group differences in ways that bias cognitive and affective judgments; 2) the stereotypical association of Black males with aggression and crime\(^10\) interacts with these basic processes to predispose defendants to perceive Blacks as potential threats; and 3) the reaction to these based perceptions and judgments is characterized by aggression and violence; and 4) thus basic psychological research shows that stand your ground laws provide a recipe for racial bias that undermines both legal and social justice.

1. **Perception of group membership is early and deep**

While the bulk of this bibliography enumerates research at an intermediate level of analysis (\textit{i.e.}, perception, behavior, and judgment) and in the context of particular social groups (\textit{i.e.}, American White and minority groups), psychological science demonstrates that group membership is processed early at a neural level. Indeed, from an age of only three months, infants begin distinguishing and preferentially attending to own-race faces.\(^11\) Differential brain responses to Black and White faces occur as early as 122ms\(^12\) and can be seen in medial temporal regions responsible for basic face perception.\(^13\) In addition to demonstrating the depth of racial identity’s influence on processing, social neuroscience research has shown similar preferential processing for experimentally-defined in groups,\(^14\) suggesting that social groupings perceivers bring to a situation are consequential for neural processing as well as more macroscopic cognition and behavior. These basic mechanisms of intergroup perception combine with learned stereotypes linking minorities to threats, guiding perception, behavior, and judgment.

2. **Stereotypes shape what we see**

Research from perceptual and social psychology has examined how stereotypes linking members of particular social groups to threat can influence every stage of perception, from visual attention to the interpretation of behavior. Taken together, these studies show a consistent pattern of results, demonstrating that Black targets come under increased scrutiny as sources of threat.

\(^9\) Dr. James M. Jones, Dr. Jennifer Eberhardt and Nick Camp, Problems that Arise When Stand Your Ground Laws are Applied in Cross-Racial Situations: An Annotated and Analytical Bibliography of Relevant Social Psychological Research. This report was prepared for the American Bar Association’s National Task Force on Stand Your Ground Laws in collaboration with the American Psychological Association.

\(^10\) Cottrell & Neuberg, 2005; Devine, 1989; Devine & Elliot, 1995

\(^11\) Pascalis et al., 2005

\(^12\) Ito & Urland, 2003

\(^13\) Golby, Gabrieli, Chiào, & Eberhardt, 2001.

and are more likely to have their behavior construed as aggressive, particularly in situations that highlight self-protection as a relevant goal.

3. **Stereotypes shape how we respond**

The research summarized above demonstrates how intergroup processes and social stereotypes influence the perception of minority actors, guiding attention and construal towards the conclusion that a Black target is more likely to pose a threat to one’s safety. What consequences do these perceptions have for behavior “in the moment”? In the following areas, [Drs. Jones and Eberhardt] highlight several lines of research in this area suggesting that the perception of Blacks as threats can translate to diminished empathetic responses, greater hostility, and a tendency to respond violently towards Black targets.

**B. Implicit Racial Bias**

Particularly relevant to the analysis of Stand Your Ground laws is the issue of implicit bias and cultural misperceptions of racial minorities as “more violent” or “more aggressive,” even when exhibiting the same behaviors as Caucasians. Legal scholars have applied implicit bias research regarding cross-cultural fear and perception to the reasonableness prong of the non-Stand Your Ground self-defense statutes and opined that race and racial stereotypes are important public policy considerations when enacting, amending or repealing laws that eliminate one’s “duty to retreat,” like Stand Your Ground statutes.

Testimony from witnesses bears out this concern. Ed Shohat, a criminal defense attorney and member of the Miami-Dade County Community Relations Board, testified that “minority communities are deathly afraid that Stand Your Ground law sits side-by-side with racial profiling; the ticket to vigilante justice.” Further, two experts, psychologist Dr. Jennifer Eberhardt and Professor John Powell, described the importance of how implicit biases impact the application and efficacy of stand your ground laws. Psychologist Dr. Jennifer Eberhardt explained that stand your ground laws give people broad leeway in determining what constitutes a threat, how to act upon those perceived threats, and how that renders blacks vulnerable. She described several studies that explore the association between black and crime and how that association can influence a person’s perception and memory. In one of the studies, simply exposing a person to a black face facilitated that person’s ability to see weapons, regardless of the person’s prejudice level. She described another study that found people were quicker to shoot black men with guns than white men with guns, and if there existed any doubt, would shoot a black person with no gun over a white man with no gun. “In the absence of laws that constrain the use of force in the service of defense . . . blacks are more likely to draw out attention and more likely to be perceived as threatening.”

Professor John Powell testified that a study found the word black was associated with the words “poverty,” “dangerous,” and “lazy”. He explained that these cultural associations impact a person’s perception especially under stress. He also spoke about a study that showed that

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15 Duncan, 1976; Sagar & Scholfield, 1980.
white America has a growing anxiety about race and Stand Your Ground laws are an example of institutionalizing the fear of white Americans.

Moreover, San Francisco District Attorney, George Gascon, and San Francisco Public Defender, Jeff Adachi, both testified that implicit bias plays the most significant role in the troubling outcomes in inter-racial homicide incidents. Professor Fingerhut of Florida International University testified to a similar point in stating that Stand Your Ground laws highlight what separate us . . . no judge will be able to fix that,” eluding to the underlying implicit racial bias at the root of some of the problematic cases. “The law can open door, and break down wall, but it cannot build bridges,” Fingerhut said. He explained that part of the problem is “seeing the other as other.”

IV. Innocent Bystanders & Victims

The statutory immunity provisions of certain Stand Your Ground laws prevent victims from obtaining redress through the criminal justice system and prohibits subsequent civil suit and thus substantially restricts the available remedies, such as compensation, typically available to innocent bystander and other victims.

Several witnesses also spoke to the issue of giving a voice to victims, who are silenced by cases involving Stand Your Ground law: “if I'm attacked and I try to fight to defend myself but lose my life, I will not be able to use the Stand Your Ground defense and no one will be able to hear my complaint.” (Goodwille Pierre, Vice-President, National Bar Association). Stand Your Ground laws often exacerbate the complexity of analyzing who is the victim, particularly in violent altercations which result in fatalities. “Oftentimes the distinction between who is the victim is blurred. And as a defense lawyer, it's something you look forward to in having lax self-defense laws because it makes it easier to defend.” (Eric J. Davis, Assistant Public Defender, Harris County Public Defender’s Office)

V. Inconsistent Outcomes: Judicial & Jury Evaluations of Stand Your Ground Cases

Inconsistent and/or erroneous jury instructions given in Stand Your Ground cases have also raised concerns and even resulted in the grant of a new trial. Are Stand Your Ground laws causing confusion among jurors? One defense attorney testified that the Stand Your Ground law was a “good law” because it removed the “duty to retreat” rule which jurors don’t understand anyway. However, others, including criminal defense attorneys, took issue with placing the complex, factual analysis associated with a Stand Your Ground defense before a sole arbiter:

Traditional self-defense laws at a trial in front of a jury, rather than putting it in front of a judge who has all sorts of competing values, including in this state reelection, to consider when deciding these cases, traditional self-defense laws are more than enough to deal with these issues. — Ed Shohat, criminal defense attorney and Miami-Dade County Community Relations Board representative

To address such issues, courts should uniformly instruct juries regarding limitations of the right to Stand Your Ground, including, but not limited to, that (i) initial aggressors are not entitled to
Stand Your Ground, (ii) the alleged victim may also have a right to stand his or her ground, and (iii) the ability to retreat can be considered in determining whether the use of deadly force was objectively necessary.

Additionally, other witnesses indicated the potential for juror bias in Stand Your Ground cases, due in part to the operation of implicit biases and socialized perceptions of youth, racial and ethnic minorities and women.

Not only have Stand Your Ground laws impacted the province of the jury, but inconsistent outcomes in cases that were factually similar due to divergent judicial rulings provides evidence of judicial confusion over the proper application of these laws. In some jurisdictions, these laws impose upon the judge (as opposed to a jury), the decision making process of whether to grant Stand Your Ground immunity from prosecution. As detailed more fully below, this interpretation has led to varying and inconsistent application by the law enforcement officers, who may alter their investigation based upon a belief that the party using force against another was standing his or her “ground”. Additional results involve prosecutors, who do not file charges if they believe the statute will come into use; and judges, who arrive at radically different decisions in factually-similar cases, causing inconsistencies in the dispensation of justice. The Tampa Bay Times report, in fact, details cases that are nearly identical fact patterns, yet, different judges arrived at opposing decisions, with one defendant receiving immunity, while his counterpart receiving a tough sentence elsewhere. This results in factually similar cases having dramatically different outcomes under the same laws, from jurisdiction to jurisdiction.

C. The Challenges Presented by the Reasonableness Standard & the Perception of Threat

The standard applied in self-defense law, including in Stand Your Ground cases is reasonableness. Although, the individual using the Stand Your Ground defense may have no duty to retreat prior to responding in self-defense, he or she must act reasonably in perceiving the imminence of the threat, the necessity to respond to the threat, and whether the threat is a deadly or non-deadly threat.

Critics of Stand Your Ground laws often point to the lack of an external, objective trigger to justify the use of deadly force. Pennsylvania’s Stand Your Ground law, however, attempts to address the vulnerability of the reasonableness standard by inserting additional objective criteria within its statute. Pennsylvania’s perquisites to asserting a Stand Your Ground defense require a defendant to: (i) be in the public space at issue lawfully, (ii) not be engaged in crime, (iii) observe the attacker visibly display a weapon; and (iii) believe the use of deadly force is necessary to prevent death, kidnapping, serious bodily injury or rape. Pennsylvania policy makers testified that its 2011 Stand Your Ground law constitutes a marked improvement over other states with a “blanket” no duty to retreat in public. Indeed, firearm advocates concur: “I think that those guidelines are better than an extreme lunge to completely eliminating the duty to retreat in all circumstances. And I think they are better than what we had before, and I think they provide a clear focus upon which we can analyze situations of self-defense and by which prosecutors can easily determine cases that simply cannot get protection of Stand Your Ground laws here in Pennsylvania.” (David Green, Firearm Owners Against Violence).
Many argue that the “duty to retreat” obligation placed an unreasonable burden on individuals legitimately acting in self-defense. Proponents of this view often cite to Justice Oliver Wendell Holmes’ articulation of the difficulty imposed under the “duty to retreat” hindsight analysis: “detached reflection cannot be demanded in the presence of an uplifted knife. Therefore, in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.” Brown v. United States, 256 U.S. 335, 343 (1921). As one witness explained, “I recognize that at least one utility of Stand Your Ground laws are that it relieves citizens' hesitancy that may be attended in making a determination of the viability of the withdrawal in the heat of the moment. The prevalent and unfortunate lethality of firearms render withdrawal not viable in many circumstances.”

VI. Impact of Stand Your Ground Laws on Law Enforcement & Public Safety

Police chiefs and prosecutors across the country have opposed Stand Your Ground laws by arguing they undermine fairness in the criminal justice system, place officers at risk and provide a reliable way to avoid liability for criminal acts. Justice mandates that law enforcement and prosecutors closely and carefully assess every deadly force situation without favor toward the either party. Without such objectivity, individuals will view the criminal justice system with skepticism and disenfranchisement.

A. Police Investigation

Stand Your Ground laws have ignited an active debate about the practical enforcement and safety issues its implementation has illuminated. “From a public policy perspective it clouds an administration of justice by removing the instances of investigation when someone is killed and creates an environment of flawed subjective analysis.” (Goodwille Pierre, Vice-President, National Bar Association).

Police officers report varying degrees of confusion regarding how to properly apply Stand Your Ground laws. Most Florida police officers now defer decisions to arrest on Stand Your Ground cases to the prosecutor’s office to make. This may be an unintended consequence of the law, as some Stand Your Ground statutes explicitly state in their language that the police should not vary from normal investigation procedures in Stand Your Ground cases. However, in jurisdictions with immunity from prosecution statutes, “criminal prosecution” is defined to include “detention, arrest, and charging.” This broad definition leaves police officers unsure about when they can and should arrest suspects in addition to how comprehensive of an investigation to make prior to and during an arrest.

Police on the street are unclear when the immunity statute applies and therein the new law impedes their ability to arrest and detain suspects. In some jurisdictions, police officers even stopped investigating shootings involving self-defense claims and instead deferred to the prosecutors make initial charging decisions.\textsuperscript{17} Police officers are frustrated that Stand Your

\textsuperscript{17} Wallace, 2006; Timoney, 2012; Curtis, 2012.
Ground law is being used as a loophole by repeat offenders and is less frequently asserted under factual circumstances intended by the legislators.

B. Police Safety

Law enforcement critiques of Stand Your Ground laws also cite to the differing standards governing the use of deadly force in public by police officers and public servants. Further, law enforcement officials are also concerned that officers will not be able to distinguish between criminals and individuals who are observed with a firearm and likewise for armed individuals to discern police officers in plain clothes. Indeed, as Dr. Jerry Radcliffe testified, “I worry that this is carte blanche for people to say that they are approached by somebody who wasn’t in uniform, shoot first and then maybe have to apologize for it later if they deem to do so. I worry as a former police officer about the safety of police officers. Encouraging untrained individuals to take aggressive deadly force action can lead to more social harm, not less.” For these reasons, both prosecuting attorneys and law enforcement officials raised strong opposition to enacting the Stand Your Ground law in Florida and other jurisdictions.

Others, however, argue that Stand Your Ground laws are necessary to combat the failure of the existing system to hold law enforcement officers accountable for improper use of deadly force: “[t]he charging of police officers is extremely low even though the reasons for providing less scrutiny is [sic] their alleged specialized training. Therefore, we must insure that the police officers are not treated any differently than our citizens in determining justification as we all seek the same result, the protection of ourselves and other innocents.” (Joshua Prince, Firearms law attorney.)

Similarly, while most Stand Your Ground laws do not extend self-defense rights or immunity protections to using deadly force against a police officer, Indiana permits the homeowner to defend against the “unlawful intrusion by another individual or a public servant.” In reaction to the Indiana Supreme Court decision in Barnes v. State, 949 N.E. 2d 572 (2011) (holding an individual does not have the right to resist unlawful entry by the police into his home), the Indiana legislature amended its Stand Your Ground statute to authorize the use of deadly force in self-defense against a police officer attempted to make an unlawful entry into one’s home.

C. Prosecutorial Discretion

Stand Your Ground laws have influence the breadth of prosecutorial discretion. A senior Miami prosecutor testified at the Southeast regional hearing about an unjust homicide case that his office could not charge because Stand Your Ground law made it too hard to prove, but the shooter was not in imminent threat and the victim was in the process of trying to flee when he was shot. This testimony supports the conclusion that Stand Your Ground laws impact

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18 Indiana Code § 35-41-3-2
19 Due to the ruling in Barnes, the amendment to Indiana’s law was enacted in 2012, and triggered the following string of news headlines: “Indiana law lets individuals shoot cops;” “Indiana law lets individuals shoot at police;” “How were the National Rifle Association and Indiana’s “law and order Republicans” able “to get cop-killing legalized?”
prosecutorial discretion. In the Stand Your Ground states that also have statutory immunity from prosecution, prosecutors are also influenced by knowing they may have to “try the case twice,” once at the immunity hearing, and once at the real trial, and therefore are reluctant to prosecute Stand Your Ground cases. Further study and inquiry into the Tampa Bay Times study may reveal why there is such a high rate of prosecutors declining to prosecute Stand Your Ground cases.

D. Public Safety

Stand Your Ground laws exist within a vigorous public policy debate. Proponents of Stand Your Ground laws contend these statutes affirm a core belief that all persons have a fundamental right to stand their ground and defend themselves from attack with proportionate force in every place they have a lawful right to be.

Moreover, as a matter of public safety, proponents contend, individuals must have a means of protecting themselves, particularly in light of U.S. Supreme Court precedent holding that local law enforcement has no duty to protect individuals, but rather only a general duty to enforce the laws. See South v. Maryland, 59 U.S. 396 (1856). Advocates of Stand Your Ground laws cite slow police response timeframes and limited funding and police resources to adequately protect individuals and communities from legitimate public safety emergencies. “What we can take from this is that when seconds count the police are only minutes away, assuming first that they have the funding to protect; and, second, that they decide to protect you, your family and other innocents.” (Joshua Prince, Firearm law attorney).

Conversely, opponents of Stand Your Ground laws are concerned that Stand Your Ground laws unnecessarily encourage the use of deadly force as a low cost license to kill instead of reserving it only as a protective measure. “It encourages vigilante law... So one of the critical problems with the Stand Your Ground law is that before, that person would have had the impetus to leave, to go away... But the Stand Your Ground laws allow people to stand, shoot, and murder with no consequences.” (Eva Patterson, Equal Justice Society).

Several witnesses testified regarding their perception that Stand Your Ground law had a negative impact in their communities. Many labeled it as “a license to kill.” Others raised concerns that, as social framework, Stand Your Ground laws do not place enough value on human life and further that they discourage non-violent conflict resolution instead of encourage the use of deadly force to resolve disputes. “It seems to me that I don't quite understand how we expect and address issue[s] of violence with just more violence... I just don't understand why we can't have a very basic discussion about the need for human beings to start acting like human beings, trying to find ways to love each other instead of kill each other.” (David Will, criminal law attorney).

VII. Interplay Between Firearm Violence and Stand Your Ground laws

Notably, a number of witnesses raised concerns that gun control laws are the root problem with Stand Your Ground laws. Advocates of Stand Your Ground laws contend that firearm possession has deterred crime in the United States. However, as Professor David Hemenway, Professor of Health Policy at the Harvard School of Public Health at Harvard
University, observed, “no credible evidence exists for a general deterrent effect of firearms. Gun use in self-defense is no more likely to reduce the chance of being injured during a crime than various other forms of protective action.” The recent empirical research relating to homicide rates in Stand Your Ground states addressed earlier in this Report fully supports Professor Hemenway’s supposition. Even Dr. Gary Kleck, a noted pro-gun researcher and staunch advocate for Second Amendment rights concluded: “There is little or no need for a gun for self-protection [for most Americans] because there’s so little risk of crime. People don’t believe it, but it’s true. You just can’t convince most Americans they’re not at serious risk.”

Moreover, the Harvard Injury Control Center examination of “Gun Threats and Self-Defense” identified the role that firearms play in protection of oneself or the home. This study debunked a touted myth that firearm use as self-defense by individuals was a common occurrence and that few criminals were shot by home owners. Instead of thwarting criminal assaults, research by the Harvard Injury Control Center determined that most purported self-defense gun uses involved the escalation of arguments, which is not what a civilized society would want to promote. As testimony from the Western regional hearing indicated, the “no duty to retreat” rule (judicially recognized in California since 1875) has had an inconsequential impact on crime rates. Rather, in California, the lack of gun culture and the smaller number of gun owners, compared to Florida and Texas was the true source of reduced violence crime.

Respectfully Submitted,

Leigh-Ann A. Buchanan, Co-Chair
Jack B. Middleton, Co-Chair
National Task Force on Stand Your Ground Laws
February 2015

Hon. Michael B. Hyman, Chair
Coalition on Racial & Ethnic Justice
February 2015

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21 Ibid.
1. **Summary of Resolution(s).**

The resolutions urge applicable legislative bodies to repeal or refrain from enacting Stand Your Ground Laws, which eliminate the duty to retreat before using force in self-defense in public spaces.

In the event that states elect not to repeal Stand Your Ground laws, the resolutions further urge applicable bodies to modify existing or proposed laws to: (1) eliminate the civil immunity provisions, (2) prohibit the use of the Stand Your Ground defense when force is used against a law enforcement officer; (3) develop strategies to combat the apparent racially disparate impact; (4) ensure jury instructions are drafted to enhance clarity of the application and limitations; (5) protect the use of deadly force against a person who is in retreat; and (6) protect a person who is the initial aggressor in an encounter.

With respect to the law enforcement function, the resolution urges the development of training materials on best practices for investigating Stand Your Ground Laws in addition to the creation of a national database for tracking Stand Your Ground cases.

Finally, the resolution urges the American Bar Association to implement a national educational campaign regarding Stand Your Ground Laws to the general public as well as to undertake efforts to investigate the impacts that gun laws have in Stand Your Ground states.

2. **Approval by Submitting Entity.** Approved by the Coalition on Racial & Ethnic Justice on October 24, 2014 and National Task Force on Stand Your Ground Laws on November 14, 2014.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

   The Association does not have existing policies relating to Stand Your Ground Laws, which as defined in the proposed resolution, are limited to state laws that eliminate the duty to retreat before using force in self-defense in public spaces.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** Not applicable.
6. **Status of Legislation.** (If applicable) Not applicable.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The National Task Force on Stand Your Ground Laws and the Coalition on Racial & Ethnic Justice will work with ABA entities, including co-sponsoring and supporting entities, ABA affiliates and external organizations and other bars as appropriate to foster implementation.

8. **Cost to the Association.** (Both direct and indirect costs)
   $30,000 for fiscal year 2015 was budgeted.

9. **Disclosure of Interest.** (If applicable) None.

10. **Referrals.**
    Center on Racial and Ethnic Diversity
    Commission on Racial and Ethnic Diversity in the Profession
    Council for Racial and Ethnic Diversity in the Pipeline
    Commission on Sexual Orientation and Gender Identity
    Commission on Hispanic Legal Rights
    Young Lawyers Division
    Commission on American Jury Project

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolutions urge applicable legislative bodies to repeal or refrain from enacting Stand Your Ground Laws, which eliminate the duty to retreat before using force in self-defense in public spaces.

In the event that states elect not to repeal Stand Your Ground laws, the resolutions further urge applicable bodies to modify existing or proposed laws to: (1) eliminate the civil immunity provisions, (2) prohibit the use of the Stand Your Ground defense when force is used against a law enforcement officer; (3) develop strategies to combat the apparent racially disparate impact; (4) ensure jury instructions are drafted to enhance clarity of the application and limitations; (5) protect the use of deadly force against a person who is in retreat; and (6) protect a person who is the initial aggressor in an encounter.

With respect to the law enforcement function, the resolution urges the development of training materials on best practices for investigating Stand Your Ground Laws in addition to the creation of a national database for tracking Stand Your Ground cases.

Finally, the resolution urges the American Bar Association to implement a national educational campaign regarding Stand Your Ground Laws to the general public as well as to undertake efforts to investigate the impacts that gun laws have in Stand Your Ground states.

2. Summary of the Issue that the Resolution Addresses

The call for amendment or repeal of Stand Your Ground laws addresses the empirical evidence which shows that states with statutory Stand Your Ground laws have not experienced decreased theft, burglary, or assault crimes and have experienced increased homicide rates.

In addition to the issues referenced in Section 1 above, the call for modification of existing or proposed Stand Your Ground laws addresses these issues:

1. Implicit racial bias has been identified as a significant factor causing inconsistent outcomes in Stand Your Ground cases.

2. The statutory immunity provisions of certain Stand Your Ground laws prevent victims from obtaining redress through the criminal justice system and prohibits subsequent civil suit and thus substantially restricts the available remedies, such as compensation, typically available to innocent bystander and other victims.

3. Evidence of inconsistent outcomes in Stand Your Ground cases that were factually similar due to divergent judicial rulings due to judicial confusion, or juror misunderstanding of the proper application of these laws.
• The creation of additional difficulties for law enforcement that impede the pursuit of fair and consistent outcomes in self-defense cases.

3. Please Explain How the Proposed Policy Position will address the issue

   Given that there is no existing ABA policy with respect to Stand Your Ground laws, the proposed policy positions will permit the ABA to make inroads in addressing a significant legal issue by engaging federal, state, territorial and local legislative bodies and governmental agencies to develop solutions to the aforementioned issues through education, advising and collaboration.

4. Summary of Minority Views

   None.
RESOLVED, That the American Bar Association urges federal, state, territorial and tribal
governments, courts, and agencies to establish laws, rules, regulations, and policies to implement
the following principles:

1. Counsel should be appointed for unaccompanied children at government expense at
all stages of the immigration process including initial interviews before United States
Citizenship and Immigration Services Asylum Offices and at all proceedings
necessary to obtain Special Immigrant Juvenile Status, asylum and other remedies;

2. Immigration courts should not conduct any hearings, including final hearings,
involving the taking of pleadings or presentation of evidence before an
unaccompanied child has had a meaningful opportunity to consult with counsel about
the child’s specific legal options;

3. State court judges and staff should receive training to learn to effectively and timely
hear and adjudicate petitions or motions on behalf of immigrant children, including
for the purpose of making the predicate findings that are required for a child to obtain
Special Immigrant Juvenile Status; and

4. Due to firm deadlines in federal immigration laws which limit certain immigration
remedies by age, state, territorial and tribal courts with jurisdiction should consider
implementing specialized calendars to timely hear and adjudicate petitions on behalf
of immigrant children to determine predicate matters that are required for the children
to apply for Special Immigrant Juvenile Status, including creating expedited processes
for children aged 16 and older.
REPORT

Thousands of foreign-born children arrive in the United States each year unaccompanied by their parents or other legal guardians. Some are escaping political persecution, while others are fleeing poverty, gang violence, abusive families, or other dangerous conditions in their home countries. Some children have lost contact with or been abandoned by their families abroad, while others are sent here for safety by parents who remain behind. Here is just one representative example:

J.E., J.F., and D.G. are ten, thirteen, and fifteen years old, respectively. They were scheduled to appear in immigration court on September 4, 2014, in Seattle, Washington. They were born in El Salvador, where their parents ran a ministry and rehabilitation center for former gang members. These activities drew retaliation from local gangs, who killed the children’s cousin and then their father: the children watched as gang members murdered him in the street. Several years later, the children themselves became the targets of gangs that threatened them with harm if they refused to join, and they fled to the United States.

When unaccompanied children arrive in the United States, they generally have no predetermined U.S. legal status and no immediate support system. What many of these children face when they arrive in the United States is immediate detention in a foreign culture, a mire of immigration proceedings and the challenge of finding legal assistance involving high standards of proof and complex legal issues. In an area of law compared in complexity to the IRS tax code, a lawyer is critical to prepare a child’s claim for immigration relief, gather the required evidence largely located abroad, complete and file the necessary forms pursuant to the regulations, present the case in a court setting and rebut evidence and legal arguments presented by the government, which is represented by an experienced trial attorney. Indeed, “[s]tudies have found that asylum seekers in deportation proceedings are four times more likely to be granted asylum if represented.”

Though similar statistics are not available for children seeking Special Immigrant Juvenile Status, immigration practitioners have anecdotally stated that the effect of representation is just as great.

ABA COMMITMENT AND POLICY UNDERLYING THE RESOLUTION

The American Bar Association is committed to ensuring fair treatment and access to justice under the nation’s immigration laws in accordance with the Constitution. ABA policy has consistently recognized the importance of representation in immigration cases where a lawyer can help a noncitizen understand and effectively navigate the complexities of the U.S. immigration system, a process that can be especially daunting and difficult where language and

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cultural barriers are present. These problems are multiplied when the applicants for immigration relief are children under the age of 18 who are alone with no adult responsible to care for them. This policy resolution seeks to increase representation and enhance fairness by suggesting changes in the practice of immigration courts as well as the state, territorial and tribal courts that issue orders required for Special Immigrant Juvenile Status. These changes will help strengthen the system of assuring due process for each child and engage counsel for them - both pro bono and government-funded –to help address the crisis of the surge of children facing our immigration courts alone.

This policy resolution seeks to ensure that the most vulnerable children who flee their native lands and seek refuge here have access to counsel at government expense to ensure that no child deserving of protected refugee or Special Immigrant status is relegated, due to incapacity to voice the merits of their cause, to likely removal and danger upon return. Women and children are fleeing to the U.S., in part, because of the sexual discrimination and exploitation that they have suffered. According to a report by the United Nations High Commissioner for Refugees, 70% of 404 children interviewed cited domestic abuse or some other form of violence among their primary reasons for fleeing their homes in Mexico and Central America. The International Labor Organization estimates that women and girls represent the largest share (55%) of the nearly 21 million victims of forced labor. The rising rate of gender violence and child exploitation in Mexico and Central America has certainly impacted this child crisis, but our broken immigration system exacerbates it.

This resolution will affirm the ABA’s support for government appointed counsel for unaccompanied children and that immigration proceedings should not proceed where a child is unrepresented because today’s urgent crisis compels a reminder of the fundamental importance of appointment of counsel for the unaccompanied immigrant children that lawyers across America are called on to serve. When children will be seeking Special Immigrant Juvenile Status (SIJS) as a form of immigration relief, counsel should also be appointed at government expense for them to protect the child’s legal rights in the state, territorial and tribal courts from which the predicate orders incorporating the necessary SIJS factual findings will be requested. The resolution further seeks to assure that no child who seeks to remain in the United States has a substantive hearing scheduled without the opportunity for consultation with counsel.

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Because Special Immigrant Juvenile Status is one key immigration remedy available to many of these children, the resolution seeks to secure training for state, territorial and tribal courts to help them promptly provide the prerequisite orders for this status that fall within their jurisdiction.

Finally, the resolution urges state, territorial and tribal courts to consider whether it is necessary to create specialized dockets to ensure the quick and timely adjudication of these matters which are under firm immigration law deadlines. Recognizing that state court jurisdiction over abused, neglected or abandoned youth can range from age 21 down to age 18 in most states, the resolution suggests an expedited proceeding for those children in danger of losing their claims because they "age out" of the Special Immigrant Juvenile Status age range when state court jurisdiction ends. This weighs in favor of considering a special expedited docket for any child within two years of the end of his or her state court jurisdiction. In many states, that is age 16.

In recognition of these problems, ABA leadership has created the Working Group on Unaccompanied Minor Immigrants to assist in mobilizing and engaging pro bono lawyers to represent the thousands of immigrant youth appearing in American courts alone and in need of representation to secure due process for each of their claims.4

THE NEED AND WHY REPRESENTATION MATTERS5

An “unaccompanied alien child” (unaccompanied child) is a minor who has no lawful immigration status in the United States, and has no parent or legal guardian in the country present or available to provide care.6 The Department of Homeland Security (DHS) reports that 68,541 unaccompanied children were processed by Customs and Border Protection (CBP) in the United States between October 1, 2013 and September 30, 2014, as compared to 38,759 in Fiscal Year (FY) 2013, a 77% increase.7 While the numbers of unaccompanied children entering the United States at the Southwest border have decreased significantly over the past three months, the numbers will likely rise again in a typical cyclical fashion. This is an unprecedented “surge” that caps a growing trend: 13,625 unaccompanied children entered U.S. custody in Fiscal Year 2012 and 24,668 in Fiscal Year 2013.8 Unaccompanied children are turned over to the custody of the Department of Health and Human Services’ Office of Refugee Resettlement (ORR) and placed in removal proceedings in which they face deportation. Most are released by ORR if they have family or an adult in the United States able to care for them, after which they continue to defend against removal in immigration court, often without an attorney.9

These children face significant challenges in the immigration system, causing an urgent need for access to counsel in light of the complexity of U.S. immigration laws. Many unaccompanied children have legitimate claims that would grant them legal status under U.S. immigration law but, without representation, they cannot enjoy the due process to which they are entitled or have a fair basis to estimate whether they have a provable claim or not. For example, approximately 40% of unaccompanied children in ORR custody in 2010 were potentially eligible for some kind of relief from deportation.\(^{10}\) Depending on where an unaccompanied child is released, local legal services organizations and private law firms may be available to provide representation to some children. But these meager resources are already stretched beyond capacity—the current surge in numbers will stretch them even further, meaning that more and more unaccompanied children will lack legal representation. This limited capacity will be further taxed in short order by the tsunami of need if for legal assistance arising from the recently announced executive order regarding deferred action for several million persons.

While the Executive Office for Immigration Review (EOIR) has put in place some measures to provide noncitizens with assistance in obtaining representation which include procedures for recognizing or accrediting organizations that can represent individuals in immigration matters and providing a list of pro bono service providers, less than half of the noncitizens whose proceedings were completed in the last several years were represented. In 2010, almost 60% of noncitizens were unrepresented.\(^{11}\) The figure is substantially higher for those who are detained, with around 84% unrepresented.\(^{12}\) Rates of representation for proceedings before the Board of Immigration Appeals (BIA) are somewhat better than for those before the immigration courts, but a substantial number of noncitizens are unrepresented there as well.\(^{13}\)

There is strong evidence that representation affects the outcome of immigration proceedings. In fact, the recently released preliminary findings from The New York Immigrant Representation Study, a two-year project of the Judge Robert A. Katzmann Immigrant Representation Study Group, show that "[t]he two most important variables in obtaining a successful outcome in a case (defined as relief or termination) are having representation and being free from detention."\(^{14}\) The study analyzed representation in the New York immigration courts, and found that 74% of individuals who were represented and released or never detained had a successful outcome; 18% of individuals who were represented but detained were successful; but only 3% of individuals who were unrepresented and detained were successful.\(^{15}\) Another study has shown that whether

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\(^{10}\) Id.


\(^{12}\) Jaya Ramji-Nogales et al., Refugee Roulette: Disparities in Asylum Adjudication, 60 STAN. L. REV. 295, 340-41 (2007) (citing Donald Kerwin, Revisiting the Need for Appointed Counsel, INSIGHT (Migration Policy Inst.), April 2005, at 1). For an expanded version of the Refugee Roulette study, with commentary by scholars from Canada and the United Kingdom as well as from the United States, see JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (NYU Press 2009).

\(^{13}\) Id. The CLINIC BIA Pro Bono Project was developed in 2001 to alleviate some of this need at the appellate level, using a network of committed volunteers, trainers, and mentors to safeguard the rights of vulnerable asylum-seekers and long time lawful permanent residents. Since the Project's Inception in 2001, it has secured representation for more than 550 individuals. See BIA Pro Bono Project, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., http://cliniclegal.org/programs/center-immigrant-rights/bia-pro-bono-project/0811/bia-pro-bono-project.


\(^{15}\) Id.
a noncitizen is represented is the "single most important factor affecting the outcome of [an asylum] case." For example, from January 2000 through August 2004, asylum seekers before the immigration courts were granted asylum 45.6% of the time when represented, compared to a 16.3% success rate when the asylee proceeded pro se. Between 1995 and 2007, in affirmative asylum cases, which are processed administratively by asylum officers, the grant rate for applicants was 39% for those with representation and only 12% for those without it. In defensive asylum cases, which are heard in immigration court, 27% of applicants who had representation were granted asylum, while only 8% of those without representation were successful. Between 2000 and 2004, in expedited removal cases, 25% of represented asylum seekers were granted relief, compared to only 2% of those who were unrepresented.

As noted above, representation also has the potential to increase the efficiency, and thereby reduce the costs, of at least some adversarial immigration proceedings. In short, enhancing access to quality representation promises greater institutional legitimacy, smoother proceedings for courts, reduced costs to government associated with pro se litigants, and more just outcomes for noncitizens.

Unlike other court systems, immigration courts do not accord a special right to counsel for children. Without counsel, children, even infants, must defend themselves against trained government attorneys who bring evidence against the child in court. Children face a myriad of challenges just like those adults face: they must testify under oath, secure the testimony of witnesses, obtain evidence from abroad, plead to government charges, tell the judge what forms of relief they wish to pursue, file applications for relief and supporting documents in English, testify, and call witnesses, all with no knowledge of the legal norms and customs. In addition, they seldom speak English and must communicate through an interpreter. Faced with these challenges, the existing protections and remedies offered by the laws of the United States are rendered meaningless if these children do not have access to an attorney.

It is a fiction that most of these children lack viable claims to protective immigration relief – a significant number are eligible because they are fleeing oppressive forces or because they have been abused, neglected or abandoned. In a recent report, the United Nations High Commissioner for Refugees found that 58% of 404 unaccompanied children interviewed had potential claims for international protection. Among the most common forms of relief that unaccompanied children are eligible for are (1) Special Immigrant Juvenile Status (SIJS) for children who have

16 GOV'T ACCOUNTABILITY OFFICE, SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 30 (2008) ("GOV'T ACCOUNTABILITY OFFICE"). An affirmative asylum case is where the noncitizen files a Form I-589 Application for Asylum, which is reviewed by USCIS in a non-adversarial process.
17 Id. A defensive case is where an individual requests asylum before an immigration judge in response to an expedited removal or other removal action by DHS.
20 See U.N. High Comm'r for Refugees, Children on the Run, supra note 2.
been abused, abandoned, or neglected by at least one parent; and (2) asylum for children fleeing persecution in their home countries. Approximately 23% of unaccompanied children are potentially eligible for SIJS and 17% for asylum and related protections.\(^{21}\) Other potential forms of relief include the U visa for individuals who have been a victim of certain serious crimes in the United States, and the T visa for victims of severe forms of human trafficking including for any child under the age of 18 engaged in commercial sex acts.\(^{22}\)

Aside from the complexities of navigating Immigration Court, there are separate challenges in seeking to obtain Special Immigrant Juvenile Status. This status is a unique hybrid of family and immigration law that requires three separate steps. First, it requires obtaining an order with specific predicate findings from a state court\(^{23}\) before filing the SIJS visa petition with USCIS. Only after the state court order and the approved visa petition are obtained may the child apply for lawful permanent residence (green card) from and immigration judge or, if the judge agrees to terminate removal proceedings, from USCIS. The predicate state court order must include certain factual findings, including that a child is unable to reunify with one or both parents because of abuse, neglect, abandonment, or some similar basis under state law, and that it is not in the child’s best interest to return to the home country.\(^{24}\) An increasing number of state courts are familiar with this form of relief, but even with growing awareness, some state court judges are confused by the federal immigration laws related to SIJS and others are unaware that they have the authority to make the special findings.

Many other barriers make obtaining Special Immigrant Juvenile Status a challenge:

1. A state juvenile, probate, or family court must issue the special findings order; however they typically neither provide free legal counsel to children nor even pay for interpreters. These deficiencies, coupled with the fact that these courts and the lawyers who practice in them often are unfamiliar with SIJS, make it difficult to initiate and advance the claim, let alone obtain the predicate order with appropriate language acceptable for USCIS adjudication of the visa petition. The appropriate jurisdictional grounds for filing in state court are varied and depend on the individual state. Examples include a petition for legal guardianship, child custody, juvenile delinquency proceedings, or child dependency proceedings. The complexity of navigating these pro se is virtually impossible for an immigrant child. Even if a child knows that he is eligible for SIJS, questions abound—which court should he file in, and what kind of proceeding is most appropriate to bring? Should the child start the claim, or the adult caring for the child?

\(^{21}\) VERA INSTITUTE OF JUSTICE, supra note 9.

\(^{22}\) For a detailed treatment of these forms of relief and the associated challenges, see the February 2014 report by Kids in Need of Defense and the Center for Gender and Refugee Studies (CGRS), A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System at [http://cgrs.uchastings.edu/our-work/treacherous-journey](http://cgrs.uchastings.edu/our-work/treacherous-journey). This article focuses on SIJS and asylum and describes the challenges that children who are eligible face in obtaining these forms of relief. Without adequate assistance of counsel, the complexity of these forms of relief can doom an otherwise viable claim. See also USCIS, www.uscis.gov/green-card/special-immigrant-juveniles/history-sijs-status; NCSB, www.ncsc.org/sitecore/conent/microsites/trends-2014/home/monthly-trends-articles/unaccompanied-minors-in-state-courts.aspx.

\(^{23}\) Throughout this report, reference is made to Special Immigrant Juvenile Status requiring orders from different divisions for state courts. Of course, this resolution language recognizes that the requisite orders for Special Immigrant Juvenile Status may also come from territorial and tribal courts. Therefore all the provisions about state courts in this report equally apply to territorial and tribal courts that are responsible for adjudicating these same requisite orders for children subject to their jurisdictions.

(2) After the state court has issued its special findings order, the child must submit an application for SIJS to the immigration adjudication office at USCIS. An adjudications officer at USCIS may conduct an interview of the child to determine whether to approve or deny the child’s SIJS petition. This process can be very stressful and intimidating for a child proceeding pro se. An attorney would ensure that the child files the correct application and documents and that he is prepared to answer questions about his application.

(3) To obtain permanent status, the child must submit an application for lawful permanent residency ("LPR") that is separate and distinct from the SIJS petition. The LPR application may be decided by an adjudications officer at USCIS after an interview or by an immigration judge after a hearing, if the child’s removal proceeding has not been terminated. Provision of an attorney would ensure that the child is prepared to present the appropriate claim, include the correct supporting documentation including fees, identity documents and a medical exam, and testify and be cross-examined by the government attorney in immigration court or answer any questions about his application before USCIS.

During all the steps of the SIJS process, the unaccompanied child must continue to appear in immigration court, explain the progress of the SIJS application, and request continuances from the judge to complete the state court process. The complexity of multiple areas of law coupled with multiple legal venues makes SIJS particularly difficult to obtain on a pro se basis. Could anyone imagine their own children navigating this puzzle alone and without the benefit of professionals trained to understand and proceed through it?

Perhaps the most significant obstacle is the pressure of time. Deadlines in federal law require adjudication of all three steps - immigration filing, state court orders, and return to USCIS or immigration court - before the child turns 18 in most instances. The risk of loss of rights due to a child’s “aging out” of the system while proceedings are delayed is discussed in detail below.

A CHILD’S RIGHT TO IMMIGRATION COUNSEL AT GOVERNMENT EXPENSE

A hallmark of the U.S. legal system is the right to counsel, particularly in complex proceedings that have significant consequences. 25 Immigration proceedings for unaccompanied children can separate children from families they are trying to join to avoid the horrific conditions they fled, can impoverish them, can return them to countries in which they have no functional ties, and can lead to their persecution and personal, physical danger. Despite the dangers of a journey that threatens their lives and safety, parents and caregivers in other nations abandon their children to this fate. Children themselves run away from homes abroad that fail to protect them. As Justice Brandeis wrote more than 80 years ago, removal can result “in loss of both property and life; or of all that makes life worth living.” N. G. Fung Ho v. White, 259 U.S. 276, 284 (1922). This is particularly true for persons who may qualify for relief from removal under strict U.S. immigration standards.

25 The right to legal representation is a bedrock principle of the ABA as reflected in its stated goals. ABA Goal II “speaks directly to this priority: “to promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition.” Expanding legal representation to unaccompanied children also improves the U.S. system of justice (Goal I), promotes standards of professionalism (Goal V) and enhances public service (Goal X).” American Bar Association, Commission on Immigration, Report to the House of Delegates (February 2006), p.4.
Consistent with its commitment to legal representation, the ABA has adopted several “right to counsel” policies in the immigration field. These policies seek to expand access to retained and pro bono legal representation for persons in removal proceedings, to protect existing attorney-client relationships, and to extend representation to certain vulnerable populations. Of particular concern are persons in removal proceedings (formerly called “exclusion” and “deportation” proceedings), political asylum seekers, unaccompanied minors, individuals with diminished mental capacity, non-citizens whose removal cannot be effected, detained parents with children, and those held in incommunicado detention. The recent border crisis has created a situation of such magnitude that vast numbers of children who should be eligible for protected status either under political asylum laws or SIJS are threatened with being deprived of any meaningful access to legal assistance, putting them in danger of being returned to life-threatening conditions.26

A necessary corollary to a right to counsel for the child herself is that when an adult files a custody, guardianship or other action seeking SIJS findings on behalf of a child, and that adult qualifies for in forma pauperis status, counsel should be appointed at government expense for that adult as well. The purpose of providing counsel to the child is to protect her rights. In SIJS proceedings in non-immigration courts, the child’s rights can often only be vindicated when a responsible adult caring for the child files to obtain a predicate order from the state court in order to later obtain SIJS status from USCIS. In those cases, counsel should be provided to the responsible adult, subject to financial eligibility requirements. This is the only effective way to protect the legal rights of children in these proceedings.

Principles of economy and efficiency also militate in favor of this resolution as representation advances both in this context, with the potential of reducing costs sharply. Pro se litigants cause delays in immigration court proceedings and, as a result, impose a substantial financial strain on the government. Countless immigration educators, judges, practitioners, and government officials have observed that the presence of competent, well-prepared counsel on behalf of both parties helps to clarify the legal issues and allows courts to make more principled and better informed decisions. In addition, representation can speed the process of adjudication, reducing detention costs. The Executive Office for Immigration Review confirmed that the involvement of counsel allows the immigration process to run more smoothly and efficiently, and certainly more humanely.27 This is certainly true for the immigration process as it irreversibly affects the destinies of the most vulnerable populations of children.

This resolution is also justified because of the disproportionate number of children arriving at our border who are eligible for some type of protected status. For example, the United Nations High Commissioner for Refugees recently noted that 58% of the children interviewed in a 2013 study “raised potential international protection [needs].”28 Given that more than half of these children self-identify with information indicating a likelihood that they qualify for legal status it seems only just and proper to invest in their protection through representation.

26 See In re Gault, 387 U.S. 1, 40 (1967) (noting that counsel is often “indispensable” to any meaningful realization of due process); see also Haley v. Ohio, 332 U.S. 596, 599-600 (1948) (noting that “a lad of tender years ... needs counsel and support if he is not to become the victim first of fear, then of panic.”).
28 See U.N. High Comm’r for Refugees, Children on the Run, supra note 2 at pg. 9.
DUE PROCESS CONSIDERATIONS

The courts have long recognized that children as well as adults in deportation proceedings are entitled to due process protections. One of the most important elements of due process is the right to be represented by counsel. This right has also long been recognized in the field of immigration law. The Immigration and Nationality Act provides that individuals in removal proceedings "shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing." Federal regulations recognize an individual's right to counsel in diverse matters and circumstances. The courts have long recognized the importance of counsel in deportation proceedings – as one federal appeals panel noted, "[a] lawyer is often the only person who could thread the labyrinth".

Two U.S. Courts of Appeals have suggested that where a noncitizen adult's rights would be substantially impaired in the absence of counsel, the government may be required constitutionally to pay for an attorney in immigration proceedings. The U.S. Court of Appeals for the Sixth Circuit dismissed previous case law on this point as relying on an "outmoded distinction between criminal cases and civil proceedings." The court then found that "[w]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided a lawyer at the Government's expense. Otherwise 'fundamental fairness' would be violated." The Ninth Circuit has observed that due process rights include providing an indigent alien, in that case an adult, with government appointed counsel. This argument is only strengthened when considering the needs of children who generally lack the capacity to represent themselves.

The U.S. Supreme Court has recognized that children need special protections. "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children." The Court went on to point out that "although children generally are protected by the same guarantees against government deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability."

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30 See Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990); Castaneda-Delgado v. INS, 525 F.2d 1295 (7th Cir. 1975).
32 See 8 C.F.R. §§ 3.15(b)(5), 240.10(a)(1), 240.48(a), 292.5(b) (2000).
33 Castro-O Ryan v. INS, 787 F.2d 1294, n.3 (9th Cir. 1986), aff'd en banc, 838 F.2d 1020 (1988).
34 Aguilera-Enriquez v. INS, 516 F.2d 565, 568 n.3 (6th Cir. 1975) (holding that the absence of counsel in the case at hand was not a denial of due process because the petitioner had no arguable defense against being deported so counsel would not have served any meaningful role).
35 Id.
36 See Escobar-Ruiz v. INS, 787 F.2d 1294, n.3 (9th Cir. 1986), aff'd en banc, 838 F.2d 1020 (1988).
NO HEARINGS INVOLVING THE TAKING OF PLEADINGS OR PRESENTATION OF EVIDENCE BEFORE MEANINGFUL OPPORTUNITY TO CONSULT WITH COUNSEL

Immigration courts, in the face of the crisis, will make efforts to allow children to find counsel. Immigration courts will often allow non-profit organizations to help children by providing legal information and screening services in the court prior to master calendar hearings, appearing as “Friend of the Court,” or finding counsel by recruiting, training and mentoring private attorneys to represent children pro bono. In the face of a crisis of so many children at once, the private bar has heroically stepped up to meet the call, but the numbers are overwhelming and countless children will end up without representation.

In the case of a minor who evidences an intent to stay in the US but no counsel has been found, a case should be continued until counsel can be found. From the very first master calendar appearance, the child respondent is required to make representations and statements which carry serious consequences related to the finding or removability or relating to eligibility for relief which the child should therefore never make uncounseled. To secure due process, no proceeding should take place where a court takes pleadings or evidence is presented before an unaccompanied child has had a meaningful opportunity to consult with counsel about his or her specific legal options. Given the very real inequity of legal proceedings taking place with the able counsel of attorneys from DHS on the other side of the aisle from the lone child, no other remedy but counsel could secure due process. Courts should continue any proceeding until the child is there with the able advice of trained counsel on her side.

Communication with these children can be challenged by language, resources, and the fact that so many of these children are trauma victims from the torture, abuse, neglect or trafficking they experienced in their countries or during their journey to the United States.39 As a result, the ABA already has extensive policy concerning the extra care and effort that must be taken in communicating with a child client and established best practices for how to accomplish this in any legal setting including immigration.

The ABA has long championed the notion that every lawyer has a professional responsibility to provide legal services to those unable to pay.40 "Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.”41 Nowhere is this need and expectation of the best of our profession more apparent than in the immigration context where the stakes are so high and the role that private bar members can play so vital – for their expertise can transform a child’s destiny from terror to hope and normalcy.

But pro bono isn’t free. In fact, it can be exceeding costly. Volunteer attorneys who apply their best talents to indigent immigration representation often require significant assistance and guidance from public interest law experts to ensure they deliver first class legal services to pro bono clients, especially when their regular practice does not include immigration law. They thus

39 See Walker, Kenniston, Inada, Handbook on Questioning Children: A Linguistic Perspective (American Bar Association Center on Children and the Law, 3rd Ed.)
40 ABA Model Rule 6.1.
41 ABA Model Rule 6.1 Commentary.
require training, mentorship, case review, and guidance from a dedicated and experienced public
interest lawyer or other appropriate mentor. These experts are housed in outstanding
organizations around the nation committed to the direct representation of immigrant adults and
children, as well as the training and recruitment of volunteer attorneys to assist in that effort.42

Of course pro bono is only part of the solution to this legal crisis. As the Association of Pro
Bono Counsel (APBCo)43 has argued to the government and to the public, law firms must
dedicate their lawyers to assist in this effort but volunteers alone will not meet the extreme
demand of the surge of unaccompanied minors.44 This resolution emphasizes the need to find
counsel - pro bono or government funded - in order to ensure access to justice for every child
before the court who has expressed an interest in staying in the United States.

TRAINING JUDGES

This resolution is also in furtherance of the ABA’s mandate to defend liberty and pursue justice.
Our profession must promote professional excellence and respect for the law and its
administration. Improving our system of justice translates to providing heightened access to
legal representation and to the American system of justice for all persons; increasing respect for
the law and legal process; advancing the rule of law in the world; and preserving the
independence of the legal profession and the judiciary. The ABA has long-standing policies
exhorting our profession to stay abreast of our professional obligations and legal reforms through
regular and appropriate training.

Training for judges is critical to avert injustices that arise from lack of awareness of legal
developments. This resolution is necessary because the judiciary itself is expressing a need for
training in this uniquely challenging and evolving area of law. For example, ABA members who
represent unaccompanied minors in SIJS proceedings are receiving increasing queries from some
state judges asking why they are being brought into federal immigration proceedings and who
clearly lack an informed appreciation of the vital role that the SIJS statute demands of them.

The ABA is spearheading efforts to humanize our collective response to the border crisis that is
affecting countless vulnerable children – many if not most of whom should qualify for protected
status under either political asylum laws or those governing SIJS. Their prospects for achieving
protected status in accordance with federal law is jeopardized if state judicial officers and their
staff are not properly trained and informed on emerging policies and procedures that are critical
to protect this vulnerable class. State court judges need to understand the United States’ legal

42 For an extensive list of organizations and bar associations that serve the community in this way see Immigrant

43 The Association of Pro Bono Counsel (APBCo) was established in 2006 as a professional organization for
attorneys and practice group managers who run a law firm pro bono practice on a full-time basis. See ASSOCIATION
OF PRO BONO COUNSEL, www.apbco.org. Today, APBCo has over 135 members representing 85 of the country’s
largest law firms. APBCo’s mission is to maximize access to justice through the delivery of pro bono legal services
by advancing the model of the full-time law firm pro bono counsel, supporting and enhancing the professional
development of pro bono counsel, and serving as the voice of the law firm pro bono community.

44 See Steven Schulman et al., Law Firms, Non-profits, Businesses and Government Must Work Together to Solve
Border Crisis, THE HILL (Aug. 11, 2014, 12:00PM), http://thehill.com/blogs/congress-blog/judicial/214705-law-
fi rms-nonprofits-businesses-and-government-must-work; see also Letter from Association of Pro Bono Counsel, to
Vice President Joseph R. Biden, Jr. (Sept. 19, 2014), available at http://www.apbco.org/wp-
obligations to protect immigrant children, the specifics of eligibility for SIJS under current law, the specific role Congress gave state courts in the fact finding process, and the interplay between state court predicate orders and the ultimate resolution of a child’s immigration status by USCIS or an immigration court. There are jurisdictions where training of the judiciary has been proven to improve the adjudication of these critical cases for children. For example, the Los Angeles Juvenile Court has long recognized how critical training on SIJS is to bench officers overseeing SIJS implementation to ensure eligible minors receive the benefit of the highest quality judicial consideration.\textsuperscript{45} That and other courts are leading examples for the nation.

CONSIDERATION OF DESIGNATED DOCKETS

The dependency, family law, probate and other state, tribal and territorial court dockets across the United States are in crisis themselves. Many are reeling from sharp budget cuts and have had to lay off judicial officers and court support staff. Despite this chaotic situation, the SIJS process calls upon these state courts to provide a critical component of the findings required for a child to obtain a visa and remain safe in the United States if they qualify. Children who should qualify for SIJ status may still be removed from the United States by immigration authorities if unable to obtain the orders from the state court ruling that they have been abused, neglected or abandoned and that it is in their best interest to remain in the U.S.

In effect, this means that state court judges are making decisions critical and potentially dispositive as to whether children will access immigration remedies and have the right to stay in the United States. It is an unusual responsibility that requires specialized training to understand the context, the consequences and the nuances of this area of law and practice. In order to meet the unyielding deadlines established by federal law, it may make sense in certain jurisdictions to establish special dockets to hear these cases outside of the regular, and frequently clogged, calendars for dependency, family and probate courts. It may decrease disruption to the regular cases before these local courts for the SIJS matters to be heard separately. It also will likely lend more thoughtful and appropriate adjudication of these matters considering the myriad contexts and unique paths these children have journeyed. It will certainly make it easier for any child who does come to the state court for assistance. As always, each state, territorial or tribal court must decide whether the ABA recommendations, if implemented, would further the purposes of this resolution.

Federal immigration law imposes intense pressure upon on applicants to obtain timely adjudication of these matters. The federal law allows for adjudications before the age of 21. But at the time of the immigration decision, the state court order must still be "in effect." Some states have expanded state court jurisdiction to declare a minor dependent and adjudicate their best interests so an order may be in effect as late as age 19 or 21. The age varies among this group of states. But many states still provide that dependency jurisdiction ends at age 18. For these states, the immigration proceeding must be resolved before the child leaves the state court's jurisdiction. The result is that children nearing the age of 16 are in danger of not being able to take advantage of immigration remedies for which they should otherwise qualify, simply due to the lack of coordinated processes between the two different court systems, state and federal. The issue is amplified by the fact that the federal government’s recent funding program allow the

\textsuperscript{45} See Presentation to Judicial Council of California, available at \url{http://www.courts.ca.gov/documents/jc-20141028-item1-presentation.pdf}
hiring of a number of lawyers to represent immigrant children who arrived in the surge but even these new attorneys will be restricted to representation of children under the age of 16 who are not in the custody of the ORR or HHS.46 This resolution seeks thoughtful consideration of resources for expediting processes only where it is needed. Where a child is 16 but there is no chance of the state court jurisdiction ending before age 21, expedited proceeding resources should be saved for other more urgent cases. But because these proceedings may take well over a year to complete, a 16 year old facing an age 18 expiration of jurisdiction in state court should have access to a proceeding that recognizes the need for an expedited process for hearing and adjudicating his or her claim.

The ABA recognizes and respects that courts must decide how to effectively administer all matters coming before them while carefully allocating the limited financial resources available to them for doing so. Because the 2014 surge in arrivals of unaccompanied children will continue to impact state courts for some time to come, the ABA also urges state legislatures to appropriate adequate funds to allow the courts to implement those procedures they may develop for the timely processing of SIJS cases.

INVIGORATING ABA’S LONG STANDING SUPPORT FOR IMMIGRATION RELIEF

The ABA is deeply committed to ensuring fair treatment and access to justice under the nation’s immigration laws. ABA policy has consistently recognized the importance of representation in immigration cases where a lawyer can help a noncitizen understand and effectively navigate the complexities of the U.S. immigration system. Promoting the goals of fairness and efficiency through improvements to our overburdened immigration adjudication system will serve to advance the rule of law (Goal IV) by providing for a fair legal process.

This resolution supports the provision of legal representation to unaccompanied minors who have come to the U.S. with no resources for counsel but with claims for immigration relief. The resolution would advance the interests of the government, protect the principle of due process for these children by protecting the rights of non-citizens facing removal, and help vindicate their bona fide claims.

Consistent with its commitment to legal representation, the ABA has adopted several “right to counsel” policies in the immigration field. These policies seek to expand access to retained and pro bono legal representation for persons in removal proceedings, to protect existing attorney-client relationships, and to extend representation to certain vulnerable populations. Populations of particular concern include persons in removal proceedings, political asylum seekers, unaccompanied minors, non-citizens whose removal cannot be effected, detainees, and those held in incommunicado detention. A brief summary of its policies follows.

- In 1983, the ABA opposed legislative initiatives to limit the right to retain counsel in removal proceedings and in political asylum proceedings. (83M120A)

- In 1990, the ABA supported “effective” access to legal representation by asylum seekers in removal proceedings. In particular, it supported improved telephonic access between detained

46 See Justice of AmeriCorps Legal Services for Unaccompanied Children, NATIONAL & COMMUNITY SERVICE, http://www.nationalservice.gov/build-your-capacity/grants/funding-opportunities/2014/justice-americorps-legal-services (describing these new grants for lawyers for these children restricted only to the children under age 16).
asylum seekers and legal representatives; dissemination of accurate lists of legal service providers; and legal orientation programs and materials for detainees. (90M131)

- In 2001, the ABA supported government-appointed counsel for unaccompanied minors in all immigration processes and proceedings. Likewise in 2001, the ABA opposed the involuntary transfer of detained immigrants and asylum seekers to detention facilities when this would undermine an existing attorney-client relationship. It also opposed the construction and use by the Immigration and Naturalization Service of detention facilities in areas that do not have sufficient qualified attorneys to represent detainees. (01M106A)

- In 2002, in response to the post-September 11 arrest and detention of several hundred non-citizens, the ABA opposed the incommunicado detention of foreign nationals in undisclosed facilities. It also supported the promulgation in the form of federal regulations of federal detention standards (originally developed by the ABA) related to access to counsel, provision of legal information and independent monitoring for compliance with these standards. (02A115B)

- In 2004, the ABA adopted its own Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States. These standards call for timely legal rights presentations for all unaccompanied children, the opportunity to consult with an attorney, the right to have an attorney present in all proceedings affecting a child’s immigration status, and (if necessary) the right to government-appointed counsel. (04A117)

- In 2006, the ABA adopted a policy supporting the due process right to counsel for all persons in removal proceedings, and the availability of legal representation to all non-citizens in immigration-related matters. This policy also supported the establishment of a system to screen and to refer indigent persons with potential relief from removal — as identified in the expanded “legal orientation program” — to pro bono attorneys, Legal Services Corporation sub-grantees, charitable legal immigration programs, and government-funded counsel; and the establishment of a system to provide legal representation, including appointed counsel and guardians ad litem, to mentally ill and disabled persons in all immigration processes and procedures, whether or not potential relief may be available to them. (06M107A)

- In 2011, the ABA urged legislation for the protection of unaccompanied minors that would assure prompt screening of their eligibility for immigration relief as well as safe and stable family reunification if they are to be repatriated. That resolution also called for federal support to train state and local judges, and attorneys, regarding the intersection of state child welfare laws, immigration laws, applicable international conventions and standards, and Intercountry protocols that affect children who are detained, separated from, or removed from their adult caretakers. (11A103D)
These policies recognize the crucial importance of legal representation in immigration proceedings right now. This resolution particularizes these policies given the immense unmet need for legal representation in immigration proceedings for unaccompanied children facing the "rocket dockets"47 now found in immigration courts across the nation. These "rocket dockets" were created in response to a directive in July 2014 from the administration to fast-track the cases and has meant the children receive initial hearings within 21 days and in some cases are given a matter of weeks, instead of months, to find an attorney. Non-profit agencies are doing their best to meet the need but it has exploded in the face of the higher numbers of children in need. Specific reforms are needed in the face of this recent crisis. Significant changes in immigration practice and procedure will profoundly challenge the capacity of state juvenile, probate and family courts properly to adjudicate matters inextricably intertwined with immigration proceedings. This resolution is tailored to redress these matters and help alleviate the impact that they are having on state, territorial and tribal courts in their handling of unaccompanied children’s’ claims for immigration protection.

Respectfully Submitted,

Christina Fiflis, Co-chair
Mary Ryan, Co-chair
Working Group on Unaccompanied Minor Immigrants

February 2015

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GENERAL INFORMATION FORM

Submitting Entity: Working Group on Unaccompanied Minor Immigrants

Submitted By: Christina Fiflis, Mary Ryan – Co-chairs

1. Summary of Resolution(s).

This resolution urges that counsel be appointed for unaccompanied children at government expense at all stages of the immigration process including initial interviews before United States Citizenship and Immigration Services Asylum Offices and at all proceedings necessary to obtain Special Immigrant Juvenile Status, asylum and other remedies and urges that immigration courts should not conduct any hearings, including final hearings, involving the taking of pleadings or presentation of evidence before an unaccompanied child has had a meaningful opportunity to consult with counsel about his or her specific legal options. Because Special Immigrant Juvenile Status is one key immigration remedy available to many of these children, the resolution seeks to secure training for state, territorial and tribal courts to help them promptly provide the prerequisites for these visas that fall within their jurisdiction. Finally, the resolution urges state, territorial and tribal courts to consider creating specialized dockets to adjudicate SIJ cases and establishing expedited processes for children age 16 and over.

2. Approval by Submitting Entity.

The Working Group on Unaccompanied Minor Immigrants approved the resolution on November 6, 2014.

3. Has this or a similar resolution been submitted to the House or Board previously?

No

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The ABA has in the past adopted several policies supporting access to counsel in the immigration context. The two policies most relevant to this resolution are: 1) a 2001 policy supporting government appointed counsel for unaccompanied alien children, among other recommendations, and 2) a 2004 policy adopting the Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States. This resolution would restate the ABA’s support for government appointed counsel for unaccompanied children and that immigration court proceedings should not proceed where a child is unrepresented. The resolution seeks to reaffirm these core principles more than 10 years after they were originally adopted because of the timeliness and importance of the issues.

The ABA has several existing policies urging training and education of judges in specific contexts. This resolution is consistent with and would complement those policies.
5. **If this is a late report, what urgency exists which requires action at this meeting of the House?**

N/A

6. **Status of Legislation. (If applicable)**

S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act, passed by the Senate on June 27, 2013, contained a provision that required the Attorney General to appoint counsel, at the expense of the government if necessary, to represent an alien in a removal proceeding who has been determined by the Secretary to be an unaccompanied alien child, is incompetent to represent himself or herself due to a serious mental disability, or is considered particularly vulnerable when compared to other aliens in removal proceedings, such that the appointment of counsel is necessary to help ensure fair resolution and efficient adjudication of the proceedings. There were several bills introduced in the House that had provisions relating to access to counsel for unaccompanied children. No action was taken on any of these bills.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

The Working Group and other ABA entities will work with the Governmental Affairs Office to engage in advocacy efforts related to supporting government-appointed counsel for unaccompanied children and ensuring that courts do not set hearings involving the taking of pleadings or presentation of evidence before an unaccompanied child has had a meaningful opportunity to consult with counsel about his or her specific legal options. The recommendations on training for state court judges and encouraging state, territorial and tribal courts to consider dedicated calendars for Special Immigrant Juvenile Status cases will be transmitted to relevant state judges, courts and other stakeholders.

8. **Cost to the Association. (Both direct and indirect costs)**

None

9. **Disclosure of Interest. (If applicable)**

N/A

10. **Referrals.**

    Commission on Immigration
    Section of Litigation
    Section of Individual Rights and Responsibilities
    Section of Family Law
    Section of International Law
Judicial Division
Center for Children and the Law
Commission on Youth at Risk
Young Lawyers Division
Center for Human Rights
Standing Committee on Pro Bono and Public Service
Standing Committee on the American Judicial System
Commission on Homelessness and Poverty

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution supports government appointed counsel for unaccompanied children in immigration proceedings and urges that immigration courts should not conduct any hearings, including final hearings, involving the taking of pleadings or presentation of evidence before an unaccompanied child has had a meaningful opportunity to consult with counsel about his or her specific legal options. Because obtaining Special Immigrant Juvenile Status is one key immigration remedy available to many of these children, the resolution seeks to secure training for state, territorial and tribal courts to help them promptly provide the prerequisites for these visas that fall within their jurisdiction. Finally, the resolution urges state, territorial and tribal courts to consider creating specialized dockets to adjudicate SIJ cases and establishing expedited processes for children age 16 and over.

2. Summary of the Issue that the Resolution Addresses

Each year thousands of unaccompanied children enter the U.S. and are placed in immigration removal proceedings. A significant number of these children do not have legal representation because they cannot find and/or afford a lawyer.

One of the few avenues of potential relief for unaccompanied children under the immigration laws is obtaining Special Immigrant Juvenile Status (SIJS). But there are challenges to obtaining SIJS, including that a state court must first make certain factual findings. Some state court judges are confused by the federal immigration laws related to SIJS and others are unaware that they have the authority to grant the special findings. In addition, deadlines in federal law require adjudication of all three steps - immigration filing, state court orders, and return to USCIS - before the child turns 18 in many instances.

3. Please Explain How the Proposed Policy Position will address the issue

The policy would ensure that all children are afforded legal representation by supporting government appointed counsel where necessary and would help ensure the children's due process rights are protected by urging immigration courts not to set hearings where an unaccompanied child has not had a meaningful opportunity to consult with counsel about his or her specific legal options.

For SIJS cases, additional training can help ensure that state, territorial and tribal court judges are aware of and understand their role in these cases. In addition, creating dedicated calendars for SIJ cases and providing expedited processes for children who are 16 years and older will help to ensure that no child is deprived of the opportunity to obtain SIJ status simply because they aged out of eligibility before their court proceedings were finished.

4. Summary of Minority Views

We are not aware of any minority views to date.
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