

# **Resolutions with Reports to the House of Delegates**

AMERICAN BAR ASSOCIATION



2016 MIDYEAR MEETING • SAN DIEGO, CALIFORNIA • FEBRUARY 8, 2016

American Bar Association  
321 North Clark Street  
Chicago, IL 60654-7598  
312/988-5000  
<http://www.americanbar.org>

Copyright © 2015 American Bar Association  
Produced by the Division for Policy Administration

# **Resolutions with Reports to the House of Delegates**

**AMERICAN BAR ASSOCIATION**



**2016 MIDYEAR MEETING • SAN DIEGO, CALIFORNIA • FEBRUARY 8, 2016**

**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

Manchester Grand Hyatt Hotel  
Harbor Ballroom, 2<sup>nd</sup> Level, Harbor Tower  
San Diego, California  
February 8, 2016

## TABLE OF CONTENTS

	<u>PAGE</u>
Preliminary Calendar .....	1
Officers and Members of the Board of Governors .....	3
Committees of the House of Delegates .....	5

## REPORTS OF OFFICERS

## ITEM NO.

Report of the President .....	1
Report of the Treasurer .....	2*
Report of the Executive Director .....	3
Report of the Committee on Scope and Correlation of Work .....	4

## RESOLUTIONS WITH REPORTS

## ITEM NO.

New York County Lawyers Association Criminal Justice Section.....	10A
New Jersey State Bar Association .....	10B
Section of Dispute Resolution Section of Health Law Section of Science and Technology Law .....	100
Standing Committee on Paralegals .....	101
Criminal Justice Section.....	102

Resolutions with Reports numbered 10A, 10B, 100 through 117 and 300 can be found in this book. Additional Resolutions with Reports submitted by state and/or local bar associations will be numbered in the "10" series and additional 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/2016-san-diego-midyear-meeting.html](http://www.americanbar.org/groups/leadership/house_of_delegates/2016-san-diego-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.

Section of International Law	
Standing Committee on Ethics and Professional Responsibility	
Standing Committee on Professional Discipline	
Task Force on International Trade in Legal Services .....	103
Standing Committee on Specialization .....	104
Commission on the Future of Legal Services	
Standing Committee on Professional Discipline	
Criminal Justice Section	
Law Practice Division	
Standing Committee on Legal Aid and Indigent Defendants	
Standing Committee on Client Protection .....	105
Section of Administrative Law and Regulatory Practice.....	106A-B
Commission on Diversity and Inclusion 360 .....	107
Section of Intellectual Property Law.....	108A-C
Law Student Division	
Law Practice Division	
National Conference of Bar Examiners	
Section of Legal Education and Admissions to the Bar	
Senior Lawyers Division	
Tort Trial and Insurance Practice Section .....	109
Young Lawyers Division.....	110
Commission on Youth at Risk	
Commission on Homelessness and Poverty	
Section of Health Law	
Section of Science and Technology Law .....	111
Section of Family Law	
Section of Real Property, Trust and Estate Law	
Section of Science and Technology Law .....	112A-B
Standing Committee on Lawyer Referral and Information Service	
Association of the Bar of the City of New York	
Austin Bar Association	
Brooklyn Bar Association	
Cincinnati Bar Association	
Oregon State Bar	
Section of Civil Rights and Social Justice	
Standing Committee on Disaster Response and Preparedness	
Standing Committee on Group and Prepaid Legal Services	
Law Practice Division.....	113

Section of Civil Rights and Social Justice	
Commission on Homelessness and Poverty.....	114
National Conference of Commissioners on Uniform State Laws .....	115A-F
Commission on Women in the Profession	
Section of Business Law	
Commission on Disability Rights	
Commission on Sexual Orientation and Gender Identity .....	116
National Native American Bar Association	
State Bar of South Dakota .....	117
Health Law Section .....	300
Index to Reports .....	After Report 300



**PRELIMINARY CALENDAR  
of the  
HOUSE OF DELEGATES  
of the  
AMERICAN BAR ASSOCIATION**

**Manchester Grand Hyatt Hotel  
Harbor Ballroom, 2<sup>nd</sup> Level, Harbor Tower  
San Diego, California**

**February 8, 2016**

All sessions of the House of Delegates will be held on Monday, February 8, 2016, in the Harbor Ballroom, 2<sup>nd</sup> Level, Harbor Tower, at the Manchester Grand Hyatt Hotel, in San Diego, California. It is anticipated that the House meeting will begin at 9:00 a.m., and will adjourn no later than 5:30 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 8. 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 18, 2015 filing deadline. Resolutions with Reports numbered 10A, 10B, 100 through 117, and 300 appear in this book. Informational Reports can be found on the ABA's website at [http://www.americanbar.org/groups/leadership/house\\_of\\_delegates/2016-san-diego-midyear-meeting.html](http://www.americanbar.org/groups/leadership/house_of_delegates/2016-san-diego-midyear-meeting.html) (*click on Informational Reports*).

Any late Resolutions with Reports, those received after November 18, 2015, 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  
Hon. 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  
Paulette Brown, New Jersey

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  
100-117 Resolutions with Reports  
300 Late Resolutions with Reports

ADJOURNMENT

**AMERICAN BAR ASSOCIATION  
2015-2016  
BOARD OF GOVERNORS**

**OFFICERS**

President	Paulette Brown, Morristown, NJ
President-Elect	Linda A. Klein, Atlanta, GA
Chair, House of Delegates	Patricia Lee Refo, Phoenix, AZ
Secretary	Mary T. Torres, Albuquerque, NM
Treasurer	G. Nicholas Casey, Jr., Charleston, WV
Immediate Past President	William C. Hubbard, Columbia, SC
Executive Director	Jack L. Rives, Chicago, IL

**BOARD OF GOVERNORS**

President		Paulette Brown, Morristown, NJ
President-Elect		Linda A. Klein, Atlanta, GA
Chair, House of Delegates		Patricia Lee Refo, Phoenix, AZ
Secretary		Mary T. Torres, Albuquerque, NM
Treasurer		G. Nicholas Casey, Jr., Charleston, WV
Immediate Past President		William C. Hubbard, Columbia, SC
First District	2017	Wendell G. Large, Portland, ME
Second District	2017	Barry C. Hawkins, Stamford, CT
Third District	2018	Penina K. Lieber, Pittsburgh, PA
Fourth District	2017	Hon. Herbert B. Dixon, Jr., Washington, DC
Fifth District	2018	E. Fitzgerald Parnell III, Charlotte, NC
Sixth District	2017	David F. Bienvenu, New Orleans, LA
Seventh District	2016	Stephen E. Chappelle, Columbus, OH
Eighth District	2016	Eduardo R. Rodriguez, Brownsville, TX
Ninth District	2018	Joe B. Whisler, Kansas City, MO
Tenth District	2016	Hon. Joseph B. Bluemel, Kemmerer, WY
Eleventh District	2016	Jimmy Goodman, Oklahoma City, OK
Twelfth District	2017	Harry Truman Moore, Paragould, AR
Thirteenth District	2016	John C. Schulte, Missoula, MT
Fourteenth District	2018	John L. McDonnell, Jr., San Francisco, CA
Fifteenth District	2018	A. Vincent Buzard, Pittsford, NY
Sixteenth District	2018	Hon. William C. Carpenter, Jr., Wilmington, DE
Seventeenth District	2018	Alan Van Etten, Honolulu, HI
Eighteenth District	2016	Robert T. Gonzales, Baltimore, MD
Judicial Member-at-Large	2018	Hon. Ramona G. See, Torrance, CA

## BOARD OF GOVERNORS (cont.)

Section Members-at-Large	2016	Pamela C. Enslen, Kalamazoo, MI
	2016	David Russell Poe, Washington, DC
	2017	William R. Bay, Saint Louis, MO
	2017	Donald R. Dunner, Washington, DC
	2018	Ilene K. Gotts, New York, NY
Minority Members-at-Large	2018	Bernard T. King, Syracuse, NY
	2017	Ruthe Catolico Ashley, Vallejo, CA
Women Members-at-Large	2018	Orlando Lucero, Albuquerque, NM
	2016	Marcia Milby Ridings, London, KY
Young Lawyer Members-at-Large	2017	Pamela A. Bresnahan, Washington, DC
	2017	Min K. Cho, Orlando, FL
	2018	Erica R. Grinde, Missoula, MT
Law Student Member-at-Large	2016	Christopher S. Jennison, Silver Spring, MD



## **COMMITTEES OF THE HOUSE OF DELEGATES**

### **ADVISORY COMMITTEE TO THE CHAIR OF THE HOUSE OF DELEGATES**

**MEMBERS:** Philip S. Anderson, Little Rock, AR  
Martha W. Barnett, Tallahassee, FL  
Laurel G. Bellows, Chicago, IL  
Allen E. Brennecke, Clemons, IA  
Robert M. Carlson, Butte, MT  
Alfred P. Carlton, Jr., Raleigh, NC  
L. Stanley Chauvin, Jr., Louisville, KY  
N. Lee Cooper, Birmingham, AL  
Robert J. Grey, Jr., Richmond, VA  
William C. Hubbard, Columbia, SC  
Linda A. Klein, Atlanta, GA  
Karen J. Mathis, Denver, CO  
J. Michael McWilliams, Baltimore, MD  
H. Thomas Wells, Jr., Birmingham, AL  
Stephen N. Zack, Miami, FL

### **CREDENTIALS AND ADMISSIONS**

**CHAIR:** Hon. Leslie Miller, Tucson, AZ  
**VICE-CHAIR:** Deborah Enix-Ross, New York, NY  
**MEMBERS:** Joseph G. Bisceglia, Chicago, IL  
David Wright Clark, Jackson, MS  
H. Ritchey Hollenbaugh, Columbus, OH  
Margaret K. Masunaga, Kealahou, HI  
Mary L. Smith, Lansing, IL

### **DRAFTING POLICIES AND PROCEDURES**

**CHAIR:** Tracy A. Giles, Roanoke, VA  
**VICE-CHAIR:** Hon. Pamela J. Brown, Ellicott City, MD  
**MEMBERS:** Don Bivens, Phoenix, AZ  
Doreen D. Dodson, Saint Louis, MO  
Myles V. Lynk, Tempe, AZ

## **ISSUES OF CONCERN TO THE LEGAL PROFESSION**

CHAIR: Palmer G. Vance II, Lexington, KY  
VICE-CHAIR: Darcee S. Siegel, Bal Harbour, FL  
ADVISORS: Robert J. Grey, Jr., Richmond, VA  
Robert E. Hirshon, Ann Arbor, MI  
MEMBERS: Hilarie Bass, Coconut Grove, FL  
Michael H. Byowitz, New York, NY  
Hon. Bernice B. Donald, Memphis, TN  
W. Anthony Jenkins, Detroit, MI  
Frank H. Langrock, Middlebury, VT  
Richard M. Macias, Los Angeles, CA  
Hon. Christel E. Marquardt, Topeka, KS  
Judy Perry Martinez, New Orleans, LA  
James Patrick Nolan, Annapolis, MD  
Manuel A. Quilichini, San Juan, PR  
Allan F. Ramsaur, Nashville, TN  
Steven M. Richman, Cherry Hill, NJ  
Stephen A. Saltzburg, Washington, DC  
Andrew M. Schpak, Portland, OR  
Neal R. Sonnett, Miami, FL  
D. Jean Veta, Washington, DC  
Adam Keith Zickerman, Flagstaff, AZ

## **RESOLUTION AND IMPACT REVIEW**

CHAIR: Michelle A. Behnke, Madison, WI  
VICE-CHAIR: Carlos A. Rodriguez-Vidal, San Juan, PR  
MEMBERS: Charles N. Clevert, Jr., Milwaukee, WI  
Damon L. Gannett, Billings, MT  
Sharon Stern Gerstman, Buffalo, NY  
Barbara J. Howard, Cincinnati, OH  
Loren Kieve, San Francisco, CA  
Barbara Mendel Mayden, Nashville, TN  
Margaret D. Plane, Salt Lake City, UT  
Beverly J. Quail, Denver, CO  
Patricia E. Salkin, Central Islip, NY  
Mark I. Schickman, San Francisco, CA  
Dwight L. Smith, Tulsa, OK  
Paul M. Smith, Washington, DC  
Richard L. Travis, Sioux Falls, SD

## **RULES AND CALENDAR**

CHAIR: Reginald M. Turner, Jr., Detroit, MI  
MEMBERS: Kim J. Askew, Dallas, TX  
Joseph D. O'Connor, Bloomington, IN  
Christina Plum, Milwaukee, WI  
Charles John Vigil, Albuquerque, NM

## **SELECT COMMITTEE OF THE HOUSE**

CHAIR: Karol Corbin Walker, Newark, NJ  
VICE-CHAIR: Pamela J. Roberts, Columbia, SC  
REPORTER: Alan O. Olson, Des Moines, IA  
MEMBERS: Mark D. Agrast, Washington, DC  
Jonathan J. Cole, Nashville, TN  
James M. Durant III, Lemont, IL  
Jose C. Feliciano, Cleveland, OH  
Albert C. Harvey, Memphis, TN  
Glenn P. Hendrix, Atlanta, GA  
Roberta D. Liebenberg, Philadelphia, PA  
Harold D. Pope III, Southfield, MI  
Alice E. Richmond, Boston, MA  
Robert L. Rothman, Atlanta, GA  
Margarita Silva, Phoenix, AZ  
Pauline A. Weaver, Fremont, CA  
Kenneth E. Young, Charlotte, NC

## **STEERING COMMITTEE OF THE NOMINATING COMMITTEE**

CHAIR: Randall D. Noel, Memphis, TN  
VICE-CHAIR: Dennis J. Drasco, Roseland, NJ  
MEMBERS: Paula E. Boggs, Sammamish, WA  
John Jacob Bouma, Phoenix, AZ  
Dale W. Cottam, Cheyenne, WY  
Paula J. Frederick, Atlanta, GA  
Jeffrey B. Golden, London United Kingdom  
Hon. James S. Hill, Bismarck, ND  
Paula H. Holderman, Chicago, IL  
Barbara Kerr Howe, Towson, MD  
Amie C. Martinez, Lincoln, NE  
Cristina Martinez-Guzman, San Juan, PR  
John L. McDonnell, Jr., San Francisco, CA  
Frank X. Neuner, Jr., Lafayette, LA  
Michael Haywood Reed, Philadelphia, PA  
Lawrence E. Stevens, Salt Lake City, UT  
Mario A. Sullivan, Chicago, IL  
Robert N. Weiner, Washington, DC  
Carolyn B. Witherspoon, Little Rock, AR

## **TECHNOLOGY AND COMMUNICATIONS**

CHAIR: Trudy Halla, Minneapolis, MN  
VICE-CHAIR: Clark Andrew Cooper, Birmingham, AL  
MEMBERS: Stephen J. Curley, Stamford, CT  
C. Elisia Frazier, Pooler, GA  
Suzanne E. Gilbert, Orlando, FL  
Rew R. Goodenow, Reno, NV  
Jaime Hawk, Seattle, WA  
James A. Kawachika, Honolulu, HI  
Daniel Warren Van Horn, Memphis, TN

## **TELLERS**

CHAIR: Roula Allouch, Erlanger, KY  
MEMBERS: Michael G. Bergmann, Chicago, IL  
Jennifer Daugherty MacPhail, Spartanburg, SC  
Michelle Philo, San Diego, CA  
Christopher A. Rogers, Dallas, TX

**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 14, 2015)

This report highlights American Bar Association activities from May 29, 2015, to December 4, 2015.

Introduction

In recent years, all professional associations have encountered concerns over membership numbers. Beginning with the global financial crisis in 2007, the American Bar Association lost some 27,000 members through 2010. Over the next several years, we saw modest growth in our membership. Determined to reverse this trend, the ABA focused on innovative new ways to engage prospective and current members, and to better articulate the Association's value proposition.

I'm pleased to report that our efforts are producing positive results. At the close of Fiscal Year 2015, the ABA reached a historic high of 416,982 members -- almost 6 percent more than the previous year. The fact that growth occurred in all categories of membership -- lawyers, students, and associates -- is worth highlighting.

While we should be encouraged by these numbers and the recent initiatives to support them, there is still much to be done to attract and retain members and to increase both our dues and non-dues revenues. Our current situation reminds me of a statement by Winston Churchill shortly after a major British victory in 1942: "Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning." Likewise, the all-time membership record we set in 2015 does not mark the end of the ABA's challenges. But it is a positive sign that our member-focused strategies are working, and that we have weathered the storm that's affecting the world of professional associations. We must now continue to enhance and advance efforts to make ABA membership a highly desired, valuable resource for attorneys.

We have developed many initiatives. Atop the list is our new insurance program, set to roll out early in 2016, which will offer some of the best, highly-rated plans at the most competitive prices. This program is expected to attract and retain dues-paying members. We will also continue to build on the success of the Full Firm Membership Program, which allows a law firm to pay a flat ABA dues rate to enroll all of its attorneys as members. These and other programs will not only help us with dues-paying members in FY 2016, but will also assist our efforts to generate non-dues revenue.

We are also determined to further enhance the ABA member experience and make our services more accessible. We must improve our communications and streamline the way we reach out to both members and non-members. To accomplish this, I appointed staff task forces to study ABA emails and our website and recommend improvements. The email group was

### 3

asked to examine concerns about the volume, duplicative nature, and lack of relevancy found in messages sent by the ABA, and to determine the best methods for future electronic communications. The website group will look at how we can upgrade [www.americanbar.org](http://www.americanbar.org) to current standards (including an improved search capacity), ensure we have the right user-friendly mobile solutions, and upgrade our ecommerce capabilities.

The ABA headquarters in Chicago is in the midst of massive skyscrapers and numerous monuments. As the architects who designed them well know, great structures are more than fancy facades and exteriors -- they require solid foundations to keep them standing for centuries. The changes we are making within the ABA will help us better communicate and connect with our members, especially younger lawyers who expect easy online access to services -- and tangible benefits. In doing so, we will put the Association in a stronger position to attract the next generation of members and to grow our revenues.

#### ABAction!

A major opportunity to meet the needs of current and prospective members is scheduled to debut in January, when the ABA will begin to offer its new, very competitive insurance program. This program is expected to help us recruit and retain dues-paying members and also generate some non-dues revenue. Upon inauguration of the program, the ABA will sell up to 20 different products, including the most popular types of insurance used and requested by lawyers, such as life, long-term disability, medical, auto, home, and more. The ABA's insurance program will feature a dedicated call center and web portal to provide a state-of-the-art user experience.

We are very pleased to have reached agreement in early December with the American Bar Endowment on mutually satisfactory terms for our insurance program. One facet of the agreement involves the sale of American Bar Insurance Plans Consultants, Inc. to the American Bar Association by the American Bar Endowment. The parties expect to execute definitive documents very soon and to close the transaction by January 31, 2016.

ABA Law Connect is a pilot program, currently limited to helping small business owners who have not used an attorney make contact with an attorney. The pilot will be evaluated to determine if this initiative may have broad application. The pilot is a joint venture between the Association and Rocket Lawyer in which ABA members use an advanced cloud-based platform to provide small businesses with assistance on legal matters. Currently tested in Illinois, Pennsylvania, and California, the effort will be carefully evaluated after the initial three-state test ends in January 2016.

We are experiencing progress with another recent effort. ABA Leverage offers meeting planning services, taking advantage of ABA staff expertise to assist others in the profession. The program has executed 24 contracts as of December, attracting clients such as Kirkland & Ellis and the National Asian Pacific American Bar Association. Since the program was established last year, a total of 14,745 room nights have been secured for clients. With six additional contracts pending, and more than \$344,000 in projected commissions through FY 2020, this service is poised for future expansion.

## Membership

As noted above, we ended FY 2015 with a record number of 416,982 ABA members. Notably, we achieved increases over the prior fiscal year in all three categories of membership: Lawyer (up 1.9 percent), Associate (up 1.2 percent) and Law Student (up 40.5 percent). Beginning this year, student memberships are offered at no charge. We anticipate substantial gains in this category of membership. We are also developing a premium student membership program, where for an annual fee of \$25, students will receive substantial additional benefits.

We continue our aggressive recruitment efforts for law students. In September, ABA-identified contact people at more than 200 ABA-accredited law schools were provided with orientation fliers and email marketing to promote law student membership. The effort complements the annual “Rep Rewards” recruitment campaign launched in August by Law Student Division members, who earn prizes for their outreach endeavors. We are actively working with law school deans to acquire student rosters for our marketing efforts; since March, we have obtained full lists from 63 schools.

I am pleased to report positive and growing success with our Full Firm Membership Program, which in November 2015 stood at 96 firm enrollments and more than 21,500 members. Thanks to the work of Immediate Past President William C. Hubbard, we recruited Caplan & Drysdale as the first of five new firms to join the program in FY 2016. Full Firm has also generated growing dues revenues -- \$4,244,048 at the end of FY 2015, an 11.3 percent increase from the previous year.

With the help of Past President Jim Silkenat, the ABA has taken the initiative outside this nation’s borders, and enrolled Toronto’s Bennett Jones as the first firm in our new Canadian Full Firm Membership Program. With a total of 364 attorneys, we will add hundreds of new international members as a result of the firm’s commitment to Full Firm membership.

Discussions are underway with several other Canadian-based law firms as part of a larger effort to deepen our international contacts. This outreach is being conducted using a Board-approved Canadian dues pilot that offers a flat rate for ABA dues and will be limited to large Toronto firms where we already have a certain level of active ABA members. This pilot program will expand networking between U.S. and Canadian firms and individual attorneys in many substantive practice areas.

We have prioritized the conversion of firms with at least five individual lawyer members to group billing, based on research that shows 95 percent of law firms with group billing arrangements retain their membership every year. As a result of this initiative, in late November 2015 the ABA had 70,166 group billed members -- up 6.8 percent from the previous year. Group billing revenues have risen 2.3 percent during this period, to more than \$15.2 million.

The Membership Department has obtained up-to-date information on new paralegal members who joined as ABA Associates since the launch of the Paralegals Membership Pilot. We’ve added 388 paralegals under this program, and they have spent more than \$24,000 on membership dues and other ABA products.

# 3

## Improving ABA Outreach: Email and Website Task Forces

A critical objective is to improve the member experience and help connect ABA staff and services to our members in new and innovative ways. The two staff task forces I appointed to focus on email and our website are crucial to achieve best results in these efforts. In addition to staff members, technical advisors, and a senior mentor, each staff task force is augmented by a large number of member liaisons, most from sections, divisions, and forums. A joint introductory meeting was held on October 6 to review the charter and tasking for each group and to ensure they coordinate their recommendations. The groups will guarantee we properly identify the issues and concerns, consider all reasonable options, come up with the best recommendations, and take the right actions to improve these areas.

The email task force has four main objectives: research and review current email policies and practices; research industry best practices; determine the best method for future ABA email communications; and report any suggested changes to ABA policies/practices, along with possible funding needs. Our decentralized organization and the large number of staff authorized to deliver emails complicates this issue, which is why the task force's ideas will be essential as we develop follow-on actions.

Similarly, the website group is also tasked with several priorities: research and review industry standards; determine the best way to upgrade the website; report on any necessary actions that must be taken; and include recommendations on funding that will be necessary to implement the changes.

The task forces have met regularly since the initial meeting and have made good progress. At this point, it appears most ABA email changes will be implemented with in-house resources, while the website task force will recommend outside expertise to help with implementation of the new model. In December, several companies made presentations at our Chicago headquarters office, describing their capabilities, backgrounds, and ideas for improvements to our two websites, [www.americanbar.org](http://www.americanbar.org) and [www.shopABA.org](http://www.shopABA.org). A request for proposals was developed for potential bidders, and the results will be briefed at our Midyear Meeting. Both task forces are on track to present their reports by January 15, 2016.

## ABA Diversity and Accessibility

The ABA embraces diversity in society and the legal profession, as articulated in our Goal III commitment, and we are also sensitive to the issue within the Association. 2015 marked the fifth year ABA staff has been offered an anonymous and voluntary Diversity Assessment Survey to help measure our progress toward a more diverse and welcoming staff culture. In September, 614 ABA employees -- 66 percent of staff -- participated in the survey. I'm pleased to report this year's results show staff believes we have made significant progress over the five-year period.

A couple statistics of note -- in 2015, 63 percent of respondents agreed the ABA hires a diverse workforce at all its levels compared to 46 percent in 2011. And 77 percent of

respondents agreed the ABA maintains a welcoming staff environment, compared to 66 percent in 2011. We recognize that there is always room for improvement, and we know that sensitivity to the issues and encouraging diversity must remain a top priority within our Association. This year's survey is a positive sign that we are taking steps in the right direction, as evaluated and reported by the staff.

As a member-service organization, the ABA has long been dedicated to ensuring and enhancing accessibility for individuals with disabilities. Legal requirements provide only a floor, and our Association should be a leader with appropriate accommodations. In February 1991, the House of Delegates resolved that the Association is committed to providing the benefits of membership to members with disabilities to the maximum extent possible. Since then, the ABA Commission on Disability Rights (CDR) has taken a leading role to turn that vision into a reality. The latest step in that process occurred over the past year. Working with CDR Chair Mark Agrast, I appointed a staff task force comprised of members from across the Association to examine current accessibility practices and come up with recommendations on how we can improve them.

In October 2015, the task force provided recommendations in three major areas. First, they suggested regular mandatory accessibility, disability awareness, and sensitivity trainings for all ABA staff. Second, they recommended that an ongoing staff accessibility team be created to review the ABA's progress, offer assistance to individual ABA entities, and make additional recommendations as appropriate. Third, they suggested the ABA create a repository of accessibility resources which staff can contribute to and easily access. The task force recommendations went into great detail in many of these areas.

I agreed with the vast majority of the task force's proposals, and asked them to prioritize them -- with consideration of their importance, cost, ease of execution, feasibility, and time. In November 2015, the task force responded that most of the recommendations can be implemented by staff alone, benefitting from enhanced in-house training. I am pleased to report many improvements are already being made to enhance accessibility on areas as the ABA's website, shopABA, and many others.

### Non-Dues Revenue Initiatives

The "Reimagining ABA Publishing" initiative continues to guide the transition to a more cost-effective publishing model for ABA books and periodicals. As we have explained, all books and periodicals that entities want to publish can be published, but in most instances, general operations funds will not underwrite those publications that cannot meet the business model. Thus far, editorial duties have been reassigned and a group of vendors has been identified to manage activities once handled by full-time, general operations funded employees. Members of entity boards and executive committees were updated on the new publishing structure and introduced to possible vendor partners at the fall meeting of the Section Officers' Conference (September 16-18) in Chicago.

As we navigate changes to our publishing program, several new ABA titles are being recognized by the mainstream media. "The AARP/ABA Checklist for My Family" was featured

on 10 radio shows heard in such areas as Miami, Atlanta, Chicago, Pittsburgh, and Washington, D.C., and that helped sell more than 19,000 copies of the book in its first two months of release. Another ABA-AARP book, “AARP/ABA Checklist for Family Caregivers” was so well received when it was highlighted on a PBS program in June that the broadcaster is selling DVD copies of its program with the book. Among titles from our Ankerwycke label for everyday consumers, “The Triumph of Genius” received favorable reviews in The Economist and Chicago Review of Books, while “Operation Greylord” was highlighted in a Publishers Weekly article of best upcoming books. Another new title, “The Dealmaker’s Ten Commandments,” was featured in a recent issue of the trade publication Variety. On August 25, the Tribune News Service published a feature story on Ankerwycke and its upcoming slate of new titles. Featured books include “BIGLAW,” which was chosen by Harper’s Bazaar as one of their 15 must-read novels, and “Stolen Legacy,” whose author was profiled in both the Guardian and The Telegraph.

Additional changes to our publishing structure are also underway. For example, a multi-departmental team has convened to improve e-commerce. While the group evaluates new online platforms, it has initiated several enhancements to the current system, including upgraded hardware for improved capacity and performance during web traffic spikes. We have also introduced a new business process to initiate book production, featuring a rigorous evaluation of expected profitability. And a new system for CLE development was introduced in August to standardize the workflow and centralize production, enabling greater staff efficiency.

This year, the ABA took a different approach to Cyber Monday at shopABA. Instead of having a one day sale, five days of specials were offered for on-demand CLE, webinars, institutes produced by the Center for Professional Development, and titles from the Ankerwycke product line -- all culminating with a 50 percent off sale for book titles more than three years old on Friday. As a result of this new approach, total sales for the week reached a record \$823,777.

Work continues to improve our Cyber Monday customer experience. Last year, as in previous years, we received numerous complaints because of the amount of time it took to purchase products, and many faced difficulties when using shopABA on their mobile devices. This year, the shopping experience was dramatically improved: We received no complaints from shoppers. (I found this to be the case when I went online to test the system as a “silent shopper.”)

Since the launch of Personify in May 2014, shopABA continues to make improvements to provide greater stability, better risk management, and improved performance. Recent changes of note include overhauling the store search, enhancing the visitor login process, speeding up checkout performance, boosting site capacity, improving login performance, and refining the customer eBook product offering by adding Kindle file formats for new e-books. We also seek to enhance personalized message content and a better shopABA environment for mobile e-commerce. These topics are currently being examined by the website and email task forces.

### Finances and Operations

The long-term financial stability of the ABA is of course vital to our success. Earlier this year, the Association created a Sustainability Task Force to review our current cost and operating

structure and to make recommendations on areas where we might reduce costs and improve efficiencies. The Task Force is chaired by Past President Jim Silkenat and comprised of key leaders, and it will report its recommendations at the Midyear Meeting.

In FY 2015, the ABA generated \$210.1 million in revenues and incurred \$216.3 million in expenses, yielding a \$6.2 million deficit. Shortfalls came in publications, dues revenues, and meeting fees. As of October 31, FY 2016's generated revenues stood at \$30.2 million, while expenses were \$31.3 million, a \$1.1 million deficit.

### Communications

As the ABA welcomed its first female president of color at the close of the 2015 Annual Meeting in Chicago, several news outlets reported on the historic milestone, including mainstream press such as Bloomberg, NBC News, and The Chicago Defender, and legal media such as Law360, Chicago Daily Law Bulletin, and Metropolitan Corporate Counsel. ABA President Paulette Brown was also interviewed in late August and September by the editorial boards of The Missoulian and the Chicago Sun-Times, as well as by the Wall Street Journal, the Boston Globe, and CNN.

In an in-depth feature story titled "The Bias Hunter" in More magazine, President Brown explained that she has devoted much of her life to "bringing equality and ethnic and gender diversity to the practice of law." On BBC Radio, she discussed racial disparity in the justice system and what she expects to do as ABA president to help eradicate the problem. Recognizing the need for such work, a columnist in the Washington Post reported that President Brown's "initiatives could help reframe the image of the country's legal field as a diversity holdout, one filled with fewer minorities than most other professions."

The Communications and Media Relations (CMR) Division worked closely with President Brown to promote "And Justice for All: An ABA Day of Service" during national Celebrate Pro Bono Week, October 25-31. CMR distributed two news releases related to the initiative on October 19, each reaching more than 300 reporters at hundreds of news outlets around the country. The Division's social media outreach and steady web-story coverage throughout the celebration kept the annual event in the headlines nationwide, in both the mainstream press, such as Forbes, Tampa Bay Times, Albuquerque Journal, Daily Utah Chronicle, and NBC News in Reno, as well as in legal media, such as the National Law Journal and Metropolitan Corporate Counsel. Additionally, CMR secured an October 26 editorial board meeting with the Portland Oregonian for President Brown to promote the celebration following her participation at a local legal aid event organized for the special week.

In late October and November, President Brown also honored service members with a statement issued on Veterans Day; spoke out on immigration detention practices during an ABA program reported by El Diario, a leading Spanish-language news outlet; emphasized the importance of civics education in the Philadelphia Inquirer, in promotion of a Public Education Division conference; and expressed condolences to the president of the Paris Bar Association following the November 13 terror attacks.

The ABA made headlines across the globe during the 800<sup>th</sup> anniversary celebration of the sealing of Magna Carta in Runnymede, England, where the Association rededicated its 1957 memorial to Magna Carta on June 15. With Prime Minister David Cameron, Attorney General Loretta Lynch, and members of the British royal family (including Queen Elizabeth II) in attendance, the festivities were covered by major news outlets from both the U.K. and America, including Sky News, the New York Times, BBC, Reuters, The Guardian, Fox, the Washington Post, and CBS News. To the crowd of more than 4,000 attendees, then-President William Hubbard described the significance of the Great Charter. “In this field [Runnymede] were born precepts that made possible the United States Constitution, the United Nation’s Universal Declaration of Human Rights, and the framework of justice in America, the United Kingdom, and much of the world,” he was reported as saying in the coverage by ABC News.

Throughout the five-day London Sessions conference, news coverage of the ABA and Magna Carta was robust, including one-on-one interviews for the ABA president with The Irish Times, National Public Radio, and BBC Television. During President Hubbard’s interview with the Irish Times, he spoke of the Commission on the Future of Legal Services and its work to serve a 21st century clientele through technology and other innovations. “The current system as it affects those who do not have access to justice is just broken and we need to fix it,” he said in the June 22 article.

### Advocacy

During the past six months, we have continued our efforts to enhance justice and equality throughout the legal profession and society. On November 9, the ABA sent a letter to the full Senate urging support for and co-sponsorship of S. 2123, the Sentencing Reform and Corrections Act of 2015. This legislation takes a number of important steps forward to reduce reliance on federal mandatory minimum sentences for low-level drug offenders and to improve fairness in the federal system. On November 17, the ABA also sent a letter to the Chair and Ranking Member of the House Judiciary Committee, urging the Committee to approve H.R. 3713, the Sentencing Reform Act of 2015, which also reforms several federal mandatory minimum drug sentences.

ABA-supported language regarding representative payee fraud, which comes from Oklahoma Senator James Lankford’s S. 1576, the Representative Payee Fraud Prevention Act of 2015, made it into the budget deal. The reforms include the creation of a new felony specifically for conspiracy to commit Social Security fraud that is punishable by up to five years in prison and fines of up to \$250,000. The legislation also provides stiffer penalties of from five to 10 years in prison for individuals in positions of trust, such as claimant representatives, doctors and other health care providers or current or former employees of the Social Security Administration. Those persons of trust could also be slapped with civil monetary penalties of from \$5,000 to \$7,500 for each false statement or omission they make to advance a fraudulent transaction.

On August 20, the Commission on Immigration released “Family Immigration Detention: Why the Past Cannot be Prologue,” a new report on the expansion of U.S. immigration detention, which concludes that the federal government’s use of family detention violated applicable laws and human rights norms. Less than a week later, after a California federal court



ruled that children should generally be released from detention within five days, President Brown applauded the decision in a press statement, saying that the ruling underscores the findings of the ABA report. In a related development, the Commission's work on behalf of unaccompanied minor immigrants will expand through a nearly \$370,000 grant received from the Texas Access to Justice Foundation in August, to establish a Houston-based mentoring and legal resource center, the Children's Immigration Law Academy.

The Task Force on Law Enforcement Body Camera held its first meeting in September in Washington, D.C. Organized by the Criminal Justice Section, the Section of Litigation, the Section of Science and Technology Law, and the Section of Civil Rights and Social Justice, the Task Force will identify best policies and practices for the deployment and use of body cameras by police and assess the technology's impact on the criminal justice system and individual liberties.

In response to the recent budget passed by the U.S. House of Representatives, which eliminated funding for public service loan forgiveness, the Governmental Affairs Office (GAO) initiated in August a nationwide grassroots social media campaign to protect the program. #Loan4Giveness has encouraged thousands of constituents to connect with their legislators through social channels to save the loan repayment option. GAO seeks to expand its campaign by involving other organizations in a "virtual" march on Washington later this fall.

Two additional bills were recently reintroduced on Capitol Hill, thanks in part to ABA advocacy. Following an ABA letter to House leaders, Congress reintroduced in both Houses the Civil Justice Fairness Act, which would exclude non-economic damages from gross income in civil rights and employment cases and eliminate the taxation for lump-sum recoveries at artificially high rates. Also, after the ABA's preparatory work with U.S. Representative Mark Pocan, the Restore Honor to Service Members Act was reintroduced in the House and Senate in July. The legislation would mandate the Department of Defense to correct discharge records for certain veterans discharged under the earlier "Don't Ask, Don't Tell" policy.

In July, the Task Force on Gender Equity hosted its fifth "Power of the Purse" meeting in Northbrook, Illinois. Held in cities across the United States, the sessions involve female general counsel who met to examine solutions to gender pay inequity. As of September 1, the Task Force was absorbed by the Commission on Women in the Profession. Among other membership changes, the Section of Individual Rights and Responsibilities received House of Delegates approval in August to change its name to the Section of Civil Rights and Social Justice.

The Division for Public Education presented the 58<sup>th</sup> annual Silver Gavel Awards for Media and the Arts on July 21. The four winners -- "The Case Against 8," "Burning Down the House: The End of Juvenile Prison," "Serial: Season One," and "Till Death Do Us Part" -- were recognized for their outstanding efforts to foster the American public's understanding of the law. Also honored by the Association in the past quarter, "The Secret of Magic" received the Harper Lee Prize for Legal Fiction, conferred by the ABA Journal and the University of Alabama School of Law.

ABA representatives briefed leaders of the National Conference of Lawyers and CPAs in June on the continued efforts of the Association to defeat legislation that would require many law firms and other personal service businesses to switch to the accrual method of accounting. In response to the ABA's outreach, at least 32 state, local, and specialty bar associations have expressed opposition to the proposals. GAO is currently at work with other ABA entities to develop a webinar set for December 14 that will further educate ABA members on the accounting issue. So far, 500 attendees have already registered for the event, which is expected to become a free ABA CLE monthly webinar.

The ABA Veterans Claims and Assistance Network completed its pilot run in May. Since August 2014, the initiative has processed 329 service requests and has now recruited 720 volunteer attorneys to work on future cases. In June, the Governmental Affairs Office met with the Veterans Benefits Administration to explore continuation of the initiative with more support from the Department of Veterans Affairs.

The Commission on Interest on Lawyers Trust Accounts (IOLTA) has assisted efforts to distribute \$45 million to IOLTA programs pursuant to recent bank settlements with the Department of Justice. The Commission helped Bank of America distribute more than \$30 million, and is now in contact with Citigroup to distribute another \$15 million.

The Association has welcomed several high-profile participants to ABA events since May. In addition to Attorney General Loretta Lynch's appearance at the ABA Annual Meeting, the August meeting included retired U.S. Supreme Court Justice John Paul Stevens, who spoke at a Section of Litigation awards luncheon. Other speakers include NAACP Legal Defense and Educational Fund President Sherrilyn Ifill, U.S. Deputy Attorney General James Cole, U.S. Congressman Luis Gutierrez, and Solicitors General serving under the last four presidents -- Drew S. Days III, Kenneth Starr, Ted Olson, and Donald B. Verrilli, Jr. About a month later, the Standing Committee on Law and National Security held a briefing that included former director of the Central Intelligence Agency and the National Security Agency, General Michael Hayden. On September 17, the Division for Public Education organized a "virtual" field trip for 8,000 classrooms from around the world that featured U.S. Supreme Court Justice Stephen Breyer, who spoke about the U.S. Constitution. Also in September, the Solo, Small Firm and General Practice Division welcomed crisis manager Judy Smith, the inspiration for the television show, "Scandal," as its keynote speaker for its annual summit. And in August, Federal Trade Commission Chair Edith Ramirez and Assistant Attorney General William Baer participated in the Section of Antitrust Law's fall leadership meeting.

In November, the 2015 Appellate Judges Education Institute Summit took place in Washington, DC. The Summit, open to all judges and lawyers and co-hosted by the ABA Judicial Division, is the nation's preeminent provider of appellate judicial education. The Summit gathers federal and state appellate judges from across the country and invites all lawyers to join them for practical, cutting-edge educational programming. Some highlights included: "A Conversation with Justice Breyer;" "The Media and the Courts: What's Behind the Curtain in the Land of Oz?;" "Weeding Out the Highs and Lows of Legalized Marijuana: a Joint Discussion;" "Guns and Gavels: A Second Amendment Update;" "Guantanamo Bay and the Rule of Law;" and "Peaceful Coexistence? When Religious Freedom Crashes into Other Laws and Values." In

addition, to outstanding CLE programming, registrants were invited to attend a reception at the United States Supreme Court which featured appearances by Justice Breyer and Justice Sotomayor. The Judicial Division hosted a reception at the British Embassy. His Excellency Sir Peter Westmacott, British Ambassador to the United States, graciously opened his residence to both Judicial Division members and AJEI registrants and delivered brief remarks. Lord Justice Ernest Ryder, Senior President of Tribunals for Great Britain and Michael Bergmann, Chair of the Judicial Division, addressed the group at the reception, with the Lord Justice's remarks focused on the 800<sup>th</sup> anniversary of the sealing of the Magna Carta.

### Governance and Public Services

Letters have been sent to the Section of International Law, and to the state bars in Colorado, Massachusetts, New Jersey, Tennessee, and Virginia, informing them that they are now eligible for an additional delegate in the House based on the revised thresholds as of the August 31, 2015 lawyer population and ABA membership figures. As part of the Five-Year Review Process, letters were sent to the state bars for Arkansas and Connecticut to alert them that their bars are in jeopardy of losing a delegate, pending the lawyer population and membership counts as of December 31, 2015.

The Nominating Committee met via telephone conference call on Thursday, October 29, 2015, to hear from the Candidates for Treasurer of the Association, and the teleconference was recorded. The recording was sent to the Nominating Committee and to the House, and was also posted to the [House's Leadership page](#).

### ABA International

The ABA continues to provide a tremendous variety of important programs to advance the rule of law internationally. Among highlights from ABA's Rule of Law Initiative (ROLI), the ABA drafted constitutional provisions on the function of local governments for the Libyan Constitutional Drafting Authority. Also in Libya, the ABA advised a group that will draft the country's national charter on the use of social media as a platform for peace-building. In Mali, the ABA helped rebuild the nation's local civil society, through shared strategies to implement transitional justice programs, which it presented to the president and secretary general of the Truth, Justice and Reconciliation Commission.

In Turkey, 23 legal awareness and counseling sessions were organized for Syrian refugees in various community centers and Syrian organizations. Four sessions were dedicated exclusively to women and vulnerable groups, and topics included the temporary protection regime, citizenship, work and residency, housing access to education and health, and family law. Some 463 Syrian refugees attended the sessions, and more than 30 requested and received private counseling by an ABA ROLI-trained lawyer. In addition, 14 legal information messages were sent though SMS to over 850 Syrians; 49 legal questions were answered by ABA ROLI-trained lawyers through the SMS helpline.

In China, the ABA worked with prosecutors, judges, and others in the criminal justice system on a rule-of-law index based on the model developed by the World Justice Project. In

### 3

November, President Brown went to Beijing where she addressed the Section of International Law's Asia Forum, and conducted high-level meetings with the Ministry of Education, Supreme People's Court, National People's Congress, All China Lawyers' Association, and the China Law Society. In her remarks and private meetings, President Brown expressed concern about the treatment of human rights lawyers in China and underscored the importance that the ABA places on the ability of lawyers to represent clients independently and without fear of reprisal.

In the Central African Republic, ABA ROLI held a series of trainings for 21 prosecutors, 25 attorneys, and 19 judges from October 26 to November 12, 2015. The trainings focused on increasing justice sector actors' knowledge and skills relevant to the effective adjudication of gender-based violent crimes. The Prime Minister, the Minister of Justice, the Minister of Social Affairs, and the Ambassadors of the United States and France attended the launch events.

In the Philippines ABA ROLI received a plaque of recognition on October 25 from the Intellectual Property Office of the Philippines during the 5th Anti-Counterfeiting and Piracy Summit. The award recognizes the contributions of partner individuals and institutions that help strengthen intellectual property enforcement in the Philippines.

#### Professional Services

During the last quarter of fiscal year 2015, several ABA entities released useful resources for lawyers and the broader community, including the six-volume "Legal Technology Survey Report," an ABA Legal Technology Resource Center survey of practicing attorneys and their technology choices; the "How to Be an Ally" toolkit on the workplace needs of gay, lesbian, bisexual, and transgender individuals, created by the Standing Committee on Sexual Orientation and Gender Identity; "The National Task Force on Stand Your Ground Laws – Final Report and Recommendations" from the Council on Racial and Ethnic Justice; a new national bar association directory from the Bar Services Division; "First Chairs at Trial: More Women Need Seats at the Table," a study by the Commission on Women in the Profession and the American Bar Foundation that indicates gender disparities among lead trial lawyers; "ABAConstitution.org, an online aggregation of learning materials developed by the Division for Public Education for Constitution Day (September 17); a directory of lawyer incubator programs compiled by the Standing Committee on Delivery of Legal Services; and "The 2014 Comprehensive Survey of Lawyer Assistance Programs

Six Section of Science and Technology Law (SciTech) leaders presented two sessions related to cybersecurity and privacy in healthcare at the Healthcare Information and Management Services Society (HIMSS) mHealth Summit in Washington, DC. The sessions were well-received and there were more than 50 participants in each session. Based on the feedback, the Director of the Summit has asked SciTech to consider presenting a program at the HIMSS16 Annual Conference in Las Vegas in February 2016.

#### Closing

For the past several years, stagnant membership numbers and revenues have impacted every professional association. The ABA has developed and implemented many new strategies

to counter the challenges. Meaningful progress does not happen overnight. It takes time. It takes focus. It takes patience. It takes resources. We're committed to implement the necessary changes and overcome obstacles so that we can assure a bright future for our Association.

Over the past 10 years, ABA has felt the impact from a major economic crisis to changes in our profession and to the significant and systemic hurdles of appealing to younger lawyers who thrive in a 24/7 digital world. As with other professional organizations that have existed for decades, our challenge has been to modernize in ways that makes membership both easy and vital for professional success. Improving how the ABA communicates with members is a key component of this. Our email and website task forces will provide new solutions to help ABA at all levels connect with members as never before.

We have passed the point that Churchill may call the "end of the beginning." FY 2015 marked a major milestone with a record 416,982 members; that highlights how the ABA has made headway to showcase our value proposition.

We have a long road ahead to secure the progress we've made with membership and to increase dues-paying revenues. But to those who lament the "perfect storm" of recent years, we can point to evidence that we have weathered the tempest. We are not only still afloat, but sailing forward to the bright sunrises that are ahead for the ABA.

Thank you for your many very positive contributions to the profession and to our Association, and please let me know whenever I may assist with anything.

Respectfully submitted,

Jack L. Rives  
Executive Director and  
Chief Operating Officer



**AMERICAN BAR ASSOCIATION**  
**COMMITTEE ON SCOPE AND CORRELATION OF WORK**  
**INFORMATIONAL REPORT**  
**TO THE HOUSE OF DELEGATES**

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 2015 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 4, 2015 in Chicago, Illinois. Scope will meet again in conjunction with the ABA's Midyear Meeting on Sunday, February 7, 2016, in San Diego, California.

**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:**

***Center for Professional Responsibility*** - Scope commends the Center for Professional Responsibility for its excellent work.

***Coordinating Council for the Center for Professional Responsibility*** - Scope commends the Coordinating Council for the Center for Professional Responsibility for its good work.

***Client Protection, Standing Committee*** - Scope commends the Standing Committee on Client Protection for its excellent work.

***Ethics and Professional Responsibility, Standing Committee*** – Scope commends the Standing Committee on Ethics and Professional Responsibility for its excellent work and its outreach to ethics committees within the ABA's sections and divisions. Since most ethics opinions occur on the state level, Scope encourages the Standing Committee to improve its outreach/relationship with ethics committees of state bar associations. This would enhance the ABA's role as the leader in this field, while being beneficial to the state committees.

***Professional Discipline, Standing Committee*** - Scope commends the Standing Committee on Professional Discipline for its excellent work.

***Professionalism, Standing Committee*** - Scope commends the Standing Committee on Professionalism for its excellent work.

***Specialization, Standing Committee*** - Scope commends the Standing Committee on Specialization for its excellent work.

**Editorial Board ABA/BNA Lawyer's Manual on Professional Conduct** – Scope commends the Editorial Board for its excellent work.

***National Conference of Lawyers and Certified Public Accountants***

**Scope's 2016 Midyear Agenda will include:**

Commission on Disability Rights, Commission on Domestic and Sexual Violence, Commission on Homelessness and Poverty, Commission on Law and Aging, and Commission on Youth at Risk.

**Scope's 2016 Spring Agenda will include:**

**Diversity Entities:** Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Council for Racial and Ethnic Diversity in the Educational Pipeline, Commission on Racial and Ethnic Diversity in the Profession, Coalition on Racial and Ethnic Justice, Center for Racial and Ethnic Diversity, and SpC on Hispanic Legal Rights and Responsibilities; **International Issues:** Commission on Immigration and Center for Human Rights; and **Task Forces:** *Cybersecurity Legal and Commission on the Future of Legal Services.*

Respectfully Submitted,



Richard A. Soden, Chair  
 Leslie Miller  
 Thomas M. Fitzpatrick  
 Amelia Helen Boss  
 W. Andrew Gowder, Jr.  
 Michael W. Drumke, Chair, SOC  
 William R. Bay, *ex-officio*  
 Pamela C. Enslin, *ex-officio*

/al

Dated: December, 2015



**AMERICAN BAR ASSOCIATION  
NEW YORK COUNTY LAWYERS ASSOCIATION  
CRIMINAL JUSTICE SECTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association urges the Department of Justice and the
- 2 Federal Bureau of Prisons to amend their policies with respect to monitoring emails
- 3 between attorneys and their incarcerated clients to permit attorneys and their incarcerated
- 4 clients to communicate confidentially via email and thereby maintain the attorney-client
- 5 privilege.



## REPORT

### I. INTRODUCTION

Telecommunications are integral to human relationships in today's society. For attorneys, email has supplanted other technologies as the primary medium for communicating with clients. Email has even become an important tool for attorneys to communicate with their incarcerated clients.

In 2005, the Federal Bureau of Prisons ("BOP") launched a pilot program offering inmates<sup>1</sup> limited email access through the Trust Fund Limited Inmate Computer System ("TRULINCS").<sup>2</sup> Today, all BOP facilities provide inmates email access through TRULINCS.<sup>3</sup> However, to use TRULINCS, inmates must acknowledge that all of their emails, including emails between an inmate and his or her attorney (together, "Legal Email"), are monitored by the BOP, and consent to the monitoring.<sup>4</sup>

The compulsory acknowledgment and consent to monitoring of their Legal Email waives the attorney-client privilege with respect to inmates' TRULINCS emails.<sup>5</sup> There is no exception for attorney-client email communications as there is for traditional postal mail correspondence, unmonitored telephone calls, and in-person meetings. Relying on the privilege waiver, the United States Attorney's Office in at least some federal districts require the BOP to turn over

---

\* The New York County Lawyers Association would like to give a special thank you to Brandon Ruben, whose Note, *Should the Medium Affect The Message? Legal and Ethical Implications of Prosecutors Reading Inmate-Attorney Email*, 83 Fordham L. Rev. 2131 (2015), provides an in-depth discussion of the ethical and constitutional implications of the BOP's Legal Email monitoring policy, and was an invaluable resource to the authors of this report.

<sup>1</sup> For the purposes of this report, the terms "inmate" and "incarcerated client" refer to both pre-trial detainees and convicts.

<sup>2</sup> National Archives and Records Administration, Request for Records Disposition Authority, Trust Fund Limited Inmate Computer Communication System (TRULINCS) (Mar. 22, 2006), *available at* [http://www.archives.gov/records-mgmt/rcs/schedules/departments/departments-of-justice/rg-0129/n1-129-06-008\\_sfl15.pdf](http://www.archives.gov/records-mgmt/rcs/schedules/departments/departments-of-justice/rg-0129/n1-129-06-008_sfl15.pdf).

<sup>3</sup> TRULINCS Locations, Federal Bureau of Prisons, *available at* <http://www.bop.gov/inmates/trulincs.jsp> (last visited July 19, 2015).

<sup>4</sup> Inmate Agreement for Participation in TRULINCS Electronic Messaging Program, Federal Bureau of Prisons, *available at* [http://www.bop.gov/policy/forms/BP\\_A0934.pdf](http://www.bop.gov/policy/forms/BP_A0934.pdf) (last visited July 19, 2015).

<sup>5</sup> If an attorney-client communication is not kept confidential, then the privilege is waived. *Bower v. Weisman*, 669 F. Supp. 602, 606 (S.D.N.Y. 1987) (holding that the privilege did not apply to defendant's letter to his attorney because it was left spread out on a table in an office's waiting room). Further, even if a party intended the communication to be confidential, courts generally hold the privilege inapplicable if her actions undermine that intent. P.R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9:24 (2d ed. 1999). Thus, when a party knowingly discloses privileged information in the presence of a third party, or fails to take reasonable precautions to prevent third parties from overhearing or reading a privileged communication, courts generally hold that the privilege was waived. *United States v. Gann*, 732 F.2d 714, 723 (9th Cir. 1984) (holding that statements made by a client to his attorney over the telephone while detectives were searching his house were not privileged). Monitored telephone calls and emails are not privileged because the presence of a recording device is the "functional equivalent of a third party." *United States v. Hatcher*, 323 F.3d 666, 674 (8th Cir. 2003). Thus, TRULINCS emails between inmates and their attorneys are not privileged because the automated waiver informs inmates that all of their emails are subject to monitoring. *Id.*

# 10A

copies of TRULINCS communications between criminal defendants and counsel, and prosecutors have been permitted to offer the emails in evidence against the defendants.<sup>6</sup>

Prison monitoring of inmates' email communications creates at least two significant problems. First, although defense lawyers must avoid making confidential disclosures and warn their clients against doing so, defendants sometimes discuss confidential information in TRULINCS emails. More troubling, the BOP's email monitoring policy deprives attorneys of the most effective means to promptly inform and consult with their inmate clients regarding important case matters, as required by Model Rule of Professional Conduct 1.4,<sup>7</sup> and frustrates their ability to provide meaningful Sixth Amendment representation. Moreover, by forcing inmates and their attorneys to rely on traditional media to communicate confidentially, the BOP's Legal Email monitoring policy causes significant administrative burdens and may thereby decrease prison security.

Additionally, because the BOP's Legal Email monitoring policy restricts inmates' ability to communicate with their attorneys, it is ripe for challenge on constitutional grounds. This report argues that the BOP's policy raises serious constitutional concerns and may be vulnerable to challenge on the grounds that it is not reasonably related to legitimate penological interests and unreasonably restricts pretrial detainees' Sixth Amendment right of access to counsel.

This report also explains that the BOP could provide a secure, unmonitored Legal Email system at a relatively low cost using existing email encryption technology.<sup>8</sup> It concludes that a change in BOP policy, to permit attorneys and their incarcerated clients to communicate confidentially via email, would improve both the quality of representation of criminal defendants detained in BOP facilities and the reality of justice in the federal criminal justice system. The proposed Resolution urges the BOP to change its policy to allow confidential attorney-client email communications.

## **II. THE BOP'S EMAIL MONITORING POLICY UNDERMINES COMPETENT REPRESENTATION AND WASTES RESOURCES**

The BOP's Legal Email policy imposes unnecessary and substantial administrative burdens on attorneys' ability to communicate with their inmate-clients. These burdens frustrate attorneys' ability to promptly inform and consult with their inmate-clients regarding important case matters, as required by Model Rule of Professional Conduct 1.4,<sup>9</sup> and, in the case of counsel representing pretrial detainees, also frustrates their ability to provide meaningful Sixth Amendment representation. The same burdens also undermine the efficiency of the lawyers representing federal convicts and raise the cost of that representation. This cost is largely borne by taxpayers, as each United States District Court is required to implement a plan to furnish

---

<sup>6</sup> See Exhibit A to Defendant's Motion requesting protective order, U.S. v. Walia, No. 1:14-cr-00365-MKB (E.D.N.Y. July 10, 2014), ECF No. 9-1.

<sup>7</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 (2014).

<sup>8</sup> See *infra* Section IV.

<sup>9</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 (2014).

adequate representation for indigent defendants under the Criminal Justice Act.<sup>10</sup>

*A. The BOP's Policy Imposes Significant Burdens on Inmates' Attorneys*

The BOP's Legal Email monitoring policy limits the means by which federal inmates can consult counsel, effectively allowing confidential correspondence only by traditional media: postal mail, pre-arranged unmonitored telephone calls, and in-person visits. As explained in greater detail in Sections III. and IV., communicating confidentially via these traditional channels is grossly inefficient and imposes substantial burdens on attorneys, especially compared to the relative speed, ease, and low cost of a system providing for confidential Legal Email.

It can take two weeks or more for an inmate to receive postal mail sent from an attorney, and additional time to receive an inmate's response.<sup>11</sup> Most prisons do not accept expedited mail delivery. Similarly, unmonitored telephone calls are procedurally difficult and time-consuming to set up.<sup>12</sup> The process must ordinarily be initiated by the inmate, and can take up to a month to complete.<sup>13</sup> In-person visits are especially burdensome, because attorneys often must wait several hours for their client to be produced by the prison, in addition to time spent traveling to and from the facility and passing through security.<sup>14</sup>

In contrast, an unmonitored Legal Email system would allow attorneys and their inmate clients to send email communications regarding confidential matters at their convenience. Unlike traditional legal mail, emails are delivered to the recipient's inbox instantaneously. Moreover, unlike unmonitored telephone calls and in-person visits, inmates and their attorneys do not have to rely on BOP staff to coordinate a specific time and place for the emails to be sent. Lastly, an unmonitored Legal Email system would greatly reduce the number of in-person visits attorneys are required to make, saving attorneys countless hours traveling to and from prisons and waiting for their clients to be produced once they arrive at the prison.

Thus, traditional postal mail, unmonitored telephone calls, in-person visits are not adequate alternatives to unmonitored emails.

*B. The BOP's Policy Frustrates the Ability of Attorneys to Promptly Communicate with Incarcerated Clients as Required Under Rule of Professional Conduct 1.4*

The burdens imposed by the BOP's Legal Email monitoring policy substantially frustrate attorneys' ability to promptly communicate with incarcerated clients regarding important case matters, as required by Rule 1.4 of the ABA Model Rules of Professional Conduct,<sup>15</sup> compared to the relative speed, ease, and low cost of a system providing for confidential Legal Email. Rule

<sup>10</sup> 18 U.S.C. § 3006A (2012).

<sup>11</sup> Transcript of Criminal Cause for Status Conference Before the Honorable Dora L. Irizarry at 16:14–16, United States v. Ahmed, No. 1:14-cr-00277 (E.D.N.Y. June 27, 2014) [hereinafter Tr. of Ahmed Conference]

<sup>12</sup> *Id.* at 16:5–13 (Defense counsel argued that unmonitored telephone calls were seemingly unavailable, as defense counsels' law firm was unable to coordinate an unmonitored telephone call with their client despite numerous telephone calls to the prison over the course of several days).

<sup>13</sup> *Id.* at 19:14–17.

<sup>14</sup> *Id.* at 19:5–11.

<sup>15</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 (2014).

# 10A

1.4 states that:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.<sup>16</sup>

Comment 2 to Rule 1.4 explains that paragraph (a)(1) “requires that the lawyer promptly consult with and secure the client’s consent prior to taking action” regarding a decision that must be made by the client, such as a proffered plea bargain.<sup>17</sup> Moreover, an attorney’s failure to communicate with a client may lead to discipline, even if the client’s legal interests are unaffected.<sup>18</sup>

## *C. The BOP’s Policy Frustrates the Ability of Attorneys to Provide Meaningful Sixth Amendment Representation and Wastes Resources*

Most pretrial defendants detained in BOP facilities are “financially unable to obtain adequate representation.”<sup>19</sup> The BOP’s Legal Email monitoring policy disproportionately impacts these indigent defendants and the already-overburdened lawyers who represent them: federal public defenders and private counsel appointed from the Criminal Justice Act Panel (“CJA Counsel”).<sup>20</sup> Federal defenders and CJA Counsel represent over 60% of federal criminal defendants nationwide.<sup>21</sup>

---

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at cmt. 2.

<sup>18</sup> *See id.* at R. 8.4 cmt. 1 (“Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct.”).

<sup>19</sup> 18 U.S.C. § 3006A(a)(1) (2012).

<sup>20</sup> 18 U.S.C. § 3006A (2015).

<sup>21</sup> *See* Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES, Aug. 23, 2013, available at <http://www.nytimes.com/2013/08/24/us/public-defenders-are-tightening-belts-because-of->

The Criminal Justice Act mandates that each United States District Court implement a plan for providing adequate representation to indigent defendants, and requires that counsel furnishing representation under the plan be selected from a panel of court-approved private attorneys (CJA Counsel), or a public defender organization, bar association, or legal aid agency.<sup>22</sup> The Criminal Justice Act was passed in 1964, one year after the Supreme Court's landmark ruling in *Gideon v. Wainwright*, which guaranteed all criminal defendants the right to adequate counsel.<sup>23</sup> Five decades after that ruling, however, "the basic rights guaranteed under *Gideon* have yet to be fully realized."<sup>24</sup> Part of the reason, explained former United States Attorney General Eric H. Holder Jr., speaking at the 2012 American Bar Association's National Summit on Indigent Defense, is that "public defender offices and other indigent defense providers are underfunded and understaffed. Too often, when legal representation is available to the poor, it's rendered less effective by insufficient resources, overwhelming caseloads and inadequate oversight."<sup>25</sup>

Implementation of a confidential Legal Email system is a cost-effective solution for improving the representation of indigent criminal defendants in federal court. Most indigent federal defendants are detained before trial in BOP facilities. The BOP's Legal Email monitoring policy substantially interferes with pretrial detainees' ability to consult counsel by forcing them to use inefficient and costly traditional communication media. In the context of the Sixth Amendment right to counsel, unreasonable interference with the accused person's ability to consult counsel is itself an impairment of the right.<sup>26</sup> Implementation of a confidential Legal Email system would not only eliminate the burdensome costs and administrative tasks associated with traditional forms of communication, but as explained in Section IV., would also be relatively simple, quick and inexpensive to implement using existing email encryption technology.

Five decades after the Supreme Court affirmed that adequate legal representation is a basic right for every person accused of a crime, the BOP's Legal Email monitoring policy is undermining this fundamental promise. By implementing a confidential Legal Email system, the BOP could facilitate bringing this fundamental promise closer to reality.

---

steep-federal-budget-cuts.html?\_r=0. (Federal defenders alone represent approximately 60% of federal defendants nationwide).

<sup>22</sup> 18 U.S.C. § 3006A (2015).

<sup>23</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>24</sup> Mark Walsh, *Fifty years after Gideon, lawyers still struggle to provide counsel to the indigent*, A.B.A. J. (Mar. 1, 2013 11:10 AM CST), available at [http://www.abajournal.com/magazine/article/fifty\\_years\\_after\\_gideon\\_lawyers\\_still\\_struggle\\_to\\_provide\\_counsel](http://www.abajournal.com/magazine/article/fifty_years_after_gideon_lawyers_still_struggle_to_provide_counsel).

<sup>25</sup> *Id.*

<sup>26</sup> *Benjamin v. Frasier*, 264 F.3d 175, 185 (2d. Cir 2001); *see also* *Wolfish v. Levi*, 573 F.2d 118, 133 (2d Cir.1978), *rev'd on other grounds*, *Bell v. Wolfish*, 441 U.S. 520 (1979) (prison regulations restricting pretrial detainees' contact with their attorneys are unconstitutional where they "unreasonably burdened the inmate's opportunity to consult with his attorney and to prepare his defense").

### III. THE BOP'S EMAIL MONITORING POLICY RAISES SERIOUS CONSTITUTIONAL CONCERNS

Prison policies that impact inmates' constitutional rights, such as the Sixth Amendment right to counsel, "must be evaluated in light of the central objective of prison administration, safeguarding institutional security."<sup>27</sup> Providing a confidential Legal Email system would enhance prison security by reducing the opportunities for drugs and contraband to be smuggled into BOP facilities with outside mail and would also ease the burden on prison staff by relieving them of the responsibility of coordinating unmonitored attorney calls and in-person visits. Thus, the BOP cannot justify its Legal Email monitoring policy, or the lack of a confidential email system, as reasonably necessary to safeguard prison security.

In *Turner v. Safley*,<sup>28</sup> the Supreme Court enunciated the standard that generally governs in cases assessing the constitutionality of prison policies that implicate inmates' constitutional rights. In *Turner*, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."<sup>29</sup> The Court held that four factors are particularly relevant in determining the reasonableness of prison regulations: (1) a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) consideration of alternative forms of expression available to the inmate; (3) the burden on guards, prison officials, and other inmates if the prison is required to provide the freedom claimed by the inmate; and (4) consideration of the existence of less restrictive alternatives that might satisfy the governmental interest.<sup>30</sup> The Court further held that, "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interest, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard."<sup>31</sup>

*Turner*, however, is inapplicable to claims challenging prison policies that implicate the constitutional rights of pretrial detainees, and specifically to claims that implicate pretrial detainees' Sixth Amendment right to adequate defense counsel.<sup>32</sup> As explained in *Bell v. Wolfish*, the Fourteenth Amendment prohibits any "punishment" of pretrial detainees,<sup>33</sup> and thus prison policies restricting a specific constitutional right of pretrial detainees are held to a stricter standard than those affecting only the rights of convicted prisoners.<sup>34</sup> Under *Bell*, "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment," and thus

<sup>27</sup> *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

<sup>28</sup> 482 U.S. 78 (1987).

<sup>29</sup> *Id.* at 89.

<sup>30</sup> *Id.* at 89–90.

<sup>31</sup> *Turner v. Safley*, 482 U.S. 78, 91 (1987).

<sup>32</sup> Brandon P. Ruben, Note, *Should the Medium Affect The Message? Legal and Ethical Implications of Prosecutors Reading Inmate-Attorney Email*, 83 Fordham L. Rev. 2131, 2150 fn 164 (2015).

<sup>33</sup> *Bell*, 441 U.S. at 538 ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); *Demery v. Arpaio*, 378 F.3d 1020, 1028–29 (9th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005).

<sup>34</sup> See, e.g., *Benjamin v. Frasier*, 264 F.3d 175, 178 n. 10 (2d. Cir 2001) ("We need not decide this issue, however, as we believe the policies and practices at issue here would not survive scrutiny under *Turner*, if in fact that standard is applicable.").



unconstitutional.<sup>35</sup> Additionally, under *Bell*, even if a condition is not punitive, it may be unconstitutional if a court finds that it “appears excessive in relation” to the government’s proffered alternative purpose.<sup>36</sup> In contrast, prison regulations restricting convicts’ access to counsel must be “reasonably related to legitimate penological interests”<sup>37</sup> and are unconstitutional if they “unjustifiably obstruct the availability of professional representation.”<sup>38</sup>

The BOP’s Legal Email monitoring policy affects both convicted prisoners’ right of access to the courts and pretrial detainees’ Sixth Amendment right to counsel. As explained below, that policy raises serious constitutional concerns and is vulnerable to challenge under the four-factor *Turner* test, and therefore even more vulnerable under the more demanding *Bell* formulation as applied to pretrial detainees.

#### *A. The BOP Lacks a Legitimate Interest in Monitoring Inmates’ Legal Email*

The BOP lacks a legitimate interest in monitoring inmates’ Legal Email because doing so is excessive in relation to the government’s interest in safeguarding institutional security. Moreover, the BOP cannot justify its policy on the basis of reducing administrative burdens and costs, because an unmonitored Legal Email system would reduce administrative burdens and costs. In fact, the BOP’s current Legal Email monitoring policy diminishes prison security and increases administrative burdens and costs as compared to an unmonitored Legal Email system because it increases the amount of traditional letter mail, unmonitored attorney telephone calls, and in-person attorney visits. Thus, the BOP cannot justify its Legal Email monitoring policy on the basis of maintenance of institutional security or reduction of administrative burdens and costs.

For more than 40 years, courts have held that prison officials are prohibited from reading attorney-client letter mail.<sup>39</sup> However, they can and do “inspect” legal mail to ensure it does not contain drugs or other physical contraband.<sup>40</sup> Unlike letter mail, email communications cannot contain drugs or other contraband.<sup>41</sup> One of the BOP’s stated reasons for implementing TRULINCS was to “reduce the opportunities for illegal drugs or contraband to be introduced into Bureau facilities through inmate mail.”<sup>42</sup> Thus, the BOP cannot justify monitoring emails between inmates and their attorneys on the basis of preventing the introduction of illegal drugs and contraband.

---

<sup>35</sup> *Bell*, 441 U.S. at 539.

<sup>36</sup> *Id.* at 538–39.

<sup>37</sup> *Turner*, 482 U.S. at 91; *see also Benjamin*, 264 F.3d at 178 n. 10 (explaining that *Turner* only applies in the case of convicts, not pretrial detainees, because “the standard [*Turner*] promulgated depends on ‘penological interests.’ Penological interests are interests that relate to the treatment (including punishment, deterrence, rehabilitation, etc...) of persons convicted of crimes.”).

<sup>38</sup> *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

<sup>39</sup> *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974).

<sup>40</sup> *See, e.g., Al-Amin v. Smith*, 511 F.3d 1317, 1325–26 (11th Cir. 2008).

<sup>41</sup> TRULINCS does not support file attachments like pictures or videos, so TRULINCS emails could not contain digital contraband either.

<sup>42</sup> U.S. DEPARTMENT OF JUSTICE, PROGRAM STATEMENT: TRULINCS (2009), *available at* [http://www.bop.gov/policy/progstat/5265\\_013.pdf](http://www.bop.gov/policy/progstat/5265_013.pdf).

# 10A

While an unmonitored Legal Email system would present several apparent security concerns, traditional forms of unmonitored legal communication present the same concerns and actually pose a greater security threat. First, unmonitored Legal Email could contain contraband information, such as escape plans. Similarly, unmonitored Legal Email raise concerns regarding verification that the communication was actually sent to or from inmates' attorneys. However, traditional legal mail can also contain escape plans or be fraudulently sent by other individuals using an attorney's return mailing address. Moreover, detecting such contraband information or fraud can be difficult in the case of traditional legal mail because it cannot lawfully be read by prison officials, and because prisoners can permanently destroy the contraband or fraudulent mail. As discussed in Section VI., an unmonitored Legal Email system would be more secure than traditional legal mail because: (1) the email system would preserve a permanent electronic record of each email, which could be retrieved and read under the right circumstances; and (2) unlike traditional legal mail, a Legal Email system can ensure the authenticity of the information's origin and that the information has not been tampered with by using digital signatures, which are nearly impossible to counterfeit and attest to both the contents of the information and the identity of the signer.<sup>43</sup>

Moreover, as detailed in Section III. C., lack of a confidential Legal Email system increases prisons' administrative burdens because it increases the amount of more-burdensome traditional communications. Traditional legal mail burdens prison staff because each piece of mail must be collected, inspected—*but not read*—and distributed to inmates. Further, prison officials must be trained on how to properly “inspect” traditional legal mail without reading it. Each unmonitored attorney telephone call and in-person-attorney-visit must be scheduled by prison administrators. Then, at the specified date and time, prison staff must transport the inmate from her cellblock to the room where the call or visit is scheduled to occur. Transporting inmates from their cellblocks to other areas of the prison increases security problems in numerous ways. First, it facilitates the transmission of illegal drugs and contraband around the prison. Second, in the event of a security breach resulting in a prison lockdown while the inmate is outside of her cellblock, locating the inmate and transporting her back to her cellblock poses serious administrative challenges and security threats.<sup>44</sup> Thus, providing an unmonitored Legal Email system will decrease the number of unmonitored telephone calls and in-person visits, and correspondingly promote prison security.

Thus, reconfiguring TRULINCS to support unmonitored attorney-client communications would be universally beneficial, as it would protect the sanctity of attorney-inmate emails, while promoting security and reducing burdens imposed on prison staff by other forms of confidential attorney-inmate communication.

---

<sup>43</sup> *Introduction to Cryptography: How PGP Works*, THE INTERNATIONAL PGP HOME PAGE, <http://www.pgpi.org/doc/pgpintro/> (last visited July. 19, 2015).

<sup>44</sup> Tr. of Ahmed Conference, *supra* note 12, at 19:5-11 (Judge Irizarry comments on her work to reduce attorney wait times, and notes that “heaven forbid there should be any security problem at the time, they may never get to see their client that day.”).

### *B. Alternative Means of Confidential Communication are Inadequate*

Unlike all existing alternatives—traditional legal mail, unmonitored telephone calls, and in-person attorney visits—an unmonitored Legal Email system would allow inmates and their attorneys to efficiently communicate in confidence.

As detailed in Section II. A., unmonitored telephone calls are procedurally difficult and time-consuming to set up;<sup>45</sup> traditional postal legal mail can take two or more weeks for an inmate to receive because most prisons do not accept expedited mail delivery;<sup>46</sup> and in-person visits are especially burdensome, because attorneys are often forced to wait several hours for their client to be produced by the prison, in addition to time spent traveling to and from the facility and passing through security.<sup>47</sup> Additionally, an unmonitored Legal Email system would be more secure than traditional legal mail and “unmonitored” telephone calls. Traditional legal mail can be accidentally read by prison guards during inspection, and a recent report by *The Intercept* revealed that one company that provides telephone services to prisons across the country has recorded and stored at least tens of thousands of telephone conversations between inmates and attorneys that were supposed to be unmonitored.<sup>48</sup>

Thus, neither unmonitored telephone calls, traditional postal mail, nor in-person visits are adequate alternatives to the ease and speed of unmonitored email communications.

### *C. Providing an Unmonitored Legal Email System Would Positively Impact Prison Staff, Inmates, and Allocation of Scarce Prison Resources*

Providing confidential email access to inmates and their attorneys would positively impact prison staff, inmates, and allocation of scarce prison resources by reducing the amount of more-burdensome traditional legal mail, unmonitored attorney phone calls and in-person attorney visits. Additionally, as described in Section III. A., confidential email would enhance the “central objective of prison administration, safeguarding institutional security.”<sup>49</sup> Lastly, while implementation of a confidential Legal Email system would require in initial investment, the reduction in more burdensome traditional communications would quickly lead to significant cost-savings for the BOP.

First, an unmonitored Legal Email system would greatly reduce the administrative burden on prison guards and officials associated with unmonitored telephone calls and in-person visits. Each unmonitored telephone call and in-person visit must be arranged and scheduled by prison administrators. Prison staff must also transport inmates from their cells to the secure meeting room for each unmonitored call or in-person visit. Thus, unmonitored Legal Email would greatly reduce administrative burdens on prison staff associated with unmonitored telephone calls and in-person visits between inmates and their attorneys.

---

<sup>45</sup> *Id.* at 16:5–13.

<sup>46</sup> *Id.* at 16:14–16.

<sup>47</sup> *Id.* at 19:5–11.

<sup>48</sup> Micah Lee and Jordan Smith, *NOT SO SECURUS*, *The Intercept* (Nov. 11, 2015), available at <https://theintercept.com/2015/11/11/securus-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-clients/>.

<sup>49</sup> *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

Second, an unmonitored Legal Email system would greatly reduce the administrative burden on prison guards and officials associated with delivery and inspection of legal mail. Every letter sent or received by an inmate must be delivered and, in most prisons, inspected by a guard in the presence of the inmate. Further, each officer must be trained on how to properly inspect inmates' mail to ensure that it remains unread. An unmonitored Legal Email system would reduce the amount of letter mail that must be delivered and inspected, freeing guards to focus on matters that promote prison safety.

Lastly, an unmonitored Legal Email system would preserve limited prison resources. While reconfiguring TRULINCS would require an initial investment, the long-term cost savings would be substantial. For example, if the unmonitored Legal Email system led to a reduction of one unmonitored telephone call or in-person attorney visit per inmate per month, each requiring approximately one hour of administrative work by prison staff, then the 743-inmate Manhattan Correctional Center (MCC)<sup>50</sup> would save 8,916 man-hours per year. If the average MCC guard makes \$22 per hour,<sup>51</sup> then an unmonitored email system would save MCC approximately \$194,853 per year.

## IV. RECONFIGURING TRULINCS TO PROVIDE FOR SECURE, UNMONITORED LEGAL EMAIL WOULD BE RELATIVELY SIMPLE AND INEXPENSIVE

Reconfiguring TRULINCS to provide for unmonitored Legal Emails would be relatively simple and inexpensive. For example, from a programming perspective, reconfiguring TRULINCS to support an email encryption program similar to Pretty Good Privacy (PGP), or other popular email encryption programs, would not be difficult or expensive. Software developers have estimated that, based on publicly-available information about the system, TRULINCS could be reconfigured in a matter of months at a cost of less than \$100,000.<sup>52</sup>

PGP is a data encryption and decryption program that provides cryptographic privacy and authentication for data communication.<sup>53</sup> PGP encryption is an asymmetric scheme that uses a pair of “keys” for encryption: a “public key” that encrypts plaintext<sup>54</sup> to ciphertext,<sup>55</sup> and a corresponding “private key” for decryption.<sup>56</sup> Each user has unique public and private keys, which are simply a series of random numbers and letters.<sup>57</sup> Anyone with a copy of a user's public key can encrypt information that can only be decrypted with that user's private key. However, the term “public key” is a misnomer, as users' public keys are not automatically known or

<sup>50</sup> Federal Bureau of Prisons: MCC New York Home Page, <http://www.bop.gov/locations/institutions/nym/> (last visited Mar. 6, 2015).

<sup>51</sup> Glassdoor, *Federal Bureau of Prisons Correctional Officer Salary*, [http://www.glassdoor.com/Salary/Federal-Bureau-of-Prisons-Correctional-Officer-Salaries-E41290\\_D\\_KO26,46.htm](http://www.glassdoor.com/Salary/Federal-Bureau-of-Prisons-Correctional-Officer-Salaries-E41290_D_KO26,46.htm) (last visited Mar. 5, 2014).

<sup>52</sup> Telephone Interview with Mike Wrather, CTO/Managing Partner at Athletez.com (February 22, 2015); Telephone Interview with Dustin Houck, BAS Senior Consultant at Grant Thornton (March 8, 2015).

<sup>53</sup> *Introduction to Cryptography*, *supra* note 44.

<sup>54</sup> *Id.* Data that can be read and understood without any special measures is called plaintext.

<sup>55</sup> *Id.* Encrypting plaintext results in unreadable gibberish called ciphertext.

<sup>56</sup> *Id.*

<sup>57</sup> Danny Yadron, *Moxie Marlinspike: The Coder Who Encrypted Your Texts*, WALL ST. J., (July 9, 2015, 7:57 p.m. ET), available at <http://www.wsj.com/articles/moxie-marlinspike-the-coder-who-encrypted-your-texts-1436486274>.

available to the public at large, but instead must “published” or sent to each person wishing to send the user an encrypted message. Each user also has a “private key” that only the user knows. The same plaintext encrypts to different ciphertext using different public keys, and only the recipient’s private key can decrypt messages encrypted with the user’s corresponding public key.<sup>58</sup>

PGP can also ensure the authenticity of the information’s origin by using digital signatures.<sup>59</sup> The sender digitally signs the message with his private key, so when the recipient verifies the message with her own public key, she can confirm that the message was sent from the person in question.<sup>60</sup> This ensures that the message was sent by a specific person and has not been tampered with. A digital signature serves the same purpose as a handwritten signature. However, a digital signature is superior to a handwritten signature in that it is nearly impossible to counterfeit, plus it attests to the contents of the information as well as to the identity of the signer.<sup>61</sup>

In layman’s terms, to use PGP encryption, users must install PGP software on their computer, and then swap their “public keys” with anyone they wish to communicate with using encrypted email. In the case of inmates and their attorneys using TRULINCS, for added security the “public key” and “private key” can be assigned by an independent third party such as the court or a third party administrator. Sending an encrypted message would simply require several clicks, a password, and sometimes, copying and pasting. Moreover, because the public and private keys would be issued by a third party, if the origins of a purported attorney email were ever in question, prosecutors could petition the court to have the content of the message reviewed.

From the government’s perspective, providing confidential Legal Emails and preventing their review unless a court grants authorization to do so should be preferable to unmonitored phone calls or in-person visits because the email is preserved and can be retrieved and read under the right circumstances. Thus, reconfiguring TRULINCS to support PGP encryption, or a similar encryption or filtering program, would be universally beneficial, as it would protect the sanctity of attorney-inmate emails, while substantially reducing burdens imposed on institutional staff by other forms of confidential attorney-inmate communication.

## **V. THE BOP SHOULD VOLUNTARILY CHANGE ITS LEGAL EMAIL MONITORING POLICY AND IMPLEMENT A CONFIDENTIAL LEGAL EMAIL SYSTEM BECAUSE DOING SO WOULD IMPROVE THE QUALITY OF JUSTICE, BENEFIT THE BOP AND AVOID A CONSTITUTIONAL CHALLENGE**

In recent years, the total number of federal inmates and the proportion of inmates to BOP staff have greatly increased. These population changes have greatly increased the burden on BOP staff, which in turn increases the barriers that attorneys face when trying to communicate

---

<sup>58</sup> *Id.*

<sup>59</sup> *Introduction to Cryptography*, *supra* notes 44 and 53.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

# 10A

efficiently with their incarcerated clients. Implementing an unmonitored Legal Email system would significantly decrease the burdens on prison staff, thereby conserving BOP resources while protecting the fundamental right of all pretrial detainee defendants to adequate defense counsel.

Between 1995 and 2010, the annual number of disposed criminal cases<sup>62</sup> in federal district court increased by 120%, from 45,635 to 100,622.<sup>63</sup> During that same time period, the annual number of federal defendants detained pretrial increased by 184%, from 27,004 to 76,589.<sup>64</sup> In other words, the percentage of defendants detained prior to case disposition increased from 59% in 1995 to 76% in 2010.<sup>65</sup> Additionally, during the same period, the ratio of inmates to BOP staff members increased from 3.6 inmates per BOP staff member in 1995 to 5.75 inmates per BOP staff member in 2010.<sup>66</sup>

These changes in the total inmate population and the ratio of inmates to BOP staff further increase the administrative burdens imposed by the BOP's current email system, and undermine the right of every federal pretrial detainee to meaningful Sixth Amendment representation. Traditional communication media is burdensome for both BOP staff and defense counsel because each confidential communication requires that BOP staff facilitate each specific communication. This is inefficient compared to a wholly confidential Legal Email system, which would not require BOP staff to schedule a specific date, time and place for the communication to occur (as compared to unmonitored telephone calls and in-person visits) or to deliver and inspect the communication (as compared to traditional legal mail).

The BOP should voluntarily implement a confidential Legal Email system. Such a system would not only benefit the BOP by increasing prison safety, preserving resources, and reducing administrative burdens, but would also ensure that the BOP is not unreasonably interfering with the right of pretrial detainee defendants to receive adequate Sixth Amendment representation.

---

<sup>62</sup> A disposition is the act of terminating a federal criminal prosecution through a guilty plea or trial conviction, dismissal, or acquittal. The defendant is no longer under supervision of the federal pretrial authority after disposition.

<sup>63</sup> THOMAS H. COHEN, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995–2010 1 (2013), *available at* <http://www.bjs.gov/content/pub/pdf/pdmfcd9510.pdf> (providing number of pretrial detainees in 2010); *see also* THOMAS H. COHEN, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008–2010 8 (2012), *available at* <http://www.bjs.gov/content/pub/pdf/prmfcd0810.pdf> (providing average length of stay for pretrial detainees in 2010).

<sup>64</sup> PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995–2010, at 4.

<sup>65</sup> *Id.*

<sup>66</sup> U.S. DEPT. OF JUSTICE, FED. PRISON SYS., FY 2013 PERFORMANCE BUDGET, CONGRESSIONAL SUBMISSION 3 (2013), *available at* <http://www.justice.gov/sites/default/files/jmd/legacy/2014/06/28/fy13-bop-se-justification.pdf> (chart entitled “Total BOP Inmate and Staff Levels” demonstrates that between 1997 and 2013, the number of BOP staff increased from approximately 30,000 to approximately 40,000, while the number of inmates increased from approximately 110,000 to approximately 230,000).

## VI. CONCLUSION

One decade ago, the BOP launched TRULINCS as a pilot program.<sup>67</sup> The purpose of TRULINCS is to allow inmates to “send electronic messages to securely, efficiently and economically maintain contact with persons in the community.”<sup>68</sup> As currently configured, TRULINCS serves this purpose well for inmates’ families, friends, and other contacts, but not for their most important contacts of all: their attorneys. In effect, therefore, TRULINCS provides inmates a secure, efficient, and cost effective method for communicating with all “persons in the community” other than the one person with whom they have a fundamental right to communicate. This raises Sixth Amendment concerns, as described above, since an unreasonable interference with a defendant’s ability to consult counsel is itself an impairment of the right.<sup>69</sup>

Regardless of whether the categorical refusal to permit confidential attorney-client email communication violates the Sixth Amendment, the BOP’s monitoring of communications between inmates and their attorneys is simply wrong. The BOP cannot read inmates’ legal mail or eavesdrop on their unmonitored attorney phone calls and in-person attorney visits—and they should not be able to monitor their Legal Emails either. The BOP’s monitoring policy interferes with lawyers’ ability to provide efficient and ethical representation, and thereby degrades the quality of justice meted out to federal inmates, especially indigent pretrial detainees. In today’s world, traditional communication media are clearly inadequate as compared to the efficiency and cost effectiveness of email communications. Thus, the BOP should provide inmates and their attorneys the ability to communicate confidentially via email.

To date, the BOP’s Legal Email monitoring policy has not been directly challenged in court. However, at least six federal district courts have addressed the issue of federal prosecutors reading emails between pretrial detainees and their attorneys.<sup>70</sup> Because of the automated privilege waiver, each court held that attorney-client privilege does not apply to TRULINCS emails between inmates and their attorneys.<sup>71</sup>

Nevertheless, two district judges were so troubled by the government’s actions that they prohibited prosecutors from reviewing TRULINCS emails between attorneys and their clients in

---

<sup>67</sup> FEDERAL BUREAU OF PRISONS, REQUEST FOR RECORDS DISPOSITION AUTHORITY, TRUST FUND LIMITED INMATE COMPUTER COMMUNICATION SYSTEM (TRULINCS) (Mar. 22, 2006), *available at* [http://www.archives.gov/records-mgmt/rcs/schedules/departments/departments-of-justice/rg-0129/n1-129-06-008\\_sfl15.pdf](http://www.archives.gov/records-mgmt/rcs/schedules/departments/departments-of-justice/rg-0129/n1-129-06-008_sfl15.pdf).

<sup>68</sup> U.S. DEPARTMENT OF JUSTICE, PROGRAM STATEMENT: TRULINCS 1 (2009), *available at* [http://www.bop.gov/policy/progstat/5265\\_013.pdf](http://www.bop.gov/policy/progstat/5265_013.pdf).

<sup>69</sup> Benjamin, 264 F.3d at 185; *see also* Wolfish, 573 F.2d at 133 (prison regulations restricting pretrial detainees’ contact with their attorneys are unconstitutional where they “unreasonably burdened the inmate’s opportunity to consult with his attorney and to prepare his defense”).

<sup>70</sup> *See*, Memorandum and Order re 25 Motion in Limine As to Tushar Walia at 28–29, *United States v. Walia*, No. 1:14-cr-00213 (E.D.N.Y. July 25, 2014); *FTC v. Nat’l Urological Grp., Inc.*, No. 1:04-CV-3294, 2014 WL 3893796, at \*1 (N.D. Ga. May 14, 2014); *United States v. Fumo*, 655 F.3d 288, 294 (3d Cir. 2011); Transcript of Conference, *United States v. Saade*, No. 11-CR-111, 7:11-14 (NRB) (S.D.N.Y. September 26, 2011); Opinion and Order at 2–3, *United States v. Asaro*, No. 1:14-cr-0026 (E.D.N.Y. July 17, 2014); Tr. of Ahmed Conference.

<sup>71</sup> Saade and Ahmed.

# 10A

those cases.<sup>72</sup> In one, in response to the prosecutor's defense of the government's policy, the Court opined that attorney-client TRULINCS emails are subject to the same Sixth Amendment protections as traditional communications:

You don't have the right to eavesdrop on an attorney-client meeting in a prison or out of a prison, and it seems to me that you don't have the right to open up mail between counsel and an inmate or an inmate and counsel ... I don't see why it should make a difference whether the mode of communication is more modern or more traditional.<sup>73</sup>

In the other, after ordering the government to employ taint teams to remove all attorney-client TRULINCS emails before producing the remainder of defendant's emails to the prosecuting U.S. Attorney, the district judge articulated a strong policy argument for why the BOP should reconfigure TRULINCS to provide for unmonitored attorney-client emails:

[F]rankly, I don't understand why the BOP would not be willing to look into a technological fix that eliminates the need for them to have to go through the hassle of sorting e-mails, why the government, why the Department of Justice wouldn't be interested in a technological fix that eliminates the cost of taint teams on every single case. Talk about penny-wise and pound-foolish. I couldn't see a clearer example of it.<sup>74</sup>

Until the BOP accepts responsibility for providing inmates and their attorneys the ability to communicate confidentially via email, its Legal Email monitoring policy will continue to diminish the quality of legal proceedings in criminal cases in federal court, cause financial and administrative burdens for the BOP and defense attorneys, and impair the reputation and reality of justice in the federal criminal justice system.

Carol A. Sigmond  
President  
New York County Lawyers Association  
February 2016

---

<sup>72</sup> See Tr. of Ahmed Conference at 19–21; Transcript of Conference, United States v. Saade, No. 11-CR-111, 10:8-12 (NRB) (S.D.N.Y. September 26, 2011).

<sup>73</sup> Tr. of Saade Conference at 10:8-12.

<sup>74</sup> Tr. of Ahmed Conference. at 20:18–25.



**GENERAL INFORMATION FORM**

Submitting Entity: New York County Lawyers Association (“NYCLA”).

Submitted By: Carol A. Sigmond, NYCLA President.

1. Summary of Resolution(s)

The Resolution urges the Federal Bureau of Prisons to change its policy regarding the monitoring and reading of email communications between attorneys and their incarcerated clients. The Resolution relies on the assertion that emails between attorneys and their incarcerated clients are not meaningfully different from traditional letter mail between attorneys and their incarcerated clients, which has long been protected by the attorney-client privilege. This Report argues that email communications actually pose less of a security risk than traditional letter mail, because unlike letter mail, emails cannot secrete contraband such as illegal drugs. If the Federal Bureau of Prisons were to reconfigure their email system by using popular encryption software, authenticating the identity of the sender would be more reliable than traditional letter mail. Additionally, the software can be programmed to preserve a permanent copy of all emails, which can be retrieved and reviewed by the court under proper circumstances. Thus, the Resolution provides strong policy and constitutional arguments for providing emails between attorneys and their incarcerated clients the same confidentiality protections as traditional letter mail.

2. Approval by Submitting Entities

The NYCLA Civil Rights & Liberties Committee approved the Resolution with Report on December 5, 2014. The NYCLA Board of Directors approved the Resolution with Report on March 9, 2015. The NYCLA Executive Committee approved the final Resolution with Report on July 23, 2015, pursuant to authority granted to it by the Board.

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 Resolution is consistent with and builds upon the cybersecurity principles previously developed by the ABA’s Cybersecurity Legal Task Force and adopted by the Board of Governors in November 2012, especially Principle 3— “[l]egal and policy environments must be modernized to stay ahead of or, at a minimum, keep pace with technological advancements”— and Principle 4— “[p]rivacy and civil liberties must remain a priority when developing cybersecurity law and policy.”<sup>75</sup> The Resolution is also consistent with ABA Model Rule of Professional Conduct 1.6 (“Confidentiality of Information”), which prohibits lawyers from

---

<sup>75</sup> AM. BAR ASS’N CYBERSECURITY LEGAL TASK FORCE, REPORT TO THE BOARD OF GOVERNORS, (Nov. 2012), *available at* [http://www.americanbar.org/content/dam/aba/marketing/Cybersecurity/aba\\_cybersecurity\\_res\\_and\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/Cybersecurity/aba_cybersecurity_res_and_report.authcheckdam.pdf).

# 10A

revealing confidential client information unless the client gives informed consent or one or more narrow exceptions apply. In addition, the Resolution is generally consistent with and would build upon other existing ABA policies (1) supporting the attorney-client privilege and the work product doctrine and opposing governmental policies, practices, or procedures that would erode those protections,<sup>76</sup> and (2) opposing new federal agency regulations on lawyers engaged in the practice of law where the effect would be to undermine the confidential lawyer-client relationship, the attorney-client privilege, or traditional state court regulation of lawyers. Lastly, the Resolution is also consistent with ABA Model Rule of Professional Conduct 1.4, which requires attorneys to promptly communicate with incarcerated clients regarding important case matters, such as whether to accept or reject proffered plea bargains, which can only be made by the client.

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.

In consultation with the ABA Governmental Affairs Office, the NYCLA Civil Rights & Liberties Committee leaders would prepare communications to the Federal Bureau of Prisons and/or comment letters to relevant federal agencies, and may meet with agency staff to urge adoption of regulations consistent with the Resolution. Task Force leaders may also reach out to law firms, bar associations, other legal groups, and the courts in order to educate them about the growing problem of the Federal Bureau of Prisons and prosecutors monitoring and reading emails between attorneys and their incarcerated clients.

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

None.

9. Disclosure of Interest. (If applicable).

Not applicable.

---

<sup>76</sup> AM. BAR ASS'N TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE, REPORT TO THE BOARD OF GOVERNORS (Aug. 2005), available at [http://www.americanbar.org/content/dam/aba/directories/policy/2005\\_am\\_111.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2005_am_111.authcheckdam.pdf)

**10. Referrals.**

The proposed Resolution with Report is being co-sponsored by the ABA Criminal Justice Section. The proposed Resolution with Report was sent to the Chairs and staff liaisons of the ABA Criminal Justice Section and Civil Rights Litigation Committee for input. NYCLA received and incorporated comments from the ABA Criminal Justice Section on the Resolution with Report. NYCLA also sent the Resolution with Report to the ABA Standing Committee on Ethics and Professional Responsibility and the Judicial Division.

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

Elliot Dolby-Shields  
Co-Chair NYCLA Civil Rights & Liberties Committee  
Law Office of Elliot Dolby-Shields, P.C.  
235 West 137<sup>th</sup> Street, No. 2F  
New York, New York 10030  
Phone: (585) 749-2089  
Email: edshieldslaw@gmail.com

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

Carol A. Sigmond  
Cohen Seglias Pallas Greenhall & Furman PC  
45 Broadway, 4th Floor  
New York, NY 10006  
Telephone: 212-981-2927  
Mobile: 917-376-8585  
Email: csigmond@cohenseglias.com

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This Resolution encourages the Federal Bureau of Prisons (“BOP”) to voluntarily end its policy and practice of monitoring all email communications between attorneys and their incarcerated clients to permit attorneys and their incarcerated clients to communicate confidentially via email.

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

The BOP provides all inmates with email access through the Trust Fund Limited Communication Systems (“TRULINCS”). Inmates naturally communicate with their attorneys via email. The BOP, however, maintains a policy of monitoring all emails, including emails between attorneys and their inmate clients. Further, the BOP does not provide any alternative form of unmonitored email communication for attorneys to communicate with their incarcerated clients. There is no meaningful difference between email and traditional letter mail. Letter mail between attorneys and their incarcerated clients has been provided constitutional protection for decades, preventing prison officials and prosecutors from reading such communications. Because there is no meaningful difference between emails and traditional letter mail, and because the benefits of unmonitored emails to inmates, their attorneys, and the BOP is substantial, the BOP’s policy obstructs inmates’ access to counsel and is ripe for constitutional challenge.

### 3. Please Explain How the Proposed Policy Position will Address the Issue

By adopting the proposed Resolution, the ABA will play a leading role in urging the United States government and other governmental bodies to amend or supplement existing policies in order to prevent the monitoring and reading of emails between attorneys and their incarcerated clients, which should be provided the same constitutional protection as traditional letter mail.

### 4. Summary of Minority Views

The minority view is that since attorneys and their incarcerated clients are forced to sign an acknowledgment that their email communications are subject to monitoring prior to using TRULINCS, attorneys and their incarcerated clients waive any claim that their email communications are protected by the attorney-client privilege. Since such mandatory waivers have been upheld in the context of telephone calls between attorneys and their incarcerated clients, the minority argues that such mandatory waivers are constitutional in the context of emails between attorneys and their inmate-clients as well.

**AMERICAN BAR ASSOCIATION**  
**NEW JERSEY STATE BAR ASSOCIATION**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association supports constitutional equality for  
2 women, and urges the extension of legal rights, privileges and responsibilities to all  
3 persons, regardless of sex.  
4
- 5 FURTHER RESOLVED, That the American Bar Association reaffirm its support of and  
6 affirmatively act toward the goal of the ratification of the Equal Rights Amendment to  
7 the U.S. Constitution.  
8
- 9 FURTHER RESOLVED, That the American Bar Association calls on all bar associations to  
10 support and take up the pursuit of ratification of the Equal Rights Amendment to the  
11 United States Constitution.



REPORT

The proposed Equal Rights Amendment states,

*Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.*

*Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

*Section 3. This amendment shall take effect two years after the date of ratification.*

Article V of the Constitution prescribes how an amendment can become a part of the U.S. Constitution. While there are two ways, only one has ever been used. All 27 successful amendments have been ratified after **two-thirds of the House and Senate** approved of the proposal and send it to the states for a vote. Then, **three-fourths of the states** (38 out of 50) were required to affirm the proposed amendment.<sup>1</sup>

ERA Background

The ERA was originally presented in 1923 by Alice Paul, a leader in the women's suffrage movement who held three law degrees. The current text is modeled after the 19<sup>th</sup> Amendment, which Paul submitted it in 1943.

While many aspects of the law have evolved to offer rights and protections to many in our society, basic legal protection against sex discrimination has not yet been realized and affirmed in the Constitution, even given the considerations of the 14<sup>th</sup> Amendment. The ERA would make clear that discrimination based on sex is not allowed in the courts. Its adoption would further send a strong message to lawmakers that the highest law of the land does not tolerate disparate treatment of men and women.

Adoption of this resolution would mobilize the nation's largest lawyers organization, and hopefully activate the local, county and state bar associations around the country, to pressure public officials to make this necessary change that champions the defense of liberty and the pursuit of justice that informs the democratic question for a "more perfect union." Through a chorus of voices in the legal profession the mission of advancing equality under the law can be fulfilled.

The ERA has a long, storied history in United States political discourse. A nearly successful effort to enact the amendment occurred in the 1970's when the amendment reached a zenith of having the necessary congressional approval in both houses and the

---

<sup>1</sup> In addition, a Constitutional Convention called by two-thirds of the legislatures of the several states can propose as many amendments as it deems necessary; those amendments must be approved by three-fourths of the states to be adopted, U.S. Const. Art. V.

# 10B

affirmation of 35 out of 38 states. It ultimately failed to receive any further support. Later, five states de-affirmed their prior approvals between 1973-79.

The current version of the ERA gained passage by the required two-thirds majority on March 22, 1972.

President Richard Nixon endorsed the ERA's approval upon its passage by the 92nd Congress.<sup>2</sup> The congressional approvals, including an extension resolution, contained an expiration clause, requiring that the ERA ultimately be adopted on or before June 30, 1982.<sup>3</sup>

As of that original deadline, the ERA had been ratified by the following states:

Hawaii (March 22, 1972)	Massachusetts (June 21, 1972)
New Hampshire (March 23, 1972)	Kentucky (June 26, 1972)
Delaware (March 23, 1972)	Pennsylvania (Sept. 27, 1972)
Iowa (March 24, 1972)	California (Nov. 13, 1972)
Idaho (March 24, 1972)	Wyoming (Jan. 26, 1973)
Kansas (March 28, 1972)	South Dakota (Feb. 5, 1973)
Nebraska (March 29, 1972)	Oregon (Feb. 8, 1973)
Texas (March 30, 1972)	Minnesota (Feb. 8, 1973)
Tennessee (April 4, 1972)	New Mexico (Feb. 28, 1973)
Alaska (April 5, 1972)	Vermont (March 1, 1973)
Rhode Island (April 14, 1972)	Connecticut (March 15, 1973)
New Jersey (April 17, 1972)	Washington (March 22, 1973)
Colorado (April 21, 1972)	Maine (Jan. 18, 1974)
West Virginia (April 22, 1972)	Montana (Jan. 25, 1974)
Wisconsin (April 26, 1972)	Ohio (Feb. 7, 1974)
New York (May 18, 1972)	North Dakota (March 19, 1975)
Michigan (May 22, 1972)	Indiana (Jan. 24, 1977)
Maryland (May 26, 1972)	

---

<sup>2</sup> This supplemented President John F. Kennedy's endorsement of the provision in an October 21, 1960, letter to the chairman of the National Woman's Party

<sup>3</sup> The original 1979 deadline was extended under the 95th Congress by House Joint Resolution No. 638 (H. J. Res. 638, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1977)), introduced by NY Representative Elizabeth Holtzman. Beginning in 1917, Congress has usually (but not always) imposed deadlines on proposed amendments. While the Constitution does not expressly provide for a deadline on the state legislatures' or state ratifying conventions' consideration of proposed amendments. In *Dillon v. Gloss*, 256 U.S. 368 (1921), the Supreme Court affirmed that Congress can provide a deadline for ratification. *But Cf. Coleman v. Miller*, 307 U.S. 433 (1935), in which the Court modified *Dillon* considerably, holding that the question of timeliness of ratification is a political and non-justiciable one, leaving the issue to Congress's discretion. It would appear that the length of time elapsing between proposal and ratification is irrelevant to the validity of the amendment. For example, the 27<sup>th</sup> Amendment was proposed in 1789 and ratified more than 200 years later in 1992. On May 20, 1992, both houses of Congress adopted concurrent resolutions accepting the 27<sup>th</sup> Amendment's unorthodox ratification process as having been successful and valid.



Affirmations were later rescinded by five of those states as follows:

- Nebraska (March 15, 1973 – Legislative Resolution No. 9)
- Tennessee (April 23, 1974 – House Joint Resolution No. 371 and Senate Joint Resolution No. 29)
- Idaho (Feb. 8, 1977 – Senate Joint Resolution No. 133 and House Concurrent Resolution No. 10)
- Kentucky (March 17, 1978 – House (Joint) Resolution No. 2 and House (Joint) Resolution No. 20)
- South Dakota (March 1, 1979 – Senate Joint Resolution No. 1 and Senate Joint Resolution No. 2) *South Dakota's own ratification of the ERA would only be valid up until March 22, 1979, and any ratification activities transpiring after that date anywhere else would be considered by South Dakota to be null and void.*

(It is important to note that the U.S. Constitution is silent regarding a state's authority to rescind its ratification of a proposed, but not yet adopted, constitutional amendment.)

On Dec. 23, 1981, in Idaho v. Freeman, 529 F. Supp. 1107 (1981), the United States District Court for the District of Idaho ruled that the rescissions—all of which occurred before the original 1979 ratification deadline—were valid and that the ERA's deadline extension was unconstitutional. The National Organization for Women appealed the ruling. However, the acting solicitor general reported to the Court that the administrator of general services concluded the ERA had not received the required number of ratifications, so "the Amendment has failed of adoption no matter what the resolution of the legal issues presented here." He urged the Court to dismiss the complaint. On Oct. 4, 1982, in NOW v. Idaho, 459 U.S. 809 (1982), the U.S. Supreme Court vacated the ruling in Idaho v. Freeman and declared the entire matter moot on the grounds that the ERA was dead for the reason given by the administrator of general services.

There remains considerable academic and political disagreement on whether the ERA can be revised and ratified by achieving ratifications of an additional three states' under the 35- of 38-state tally noted above; to wit, a "three-state strategy." <sup>4</sup> That strategy is discussed in a 1997 article called "The Equal Rights Amendment: Why the Era Remains Legally Viable and Properly Before the States" in the *William & Mary Journal of Women and the Law*. In 2013, a report of the Library of Congress's Congressional Research Service (Thomas H. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, Congressional Res. Serv., (May 9, 2013)) examined the legislative history and provided an analysis of the factors affecting its viability.

---

<sup>4</sup> Allison L. Meld, Sheryl L. Herndon and Danielle M. Stager, *The Equal Rights Amendment: Why the Era Remains Legally Viable and Properly Before the States*, 3 Wm. & Mary J. Women & Law. 113 (1997).

# 10B

Proponents of the three-state strategy have promoted ratification resolutions in the legislatures of most of the 15 states that never ratified the ERA approved by Congress in 1972, but no approval has been forthcoming.

## **Going Forward to Success - ERA 2020**

While the ERA has been introduced in every session of Congress since 1982, it has not achieved a critical mass to propel it to success.

Its time has come and, as thought leaders on legal issues, lawyers can be the agents of that change. This association has long studied and supported the fundamental underpinnings of the ERA. It supported ratification of the proposed 27<sup>th</sup> Amendment to the Constitution initially in Feb. 1972 and again in Aug. 1974.

This resolution would directly advance those previously stated goals. Additionally, it speaks to the ABA's general policies, such as Goal III for the Association, which states: "Promote full and equal participation in the association, our profession, and the justice system by all persons." This is the opportunity to finish the job of delivering on the basic and fundamental right of equality based on sex under the law.

Respectfully submitted,

Miles S. Winder III, President  
New Jersey State Bar Association

February 2016

GENERAL INFORMATION FORM

Submitting Entity: New Jersey State Bar Association

Submitted By: Miles S. Winder, III, President

1. Summary of Resolution(s). This resolution seeks the affirmation of the American Bar Association's support of the ratification of the Equal Rights Amendment to the U.S. Constitution. Further, it asks other legal entities to consider same, and, if approved, act to that effect.
2. Approval by Submitting Entity. The New Jersey State Bar Association authorized this action at its Oct. 16, 2015 Board of Trustees meeting.
3. Has this or a similar resolution been submitted to the House or Board previously?  
Yes, many years ago, see answer #4.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The ABA supported ratification of the proposed 27<sup>th</sup> Amendment to the Constitution initially in Feb. 1972 and again in Aug. 1974. This resolution would directly advance those previously stated goals. Additionally, support of this effort speaks to Goal III of the association, to provide equal opportunities for women and minorities.
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) The Equal Rights Amendment was originally presented in 1923. It was nearly approved in the 1970s, garnering support in 35 (of the necessary 38) states. Some states de-affirmed their prior approval. It has since been reintroduced in every session of Congress, most recently in the 117<sup>th</sup> Congress, in which two types of ERA legislation has been introduced. One seeks the traditional ratification process and a second proposes the "three-state strategy." Both are pending.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The NJSBA will work with the ABA to use all available, existing resources, including but not limited to social media, communications, and government affairs.
8. Cost to the Association. (Both direct and indirect costs) Direct costs are not anticipated, but additional time and energy of the existing government affairs program may be sought, if adopted.

# 10B

9. Disclosure of Interest. (If applicable) N/A
10. Referrals. Referred to the Commission on Women, NCBP, NABE and the Diversity Center.
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address) Kate Coscarelli, senior managing director of communications and media relations, New Jersey State Bar Association, One Constitution Square, New Brunswick NJ 08901, 732-937-7548 or [kcoscarelli@njsba.com](mailto:kcoscarelli@njsba.com)
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.) Thomas H. Prol, President-Elect NJSBA, 60 Blue Heron Road, Sparta NJ 07871, 973-862-9817 or [tprol@lclrlaw.com](mailto:tprol@lclrlaw.com); Wayne J. Positan, New Jersey Delegate, 103 Eisenhower Parkway, Roseland NJ 07068, or [wpositan@lumlaw.com](mailto:wpositan@lumlaw.com).

**EXECUTIVE SUMMARY****1. Summary of the Resolution**

This resolution seeks the affirmation of the American Bar Association's support of the ratification of the Equal Rights Amendment to the U.S. Constitution. Further, it asks other legal entities to consider same, and, if approved, act to that effect.

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

Ratification of the ERA was originally presented by Alice Paul in 1923. It was nearly successfully enacted in the 1970s, but fell short. While many aspects of the law have evolved to offer rights and protections to many in our society, basic legal protection against sex discrimination has not yet been realized and affirmed in the Constitution, even given the considerations of the 14<sup>th</sup> Amendment. The ERA would make clear the legal status of sex discrimination in the courts and would send a clear message to lawmakers that the highest law of the land does not tolerate men and women being treated as separate classes.

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

Adoption of this resolution would mobilize the nation's largest lawyers organization, and hopefully activate the local, county and state bar associations around the country, to pressure public officials to make this necessary change that champions the defense of liberty and the pursuit of justice that informs the democratic question for a "more perfect union." Through a chorus of voices in the legal profession the mission of advancing equality under the law can be fulfilled.

**4. Summary of Minority Views**

Some believe it is not necessary given other laws on discrimination and court decisions.



**AMERICAN BAR ASSOCIATION  
SECTION OF DISPUTE RESOLUTION  
SECTION OF HEALTH LAW  
SECTION OF SCIENCE AND TECHNOLOGY LAW**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 **RESOLVED**, That the American Bar Association urges lawyers and all interested parties to
- 2 increase the informed and voluntary use of alternative dispute resolution (ADR) processes as an
- 3 effective, efficient and appropriate means to resolve health care disputes.





## REPORT

### I. INTRODUCTION

During the past few decades, the legal profession has embraced an increasingly wide array of dispute resolution processes to address their clients' problems. With the enactment of health care reform,<sup>1</sup> increased federal regulation of diverse aspects of the nation's medical care delivery system, and the ever increasing use of technology in providing health care, there are a multitude of health care disputes that span all aspects of the provision of health care. The structure of healthcare delivery across the nation is changing with increasing emphasis on successful outcomes and reducing costs. Providers are becoming increasingly integrated in a variety of arrangements of increasing integration and interdependence as a means of accomplishing these goals. These complex relationships, vital to health care delivery but often with competing goals, may give rise to conflict.<sup>2</sup>

Disputes and conflict arise in almost every facet of health care and span all settings – hospitals, physician's offices, home health agencies, hospices, health insurance company's claims departments, and providers' corporate headquarters. Issues include family disputes in a hospital, denial of claims for reimbursement, disagreements when physician practices are bought and sold, and hospital merger and acquisition. In addressing each of these conflicts and disputes, ADR can play a useful role. While there are no collected statistics reporting the precise use of ADR in healthcare disputes, anecdotal evidence suggests that the health care industry and the legal profession with an interest in health care have lagged behind others in embracing the broad array of dispute resolution techniques to address conflicts and resolve disputes.<sup>3</sup>

Health care spending represents a significant part of the nation's economy. In 2013 the United States spent \$2.9 trillion on health care or about \$9,255 per person. Health care spending remains at 17.4 percent of the economy.<sup>4</sup> Every American has a stake in our health care system – and how its conflicts and disputes are resolved.

- **What is ADR?**

The ADR processes used most commonly in health care disputes include mediation and binding arbitration.<sup>5</sup> Mediation is a voluntary dispute resolution process; all parties consent to participate in good faith in an effort to reach a mutually agreeable resolution of their dispute.

---

<sup>1</sup> Poole, C. *Experts Predict ADR Will Help Resolve ACA Claims*, Mediate.com September 2014, available at <http://www.mediate.com/articles/PooleCb120140926.cfm>; Mazadoorian, H. N., *ADR and Health Care*, 16:3 Disp. Resol. Mag. 4, 4 (2010) (stating that [a] veritable explosion in the volume and nature of health care related disputes is an unquestioned by-product of the anticipated health care revolution.”).

<sup>2</sup> Morreim, H., *Conflict Resolution in Health Care*, AHLA Connections (January 2014).

<sup>3</sup> See, e.g., Thorpe, R. Wayne, *Effective Use of Mediation and Arbitration in Health Care Disputes*, Bloomberg Law Reports – Health Law, Vol. 4, No. 7 (2011).

<sup>4</sup> Hartman, M., et al., *National Health Spending in 2013: Growth Slows, Remains in Step with the Overall Economy*, Health Affairs, Vol. 34, No. 1 (January 2015).

<sup>5</sup> There are many articles, both scholarly and otherwise, describing the features of ADR and especially mediation and arbitration. See, e.g., Cooley, J. *Arbitration vs. Mediation – Explaining the Differences*, NCJRS Abstract 1986, available at <https://www.ncjrs.gov/App/publications/abstract.aspx?ID=1014191>.

The mediator is a neutral and facilitates the negotiation process by asking questions and exploring creative means to accomplish the objectives of both parties. Some mediators engage in an evaluative process, point out strengths and weaknesses of the respective litigants, and proactively afford each party the mediator's opinion or assessment of the relevant issues focused on the likelihood of success if the parties process to litigation.<sup>6</sup> Yet others emphasize a problem-solving approach based on the parties' most important goals.<sup>7</sup>

Arbitration, on the other hand, is a dispute resolution process in which a neutral party, *i.e.*, the arbitrator, hears a dispute between one or more parties somewhat like a judge in a courtroom and, after considering all relevant evidence, renders an award or decision in favor of one of the parties. Arbitration decisions may be either binding or non-binding based on the terms of the arbitration agreement entered into by the parties. Binding arbitration decisions are generally enforceable by a court.<sup>8</sup>

The Resolution is not intended to change the existing ABA Resolution 111, adopted by the House of Delegates in February 2009 that opposed the use of mandatory, binding, pre-dispute arbitration agreements between nursing homes and patients. In addition, nothing in this Report should be construed as taking a position regarding mandatory pre-dispute arbitration of employment disputes. The Resolution focuses on the voluntary use of dispute resolution techniques where the parties mutually agree to resolve their disputes through ADR. Neither the Resolution nor Report endorses the issue of mandatory, binding pre-dispute arbitration agreements.

ADR, however, is not limited to mediation and arbitration. ADR techniques extend to pre-dispute facilitated discussions where a neutral will facilitate early resolution of a dispute. Other forms of dispute resolution include early neutral evaluation, settlement conferences, private judging or fact finding.<sup>9</sup>

Traditional ADR brings the parties together in person. In person ADR remains commonly used to mediate, arbitrate, or otherwise resolve many disputes. However, technology is increasingly used in ADR. Online dispute resolution, the application of information and communications technology, has come to dispute resolution. It takes advantage of our ability to use the Internet -- accessed by a variety of devices, our computer, smartphone, to communicate and resolve disputes easily and quickly.<sup>10</sup> ADR also includes other electronic means of communication, including video conferencing and text based, asynchronous conversations.<sup>11</sup>

---

<sup>6</sup> See, American Jurisprudence, Second Edition §6 Mediation (database Updated February 2015). *Also see*, Mediation Rules, Office of the Circuit Executive, United States Court of the Appeals for the District of Columbia Circuit, Civil Rule 84.2 (a) Description.

<sup>7</sup> See, e.g., Morreim, H., In-House Conflict Resolution Processes: Health Lawyers as Problem Solvers, ABA, The Health Lawyer, Vol. 26, No. 3 (February 2014).

<sup>8</sup> See, [www.merriam-webster.com/dictionary/arbitration](http://www.merriam-webster.com/dictionary/arbitration).

<sup>9</sup> Benesch, K., *Why ADR and Not Litigation for Healthcare Disputes*, AAA ADR Paper- 66, Dispute Resolution Journal, August/October 2011.

<sup>10</sup> The eBay/PayPal electronic dispute resolution system is a good example of ADR used on an almost exclusively electronic basis.

<sup>11</sup> Rule, C., *Technology and Future of Dispute Resolution*, ABA Dispute Resolution Magazine, Winter 2015 at 4-5.

An array of ADR techniques is broad and can serve many useful roles. Conflict management can address conflicts in a variety of contexts where there is no litigation in mind whatsoever. Processes labeled as focused or guided discussions led by peers in the nation's high schools address many conflicts experienced by adolescents and young adults. Individuals engaged in collaborative problem solving address a variety of conflicts arising in hospitals involving patients and their families. It is acknowledged that litigation will continue to be appropriate in a variety of contexts. Effective dispute resolution requires the agreement of the parties to enter into the process. Nothing in this report suggests that parties cannot file and pursue litigation whenever appropriate.

Finally, ADR is commonly accepted by nearly all courts across the nation at all levels and has become “mainstream” practice – a means of offering litigants “different options and opportunities for resolving their disputes.”<sup>12</sup>

## II. HEALTH CARE DISPUTES AMENABLE TO ADR

Many different types of private and public health care disputes are amenable to resolution through ADR. Court sponsored programs, private professional organizations offering mediation and arbitration services, and programs offered by health care providers offer a multitude of ADR services. In the health care arena the major areas of disputes may be cataloged as follows:

- **Payor/Provider claims/network disputes**

Disputes between providers and health insurance companies are becoming more and more common. In the healthcare industry, payors and providers often have claims for both underpayment and overpayment arising from ongoing contracts or other healthcare services that are litigated where lawyers may wish to consider dispute resolution, where appropriate.<sup>13</sup> Issues include coverage, coding,<sup>14</sup> billing, claims payment, contract interpretation, risk sharing, and/or administrative issues, including exclusion of providers from limited provider networks. Disputes extend to management services companies, *e.g.*, laboratory billing disputes, and third party vendors offering ancillary services such as durable medical equipment and physical or occupational therapy.

---

<sup>12</sup> See, *e.g.*, Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482, requiring all federal district courts to establish a specific plan to reduce costs and delay of litigation – specifically referencing ADR as a civil case management tool. Mediation is widely used by federal courts. For information regarding specific ADR programs in the federal courts, see, <http://www.justice.gov/olp/federal-court-annexed-adr-programs-glance>. The federal government has established an ADR working group to coordinate and encourage multi-agency ADR initiatives. See, <http://www.adr.gov>. Also see, National Center for State Courts, *Principles for Judicial Administration*, July 2012 (citing ADR as a mainstream practice in all state courts). ADR is in widespread use in the national local courts. See, *e.g.*, Description of the ADR program used in the District of Columbia courts. [http://www.dccourts.gov/internet/superior/org\\_multidoor/main.jsf](http://www.dccourts.gov/internet/superior/org_multidoor/main.jsf).

<sup>13</sup> Boserup, V., *The Managed Mediation of a Payor-Provider Healthcare Dispute*, American Bar Association, Health eSource, Vol. 10, No. 11 (July 2014), available at [http://www.americanbar.org/publications/aba\\_health\\_esource/2013-14/july/managed\\_mediation.html](http://www.americanbar.org/publications/aba_health_esource/2013-14/july/managed_mediation.html).

<sup>14</sup> The long awaited ICD-10 is now scheduled to become effective October 1, 2015. It may give rise to a marked increase of disputes. See, *About ICD-10*, CMS.gov, <http://www.cms.gov/Medicare/Coding/ICD10/dex.html?redirect=/icd10>.

Individual health claims are generally addressed through internal health insurance company appeal procedures and many states offer a right of appeal to a state insurance agency appeals process. Many large claims for denial of benefits on grounds of lack of medical necessity, cosmetic or experimental/investigative procedures, or denial of coverage of “new technology” treatment may be litigated in the courts where dispute resolution may provide a useful role.

- **Medicare Reimbursement disputes**

Hospital Medicare Part A Inpatient Prospective Payment System (IPPS) disputes or appeals from annual cost reports span a wide range of issues with enormous financial consequences for providers, principally acute care hospitals. Commonly appealed issues include the disproportionate share payment (DSH), reimbursement for bad debts, wage index, graduate medical resident and allied health education expenses, and capital costs. Cases have high dollar value.<sup>15</sup>

Presently, over 9,000 Medicare IPPS administrative provider appeals are pending before the Provider Reimbursement Review Board. Disputes between providers and Medicare Administrative Contractors (MACs) representing HHS are infrequently mediated. ADR can be expanded in this area.

- **ERISA Litigation**

Participants or beneficiaries in an employee benefit plan subject to the Employee Retirement Income Security Act (ERISA) may sue to “recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” This cause of action provides typical contract remedies such as recovery of accrued benefits, declaratory judgments to clarify plan benefits, and injunctions against future denials of benefits. Class action lawsuits may be brought against the plan denying coverage/benefits, the plan administrator, the employer/sponsor, third-party insurers and administrators and plan fiduciaries.

The Employee Benefits Security Administration (EBSA), U.S. Department of Labor, has substantial enforcement responsibility for ensuring the integrity of private employee benefit plans. In FY 2014, the ESBA initiated 2,541 cases resulting in monetary fines or other corrective action. Where voluntary remedies are insufficient, the Department of Labor initiates litigation. In FY 2014, 107 cases were brought in federal courts.<sup>16</sup> All these disputes might be more quickly and less expensively resolved through ADR.

---

<sup>15</sup> See, *PRRB Workshop*, 2014 AHIA Institute on Medicare and Medicaid Payment Issues, March 2014 (Benefits of mediation), available at [https://www.healthlawyers.org/Events/Programs/Materials/Documents/MM14/z\\_crofton\\_peabody\\_stiles\\_slides.pdf](https://www.healthlawyers.org/Events/Programs/Materials/Documents/MM14/z_crofton_peabody_stiles_slides.pdf).

<sup>16</sup> Fact Sheet, U.S. Department of Labor, Employee Benefits Security Administration, 2014, available at <http://www.dol.gov/ebsa/newsroom/fsFYagencyresults.html>.

- **National and international contract disputes involving drugs patented by pharmaceutical companies and associated issues**

Issues include breach of contract, patent/trademark infringement, licensing, and IT; disputes common to commercial claims including joint venture, partnership, distribution, and manufacturing.<sup>17</sup> Notwithstanding their complexity, and perhaps due to their difficulty, many would benefit from ADR.

- **Physician practice/Provider business disputes**

Employment contracts, purchase agreements, partnership agreements, repayment of loans, non-compete, non-solicitation, and anti-theft clauses, fiduciary duty obligations, managed services organization (MSO) contracts, space sharing agreements, corporate and LLC formation, employment law, worker's compensation issues, and shareholder issues are among the disputes that arise in physician practices. These physician disputes may escalate into unpleasant exchanges of charge and counter-charge, none of which is in the interest of any party. These disputes may be resolved by ADR in the interest of all outside a public forum.<sup>18</sup>

- **Accountable Care Organization (ACO) disputes**

There are presently over 600 ACOs serving 14% of the nation's population and the number is growing as a result of the new Medicare Shared Savings Program. Issues include quality of care,<sup>19</sup> shared cost programs, conflicts among providers in the ACO and their relationships with commercial payors, termination/withdrawal or restriction of participating physicians due to poor performance and other reasons, reimbursement and financial incentives, use of quality metrics/clinical practice guidelines, evidence based medicine standards, calculation of patient utilization and cost, and access to data.<sup>20</sup> Myriad issues associated with ACOs present additional opportunities for ADR.

---

<sup>17</sup> See, World Intellectual Property Organization, WIPO Arbitration Cases (examples), available at <http://www.wipo.int/amc/en/arbitration/case-example.html>. See also, Conerstone Research, Pharmaceuticals and Healthcare, available at <https://www.cornerstone.com/Practices/Industries/Pharmaceuticals-and-Healthcare>.

<sup>18</sup> Thorpe, R. Wayne, *Effective Use of Mediation and Arbitration in Health Care Disputes*, Bloomberg Law Reports – Health Law, Vol. 4, No. 7 (2011).

<sup>19</sup> See, Barr, S., and Mattioli, M., *Accountable Care and Integration: A Challenge for Credentialing and Risk Management*, Journal of Risk Management, American Hospital Association, July 28, 2014, available at <http://onlinelibrary.wiley.com/doi/10.1002/jhrm.21147/abstract?>

<sup>20</sup> See, Ronai, St., *The Patient Protection and Affordable Care Act's Accountable Care Act's Organization Program: New Healthcare Disputes and the Increased Need for ADR Services*, Dispute Resolution Journal, August/October 2011, available at [https://www.google.com/url?url=https://www.adr.org/cs/idcplg%3FIdcService%3DGET\\_FILE%26dDocName%3DADRSTG\\_011022%26RevisionSelectionMethod%3DLatestReleased&rc=j&frm=1&q=&csrc=s&sa=U&ei=F1IDVYX3E-O1sASZ8IFo&ved=0CCsQFjAFOBQ&usg=AFQjCNEDAgzePyPq599OmpGfe8KjDo-VPQ](https://www.google.com/url?url=https://www.adr.org/cs/idcplg%3FIdcService%3DGET_FILE%26dDocName%3DADRSTG_011022%26RevisionSelectionMethod%3DLatestReleased&rc=j&frm=1&q=&csrc=s&sa=U&ei=F1IDVYX3E-O1sASZ8IFo&ved=0CCsQFjAFOBQ&usg=AFQjCNEDAgzePyPq599OmpGfe8KjDo-VPQ).

- **Disputes over the dissolution/sale/merger or acquisition of a hospital, medical practice or other health care entity**

Contract and other disputes regarding physician practices arise in a variety of contexts including the retirement of physicians and the sale or closing of practices;<sup>21</sup> contract disputes when physician practices are sold and consolidated with hospitals, shareholder agreement buy out provisions and other features of such agreements,<sup>22</sup> sale or dissolution of practices consistent with Stark safe harbor provisions; covenants not to compete; disputes over fair market value; conversion of hospitals from not for profit to for profits status, including real estate restrictions; Medicare loss on sale claims for reimbursement with high dollar stakes. The need for litigants to resolve these business disputes quickly may strongly recommend the use of ADR.

- **Medical staff, credentialing and peer review disputes**

Medical staff disputes arise as physicians interact with hospitals and other health care providers. “Sour relations” escalating to litigation can arise from provider appointments and credentialing, termination or threatened termination of privileges, changes in by-laws, the expanding use of technology, including electronic medical records, performance of medical staff responsibilities;<sup>23</sup> addressing the needs of disruptive or impaired health care professionals; conducting peer review and quality assurance; taking corrective personnel actions; providing fair hearings for medical and allied health professional staffs; peer review communications and records confidentiality; National Practitioner Data Bank querying and reporting; peer review immunities; the effect of hospital business upon medical staff membership and privilege, and such mundane matters as the hospital’s physician call schedule or adding staff to a department absent consultation with current staff members. These disputes are susceptible to resolution by a range of ADR techniques.<sup>24</sup>

- **Medical malpractice**

Numerous commentators frequently note that ADR can be helpful in resolving medical malpractice disputes.<sup>25</sup> Where appropriate and properly used, ADR can resolve malpractice claims in a more efficient, cost effective manner than litigation and permit the use of techniques to be utilized that are not available in litigation. A physician’s apology can, among other factors,

---

<sup>21</sup> Webb, R., *Litigating a Medical Practice Break-Up is Rarely a Good Idea*, Blog, May 18, 2012, available at <http://www.healthcareneutraladrblog.com/2012/05/articles/commercial-healthcare-disputes/litigating-a-medical-practice-breakup-is-rarely-a-good-idea>.

<sup>22</sup> Boell, S., *Shareholder Disputes in Medical Practices*, Blog, May 31, 2013, available at <http://www.flblaw.com/shareholder-disputes-in-medical-practices-prevention-is-the-best-medicine>.

<sup>23</sup> American Medical Association, Medical Peer Review (description, citing the Health Quality Improvement Act of 1986, 42 U.S.C. § 11101 et seq.) available at <http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/medical-peer-review.page>

<sup>24</sup> Gallegos, A., *Calming a Hospital Culture Clash* (facilitated discussion), American Medical Association, [amednews.com](http://www.amednews.com), April 29, 2013, available at <http://www.amednews.com/article/20130429/profession/130429951/4>.

<sup>25</sup> Sorrel, A., *At the Same Table: Alternative Liability Resolution*, American Medical Association, [amednews.com](http://www.amednews.com), February 2, 2009, available at <http://www.amednews.com/article/20090202/profession/302029973/4>.

facilitate resolution of these cases that have long been the subject of controversy among physicians, lawyers, and patients. <sup>26</sup>

- **Qui tam and False Claims Act (FCA) cases – Federal and state**

Whistleblowers are filing *qui tam* lawsuits <sup>27</sup> and federal <sup>28</sup> and state <sup>29</sup> agencies are engaging in widespread investigations and other activities to address the commonly recognized problem of fraud in health care. Overpayment is an increasingly important issue as the Affordable Care Act and the Fraud Enforcement and Recovery Act (FERA) imposed False Claims Act liability for overpayments, including any overpayment held for more than 60 days and expanded government authority to address kickbacks; claims of Medicare fraud including over-billing, mis-billing, and billing for services not provided; FCA quality of care amendments, anti-kickback provisions, and other regulatory violations may make FCA cases fertile ground for dispute resolution.

- **Employment disputes in provider settings**

Employment related disputes actionable under federal and/or state law may be amenable to a variety of ADR techniques.

- **Long Term care – Skilled Nursing Facilities (SNFs), Long Term Care Hospitals (LTCHs), and Hospice Care**

Billing and quality of care issues continue to be the subject of federal and state audits, investigations and enforcement actions. They represent special opportunities for mediation beginning at the investigation stage and, if necessary, culminating at the litigation phase and during enforcement proceedings. SNFs and LTCHs are subjected to numerous allegations of abuse and inadequate treatment of patients including preventable injuries and hospitalizations. In addition, billing issues arise from the facilities' interactions with the Medicare, State Medicaid programs, and private payors. The HHS OIG latest work plan found that SNFs billed one-quarter of all 2009 claims in error, resulting in \$1.5 billion in inappropriate Medicare payments. There are licensing and certification disputes arising over standards of care and participation in federal and state programs. Finally, dispute resolution can be considered in addressing conflicts arising from end of life and other treatment decisions. These conflicts and disputes between providers, patients, and the Federal and State governments represent opportunities principally for mediation.

---

<sup>26</sup> Hyman, C., Mediation and Malpractice, American Arbitration Association, August/October 2011, available at [https://adr.org/aaa/ShowPDF?doc=ADRSTG\\_011024](https://adr.org/aaa/ShowPDF?doc=ADRSTG_011024); also see, Boothman, R., Imhoff, S., and Campbell, D., *Nurturing a Culture of Patient Safety and Achieving Lower Malpractice Risks through Disclosure: Lessons Learned and Future Directions*, *Frontiers of Health Services Management* 28(3): 13-28 (2012) .

<sup>27</sup> There are many qui tam lawsuits in the health care area. See, e.g., Mintz Levin *Qui Tam Update*, May 2014, available at <https://www.healthlawyers.org/Events/Programs/2014/Documents/MintzLevin.pdf>.

<sup>28</sup> See, Department of Health and Human Services, Office of the Inspector General, *Health Care Fraud and Abuse Control Report FY 2014*, available at <https://oig.hhs.gov/reports-and-publications/hcfac/index.asp>.

<sup>29</sup> See, Department of Health and Human Services, Office of the Inspector General, *State FCA Reviews* (criteria and listing of state FCA statutes) available at <https://oig.hhs.gov/fraud/state-false-claims-act-reviews>.

- **Home Health Care Agencies (HHAs)**

HHAs provide health care services to beneficiaries pursuant to both Medicare and Medicaid. Likewise, adult day health care programs provide health, therapeutic, and social services and activities to program participants. Beneficiaries enrolled must meet eligibility requirements, and services must be furnished in accordance with a plan of care that meets regulatory requirements. Medicaid allows payments for adult day health care through various authorities, including home and community-based services (HCBS) waivers. These programs present coverage, billing, and regulatory issues<sup>30</sup> that are tailor made for ADR.

- **HIPAA/Privacy and Security – compliance**

The health care industry now leads all business sectors in breaches of protected health information subjecting patients to undue risks of identity theft and other harm.<sup>31</sup> Breaches are occurring all across the health insurance industry from major health insurance companies to the nation's most renowned hospitals. Each breach results in the filing of significant litigation and plaintiffs are beginning to erode the prevailing standards that no relief can be afforded to patients unless each shows some demonstrable harm resulting from the breach. As a result, defendants have real incentives to resort to ADR to mitigate damages and protect against reputational harm by resolving claims quickly.

- **Recovery Audit Contractors (RACs), Program Safeguard Contractors (PSCs) and Zone Program Integrity Contractors (ZPICs) – investigation and enforcement activities**

Recovery Audit Contractors (RACs), Program Safeguard Contractors (PSCs) and Zone Program Integrity Contractors (ZPICs) carry out benefit integrity activities for Medicare Parts A and B, and a Medicare Drug Integrity Contractor (MEDIC) carries out benefit integrity activities for Medicare Parts C and D. ZPICs and PSCs are required to detect and deter fraud and abuse in Medicare Part A and/or Part B in their jurisdictions. They conduct investigations; refer cases to law enforcement; and take administrative actions, such as referring overpayments to claims processors for collection and return to the Medicare program.<sup>32</sup> Unpaid alleged overpayments are referred to the IRS for collection. These investigation and/or enforcement activities provide additional opportunities for the use of ADR.

---

<sup>30</sup> See, HHS, OIG, 2015 Work Plan, available at <http://oig.hhs.gov/reports-and-publications/archives/workplan/2015/FY15-Work-Plan.pdf>.

<sup>31</sup> Identity Theft Resource Center 2014 Breach Report, available at <http://www.idtheftcenter.org/ITRC-Surveys-Studies/2014databreaches.html> (42.5% of all reported breaches). Also see, Ponemon Institute, 2014: *A Year of Mega Breaches*, January 2015, available at [http://www.ponemon.org/local/upload/file/2014%20The%20Year%20of%20the%20Mega%20Breach%20FINAL\\_3.pdf](http://www.ponemon.org/local/upload/file/2014%20The%20Year%20of%20the%20Mega%20Breach%20FINAL_3.pdf); also see, McCann, E., HIPAA Data Breaches Climb 138 Percent, Health Care IT News, February 6, 2014, available at <http://www.healthcareitnews.com/news/hipaa-data-breaches-climb-138-percent>.

<sup>32</sup> See, HHS, OIG, 2015 Work Plan, available at <http://oig.hhs.gov/reports-and-publications/archives/workplan/2015/FY15-Work-Plan.pdf>.



### III. ADVANTAGES OF ADR

ADR has many advantages. Like any legal proceeding, the mediator or arbitrator must lead or facilitate the process in a manner that provides the parties with the advantages of the process. While any process can be abused, if implemented appropriately, ADR holds out these potential benefits.<sup>33</sup> The advantages are summarized as follows.

- **Cost efficient, less expensive than protracted, adversarial litigation**

There is little disagreement that litigation can be an expensive, time consuming way of resolving many disputes. While litigation is necessary when statutes are unclear, a novel theory is advanced to support a legal claim, or a precedent is needed to clarify an important legal principle, it need not be an automatic response to every dispute or conflict. These considerations apply to the entire range of health care disputes. Many health care disputes implicate the complexity inherent in state and federal regulations that control nearly all aspects of the nation's health care delivery system. Others involve medical and scientific data and information. Such litigated disputes often give rise to the "battle of the experts" where the competing sides seek to convince the judge, jury or both by expensive, compensated by-the-hour experts. Discovery further increases the cost and protracted nature of litigated health care disputes.

Mediation can streamline this potentially expensive, protracted process by identifying the parties' goals either before the filing of any lawsuit or at any step in the process, including after the trial. Years of litigation, discovery, motions and argument, trials, and appeals can be replaced by voluntary discussions among the parties facilitated by a neutral. Viewed from any vantage, mediation can shorten the process whenever initiated -- and can result in low cost resolution of disputes when initiated before a complaint is even filed. Arbitration can likewise streamline the process by focusing the parties, limiting discovery, including depositions, and avoiding strict application of the rules of evidence, and other formalities imposed by a court. If properly administered, arbitration will seldom take as long, consume as many resources, or result in the "quagmire" of court litigation. Both mediation and arbitration can accommodate the parties' time and scheduling requirements, and other needs.<sup>34</sup> ADR does not suffer the consequences of a crowded docket.

- **Ability to choose the neutral with expertise in health care**

The selection of a neutral with expertise in the health care can facilitate the resolution of the dispute by focusing the parties on the core of the dispute. Selecting an individual with knowledge of the relevant health care regulatory scheme, state or federal, that governs nearly all aspects of the medical delivery system, facilitates the prompt and timely resolution of health care disputes. A knowledgeable neutral in the regulatory, scientific, and/or technical aspects of the

---

<sup>33</sup> There are numerous articles discussing the potential advantages of ADR. See, e.g., Benesch, K., Why ADR and Not Litigation for Healthcare Disputes, American Bar Association, Healthcare, August/October 2011; Costello, E., *User Friendly Arbitration*, College of Commercial Arbitrators, December 29, 2006 available at [http://www.thecca.net/sites/default/files/article\\_userfriendly\\_arbitration\\_0.pdf](http://www.thecca.net/sites/default/files/article_userfriendly_arbitration_0.pdf).

<sup>34</sup> *Id.*

dispute can use this knowledge to facilitate the resolution of the dispute. There is no need to educate the judge or jury. Neutrals are also effective in the resolution of differences arising among physicians in a group practice when one member fails to meet the expectations of another physician. Neutrals with experience in reimbursement, *e.g.*, diagnostic codes, length of stay, and other reimbursement rules and regulations, can readily resolve complex reimbursement disputes governed by rules few understand and appreciate.

- **Ability to create novel solutions afforded by the flexibility of the process**

In mediation, the parties make all decisions. The parties' ability to control the process permits them to agree to remedies that may not be available through litigation but serve to meet their needs. In a medical malpractice case, among other factors, a physician's apology to the grieving parents of a deceased child can be a powerful tool of settlement.<sup>35</sup> Counsel's willingness to contribute to an agreed upon charity may help to resolve of an attorney's fees dispute in a health care dispute. In complicated health care disputes, the neutral experienced in the organizational and managerial aspects of hospitals and physician practices may assist the resolution of a contract dispute by facilitating the renegotiation of the contract as well as damages. The flexible nature of the process also facilitates scheduling, including timing of meetings/hearings and venue. Many of these same considerations apply to arbitration.

- **Maintain long term relationships while resolving a dispute**

ADR offers parties to a dispute a means of minimizing emotional, high stakes risks commonly associated with adversarial litigation. Mediation is entirely voluntary, lacks the formalities associated with court proceedings, is held in private, and can lead to confidential agreements resolving disputes absent widespread media attention. In arbitration, the parties can agree to the components of the process to a large degree, maintain their ability to promote privacy and confidentiality, and avoid most of the pit-falls of high risk public in-court litigation. All these factors may serve to maximize the parties' ability to maintain professional and business relationships essential to their long term success.<sup>36</sup> On the other hand, mediation may help mend frayed personal relationships that erupt as families address issues associated with the hospitalization or loss of a loved one.<sup>37</sup>

- **No or limited discovery**

Generally, mediation does not contemplate discovery. Mediation can commence before any discovery has been taken, be adjourned to permit any necessary fact finding, or take place

---

<sup>35</sup> Todres, J., *Toward Healing and Restoration for All: Reframing Medical Malpractice Reform*, 39 Conn. L. Rev. 667, 686 (2006) ("[a] study published in Lancet, the leading British medical journal, found that as many as 37% of medical malpractice plaintiffs reported that they would not have filed lawsuits if their doctors had sincerely apologized instead of stonewalling.").

<sup>36</sup> Seat, K., L., *Usefulness of Mediation*, undated, available at <http://www.keithseat.com/mediationlink.htm>; also see, Solovay, N., Responding to the Call for ADR: Teaching an Old Law Firm New Tricks, ABA Business Law Today, Vol. 19, No. 1 September/October 2009) available at <https://apps.americanbar.org/buslaw/blt/2009-09-10/solovay.shtml>.

<sup>37</sup> See, *e.g.*, Hughes, M and Wearing M., *Organizations and Management in Social Work*, Sage Publications 2007.

after all discovery has been completed.<sup>38</sup> Absent discovery, mediation can permit the parties to discuss the facts and present their respective positions. The discussion may assist the resolution of the matter by permitting the parties to candidly express their respective views – a useful process since nothing said or done in mediation can be later used in court.

In arbitration, it is not unusual for parties to limit the scope and timing of discovery. Arbitration rules also serve to limit discovery. For example, Rule 22 of the AAA Healthcare Payor Provider Arbitration Rules limits discovery to one deposition absent the parties' agreement or the arbitrator's approval.<sup>39</sup> Like the Federal Rule of Civil Procedure, these rules require disclosures to shorten and facilitate the resolution of the case.<sup>40</sup> JAMS has issued a list of factors for arbitrators to use when evaluating discovery requests such as the nature of the dispute, whether the parties agree to the scope of discovery, the relevance and reasonableness of the requested discovery, the presence of genuine privilege and confidentiality concerns, and the relative need of the parties.<sup>41</sup> The College of Commercial Arbitrators has issued a protocol urging arbitrators to actively manage and shape the arbitration process and "avoid unnecessary discovery."<sup>42</sup> Discovery disputes can be resolved informally by the arbitrator and, in many cases, there is no need for motions to compel discovery.

- **Privacy and confidentiality**

A formal ADR process is generally viewed as confidential and, as a result, advances the parties' privacy interests. Rules of state,<sup>43</sup> federal court,<sup>44</sup> and mediation programs operated by private organizations and entrepreneurs promise or require the parties' agreement that the proceedings be private and confidential, including the requirement that nothing used in mediation may be used outside the process or in court.<sup>45</sup> Arbitration may differ to the degree that the arbitration proceeding may lead to judicial action, including an action challenging an award or its enforcement.<sup>46</sup> As such, some information in arbitration may ultimately become

---

<sup>38</sup> Some commentators have observed that formal discovery may be required to assist mediation or arbitration during the course of the dispute resolution, especially where highly complex scientific or forensic issues are in dispute and that discovery may establish facts essential to the successful resolution of the dispute.

<sup>39</sup> AAA Healthcare Payor Provider Arbitration Rules, Rule 22 (2014) available at [https://www.adr.org/cs/idcplg%3FIdcService%3DGET\\_FILE%26dDocName%3DADRSTG\\_004106%26Revision%3DelectionMethod%3DLatestReleased&rct=j&frm=1&q=&esrc=s&sa=U&ei=cewJVf6nLYzhsATHmIHgDQ&ved=0CBQQFjAA&usq=AFQjCNEOimMQBmL0QvDXmq7WvTwl652BXA](https://www.adr.org/cs/idcplg%3FIdcService%3DGET_FILE%26dDocName%3DADRSTG_004106%26Revision%3DelectionMethod%3DLatestReleased&rct=j&frm=1&q=&esrc=s&sa=U&ei=cewJVf6nLYzhsATHmIHgDQ&ved=0CBQQFjAA&usq=AFQjCNEOimMQBmL0QvDXmq7WvTwl652BXA).

<sup>40</sup> *Id.*, Rule 23.

<sup>41</sup> JAMS, *Arbitration Discovery Protocols for Domestic, Commercial Cases*, 2010.

<sup>42</sup> Stipanowich, T., Editor, The College of Commercial Arbitrators, *Protocols for Expeditions, Cost Effective Commercial Arbitration*, 2010, available at [http://www.laechlii-adr.com/CCA\\_Protocols.pdf](http://www.laechlii-adr.com/CCA_Protocols.pdf).

<sup>43</sup> See, Washington Courts, Mandatory Mediation, Rule SPR 94.08.3m (Confidentiality); Rules of the Supreme Court of the State of New Hampshire, Rule 12-A. Mediation, § 11 (2015) .

<sup>44</sup> See, Office of the Circuit Executive, United States Court of the Appeals for the District of Columbia Circuit, Civil Rule 84.9 (a) Confidentiality.

<sup>45</sup> See, e.g., JAMS International Mediation Rules (Privacy) (Mediation sessions are private.”).

<sup>46</sup> See, e.g., JAMS Arbitration Rules, Rule 26 (Confidentiality)(Confidentiality shall be maintained “except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an Award or its enforcement ....”).

public in a court related proceeding; however, information exchanged in mediation will be protected either by the agreement of the parties or the rules of the mediation.

- **Enforceability or binding nature of agreements**

The parameters and enforceability of an agreement made pursuant to ADR is subject to agreement of the parties<sup>47</sup> except arbitration may be entered into with a pre-arbitration contractual obligation that the award is binding.<sup>48</sup> Arbitration can, of course, be non-binding in other circumstances.<sup>49</sup> In ADR, the nature of the “judgment” is flexible and can be designed to meet the needs of the parties.<sup>50</sup>

#### IV. ABA POLICY

In recent years, the ABA House of Delegates has adopted a number of policies regarding the use of ADR to resolve health care conflicts and disputes and others of general application to the area. ABA policies include the following:

Resolution 118, Adopted by the ABA House of Delegates in August 1977

The resolution endorsing the use of arbitration for resolving medical malpractice disputes under circumstances whereby the agreement to arbitrate is entered into only after a dispute has arisen.

\* \* \*

Resolution 101, Adopted by the ABA House of Delegates in August 1998

This resolution adopted the “black letter” of the Model Rules for Mediation and Client-Lawyer Disputes which recommends that jurisdictions establish a mediation program by providing a model for such programs.

\* \* \*

Resolution 103, Adopted by the House of Delegates in August 1998

This Resolution adopted a new ADR-related policy calling for giving patients enhanced rights vis-a-vis managed health plans. The Resolution supports the right of all

---

<sup>47</sup> See, Sussman, E., *The Final Step: Issues in Enforcing the Mediation*, undated, available at [http://www.sussmanadr.com/docs/Enforcement\\_Fordham\\_82008.pdf](http://www.sussmanadr.com/docs/Enforcement_Fordham_82008.pdf).

<sup>48</sup> See, *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012) (upholding the legality of compulsory binding arbitration clauses).

<sup>49</sup> See, e.g., American Arbitration Association, Non-Binding Arbitration Services and Rules, available at [https://www.adr.org/aaa/faces/services/disputeresolutionservices/arbitration/nonbindingarbitration.jsessionid=2f18VhfSt74vzhTGdxsHRxj3Gr6tnvpRcKZLQ8ny5xjWSps2rTJq!-817772710?\\_afLoop=1607098693232181&\\_afWindowMode=0&\\_afWindowId=null#%40%3F\\_afWindowId%3Dnull%26\\_afLoop%3D1607098693232181%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3Dywugrc6jk\\_4](https://www.adr.org/aaa/faces/services/disputeresolutionservices/arbitration/nonbindingarbitration.jsessionid=2f18VhfSt74vzhTGdxsHRxj3Gr6tnvpRcKZLQ8ny5xjWSps2rTJq!-817772710?_afLoop=1607098693232181&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D1607098693232181%26_afWindowMode%3D0%26_adf.ctrl-state%3Dywugrc6jk_4).

<sup>50</sup> Costello, E. *User Friendly Arbitration*, College of Commercial Arbitrators, December 29, 2006, available at [http://www.thecca.net/sites/default/files/article\\_userfriendly\\_arbitration\\_0.pdf](http://www.thecca.net/sites/default/files/article_userfriendly_arbitration_0.pdf).

consumers to a fair and efficient process for resolving differences with managed health care plans, health care providers, and institutions that serve such plans and providers.

\* \* \*

Resolution 114, Adopted by the House of Delegates in February 1999

This Resolution reiterated and expanded Resolution 103 and called for federal, state, and territorial legislation establishing ADR as one remedy for resolving disputes between patients and group health plans, as part of a process that includes a rigorous system of internal review and an independent system of external review of benefit payment requests, adverse coverage determinations, and medical necessity determinations.

\* \* \*

Resolutions 106, Adopted by the House of Delegates in February 1999

Resolution 106 supported the enactment of federal legislation to allow patients to bring state court actions against managed health care plans. In that Resolution, the ABA supported and encouraged the use of ADR mechanisms prior to the filing of such causes of action.

\* \* \*

Resolution 111, Adopted by the House of Delegates in February 2009

Resolution 111 opposed the use of mandatory, binding, pre-dispute arbitration agreements between nursing homes and patients.

The Resolutions and related Reports are available at:

<http://www.americanbar.org/directories/policy.html>

## V. CONCLUSION

This Resolution is intended to call attention to the use of a broad array of dispute resolution processes in the resolution of health case disputes and to encourage its use and further use by lawyers and other interested parties as a means of resolving the expanding number of health care disputes all across the industry in an effective, efficient, and low cost basis.

Respectfully submitted,

Howard Herman, Chair  
Section of Dispute Resolution  
February 2016

## GENERAL INFORMATION FORM

Submitting Entity: Section of Dispute Resolution

Submitted By: Howard Herman, Chair, ABA Section of Dispute Resolution

### 1. Summary of Resolution

During the past few decades, the legal profession has embraced an increasingly wide array of dispute resolution processes to address their clients' problems. With the enactment of health care reform, increased federal regulation of diverse aspects of the nation's medical care delivery system, and the ever-increasing use of technology in the provision of health care, there are a multitude of health care disputes that span all aspects of the provision of health care. The structure of healthcare delivery across the nation is changing with increasing emphasis on successful outcomes and reducing costs. Providers are becoming increasingly integrated in a variety of arrangements of increasingly interdependence as a means of accomplishing these goals. Such complex relationships to achieve competing goals may give rise to conflict when the maintenance of such relationships is vital to the delivery of care to patients. The Report acknowledges the appropriateness of litigation but emphasizes that ADR can be useful tool in resolving health care disputes.

### 2. Approval by Submitting Entities

The Section of Dispute Resolution adopted on August 1, 2015

### 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?

#### Resolution 101, Adopted by the ABA House of Delegates in August 1998

This resolution adopted the "black letter" of the Model Rules for Mediation and Client-Lawyer Disputes which recommends that jurisdictions establish a mediation program by providing a model for such programs.

\* \* \*

#### Resolution 103, Adopted by the House of Delegates in August 1998

This Resolution adopted a new ADR-related policy calling for giving patients enhanced rights vis-a-vis managed health plans. The Resolution supports the right of all

consumers to a fair and efficient process for resolving differences with managed health care plans, health care providers, and institutions that serve such plans and providers.

\* \* \*

Resolution 114, Adopted by the House of Delegates in February 1999

This resolution reiterated and expanded Resolution 103 and called for federal, state, and territorial legislation establishing ADR as one remedy for resolving disputes between patients and group health plans, as part of a process that includes a rigorous system of internal review and an independent system of external review of benefit payment requests, adverse coverage determinations, and medical necessity determinations.

\* \* \*

Resolutions 106, Adopted by the House of Delegates in February 1999

Resolution 106 supported the enactment of federal legislation to allow patients to bring state court actions against managed health care plans. In that resolution, the ABA supported and encouraged the use of ADR mechanism prior to the filing of such causes of action.

\* \* \*

Resolution 111, Adopted by the House of Delegates in February 2009 (Boston, MA)

Resolution 111 opposed the use of mandatory, binding, pre-dispute arbitration agreements between nursing homes and patients.

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

This Resolution encourages the expanded use of the broad array of dispute resolution techniques to address the potential increase in disputes and conflicts arising from the enactment of health care reform, increased federal regulation of diverse aspects of the nation's medical care delivery system, and the ever-increasing use of technology in the provision of health care. In health care today, there are a multitude of health care disputes that span all aspects of the provision of health care. The structure of healthcare delivery across the nation is changing with increasing emphasis on successful outcomes and reducing costs. Providers are becoming increasingly integrated in a variety of arrangements of increasing integration and interdependence as a means of accomplishing these goals. Such complex relationships to achieve competing goals may give rise to conflict when the maintenance of such relationships is vital to the delivery of care to patients. ADR can be among the useful tools to resolve all of these disputes.

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 Resolution will be distributed to the courts, practitioners, health care providers, and posted on the ABA website. In addition, further “educational opportunities” should be developed.

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

9. Disclosure of Interest. (If applicable).

Not Applicable.

10. Referrals.

The proposed Resolution and Report have been sent to the following Sections: Administrative Law and Regulatory Practice, Antitrust Law, Business Law, Criminal Justice, Environment, Energy and Resources, Family Law, Health Law, Individual Rights and Responsibilities, Intellectual Property, International Law, Labor and Employment, Litigation, Public Contract Law, Public Utility, Communications & Transportation Law, Real Property, Science and Technology, State and Local Government Law, Taxation and TIPS. It was also sent to the Senior Lawyer, Young Lawyer and Judicial Divisions and Commission on Law and Aging.

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

Arthur E. Peabody, Jr., Esq.  
Assistant General Counsel – Medicare  
Blue Cross Blue Shield Association  
Washington, D.C.  
arthur.peabody@bcbsa.com  
(703) 798-1001

Haavi Morriem, Esq.  
Chair, Health Law Committee, Section of Dispute Resolution  
Professor, Department of Internal Medicine  
University of Tennessee Health Science Center  
Memphis, TN  
hmmorriem@uthsc.com  
(901) 755-7479



Howard Herman, Chair  
ABA Dispute Resolution Section  
United States District Court for the Northern District of California  
45 Golden Gate Avenue  
San Francisco, CA 94102  
(415) 522-2027

12. Contact Name and Address Information. (Who will present the report to the House?)

James J. Alfini, Delegate  
Professor of Law and Dean Emeritus  
South Texas College of Law  
Houston, Texas 77002  
(713) 646-1834  
jalfini@stcl.edu

Bruce E. Meyerson, Delegate  
3101 North Central Avenue  
Suite 840  
Phoenix, AZ 85012  
(602) 254-5557  
brucemeyerson@msn.com

## **EXECUTIVE SUMMARY**

### **1. Summary of the Resolution**

This Resolution encourages the expanded use of the broad array of dispute resolution techniques to address the potential increase of disputes and conflicts arising from the enactment of health care reform, increased federal regulation of diverse aspects of the nation's medical care delivery system, and the ever-increasing use of technology in the provision of health care. In health care today, there are a multitude of health care disputes that span all aspects of the provision of health care. The structure of healthcare delivery across the nation is changing with increasing emphasis on successful outcomes and reducing costs. Providers are becoming increasingly integrated in a variety of arrangements of increasing interdependence as a means of accomplishing these goals. Such complex relationships to achieve competing goals may give rise to conflict when the maintenance of such relationships is vital to the delivery of care to patients. ADR can be among the useful tools to resolve all of these disputes.

### **2. Summary of the Issue that the Resolution Addressed**

With health care reform and the changing structure of the delivery of health care, increased use of technology and increasing federal and state regulation of healthcare, ADR can be a useful tool in addressing potential disputes and conflict arising from the present day, constant changes in healthcare.

### **3. Please Explain How the Proposed Policy Position Will Address the Issue**

The Resolution encourages the expanded use of the broad array of dispute resolution techniques as one means to promote the cost efficient, more timely resolution of a wide range of health care disputes across all health care settings.

### **4. Summary of Minority Views**

This Resolution and Report have been revised in response to input received from several ABA entities. No minority views have come to our attention.

**AMERICAN BAR ASSOCIATION**  
**STANDING COMMITTEE ON PARALEGALS**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1       RESOLVED, That the American Bar Association approves the Bunker Hill Community  
2       College, Paralegal Studies Program, Boston, MA.

3  
4       FURTHER RESOLVED, That the American Bar Association reapproves the following  
5       paralegal education programs: University of Alaska Fairbanks, Paralegal Studies  
6       Program, Fairbanks, AK; Samford University, Division of Paralegal Studies,  
7       Birmingham, AL; Coastline Community College, Paralegal Studies Program, Newport  
8       Beach, CA; El Camino Community College, Paralegal Studies Program, Torrance, CA;  
9       University of California Irvine, Paralegal Certificate Program, Irvine, CA; University of  
10      California San Diego, Legal Assistant Training Program, La Jolla, CA; Vincennes  
11      University, Paralegal Program, Vincennes, IN; Sullivan University Louisville, Institute  
12      for Legal Studies, Louisville, KY; Baker College of Auburn Hills, Paralegal Program,  
13      Auburn Hills, MI; Eastern Michigan University, Paralegal Studies Program, Ypsilanti,  
14      MI; Henry Ford Community College, Paralegal Studies Program, Dearborn, MI;  
15      Minnesota State University Moorhead, Paralegal Program, Moorhead, MN; University  
16      of Southern Mississippi, Paralegal Studies Program, Hattiesburg, MS; University of  
17      Montana Missoula, Paralegal Studies, Program, Missoula, MT; Metropolitan  
18      Community College, Paralegal Studies Program, Omaha, NE; Brookdale Community  
19      College, Paralegal Studies Program, Lincroft, NJ; Fairleigh Dickinson University,  
20      Paralegal Studies Program, Madison, NJ; Raritan Valley Community College, Paralegal  
21      Studies Program, Somerville, NJ; Genesee Community College, Paralegal Studies  
22      Program, Batavia, NY; Capital University Law School, Law and Paralegal Programs,  
23      Columbus, OH; Delaware County Community College, Paralegal Studies Program,  
24      Media, PA; Orangeburg-Calhoun Technical College, Paralegal Program, Orangeburg,  
25      SC; Technical College of the Low Country, Paralegal Program, Beaufort, SC; and  
26      Kaplan College, General Practice Paralegal Program, Dallas, TX.

27  
28      FURTHER RESOLVED, That the American Bar Association withdraws the approval of  
29      LIU Post, Legal Studies Institute, Brookville, NY; Stautzenberger College, Paralegal  
30      Studies Program, Brecksville, OH; and Western Dakota Technical Institute, Paralegal  
31      Program, Rapid City, SD, at the request of the institutions.  
32

FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the August 2016 Annual Meeting of the House of Delegates for the following programs: Auburn University Montgomery, Paralegal Education Program, Montgomery, AL; NorthWest Arkansas Community College, Paralegal Studies Program, Bentonville, AR; University of Arkansas Fort Smith, Legal Assistance/Paralegal Program, Fort Smith, AR; Cerritos College, Paralegal Program, Norwalk, CA; Cuyamaca College, Paralegal Studies Program, El Cajon, CA; John F. Kennedy University, Legal Studies Program, Pleasant Hill, CA; Miramar College, Legal Assistant Program, San Diego, CA; Mt. San Antonio College, Paralegal/Legal Specialty Program, Walnut, CA; National University, Paralegal Studies Program, Los Angeles, CA; San Francisco State University, Paralegal Studies Program, San Francisco, CA; Santa Ana College, Paralegal Studies Program, Santa Ana, CA; University of California UCLA Ext, Paralegal Training Program, Los Angeles, CA; University of LaVerne, Legal Studies Program, LaVerne, CA; West Valley College, Paralegal Program, Saratoga, CA; Arapahoe Community College, Paralegal Program, Littleton, CO; Norwalk Community College, Legal Assistant Program, Norwalk, CT; Quinnipiac University, Legal Studies Program, Hamden, CT; Georgetown University, Paralegal Studies Program, Washington DC; Delaware Technical and Community College, Paralegal Technology Program, Georgetown, DE; Widener University Delaware Law School, Legal Education Institute, Wilmington, DE; Broward College, Legal Assisting Program, Pembroke Pines, FL; Seminole State College of Florida fka Seminole Community College, Legal Assistant/Paralegal Program, Sanford, FL; South University, Legal Studies/Paralegal Studies Program, Royal Palm Beach, FL; Athens Technical College, Paralegal Studies Program, Athens, GA; South University, Legal Studies/Paralegal Studies Program, Savannah, GA; Kirkwood Community College, Legal Assistant Program, Cedar Rapids, IA; College of Lake County, Paralegal Studies Program, Grayslake, IL; Northwestern College fka Northwestern Business College, Institute of Legal Studies, Bridgeview, IL; Roosevelt University, Paralegal Studies Program, Chicago, IL; Southern Illinois University Carbondale, Paralegal Studies Program, Carbondale, IL; William Rainey Harper College, Paralegal Studies Program, Palatine, IL; Bowling Green Community College of Western Kentucky University, Paralegal Studies Program, Bowling Green, KY; Morehead State University, Paralegal Studies Program, Morehead, KY; University of Louisville, Paralegal Studies Program, Louisville, KY; Herzing University, Legal Assisting/Paralegal Studies Program, Kenner, LA; Tulane University, Paralegal Studies Program, New Orleans, LA; Oakland Community College, Paralegal Program, Farmington Hills, MI; Oakland University, Paralegal Program, Rochester, MI; Missouri Western State University, Legal Studies Program, St. Joseph, MO; Mississippi University for Women, Legal Studies Program, Columbus, MS; Central Piedmont Community College, Cato Campus, Paralegal Technology Program, Charlotte, NC; Middlesex County College, Legal Studies Department, Edison, NJ; Montclair State University, Paralegal Studies Program, Montclair, NJ; Suffolk County Community College, Paralegal Studies Program, Selden, NY; Columbus State Community College, Paralegal Studies Program, Columbus, OH; Fortis College, Paralegal Program, Centerville, OH; Sinclair Community College, Paralegal Program, Dayton, OH; University of Cincinnati--Clermont, Paralegal Technology Program, Batavia, OH; University of Toledo, Paralegal Studies Program,

79 Toledo, OH; Ursuline College, Legal Studies Program, Pepper Pike, OH; Rose State  
80 College, Paralegal Studies Program, Midwest City, OK; University of Oklahoma Law  
81 Center, Legal Assistant Education, Norman, OK; Central Carolina Technical College,  
82 Legal Assistant/Paralegal Program, Sumter, SC; Greenville Technical College, Paralegal  
83 Program, Greenville, SC; Midlands Technical College, Paralegal Program, Columbia,  
84 SC; Kaplan Career College, Paralegal Studies Program, Nashville, TN; South College,  
85 Legal Studies and Paralegal Studies Programs, Knoxville, TN; Lee College, Paralegal  
86 Studies Program, Baytown, TX; Salt Lake Community College, Paralegal Studies  
87 Program, Salt Lake City, UT; J. Sargeant Reynolds Community College, Paralegal  
88 Studies Program, Richmond, VA; Marymount University, Paralegal Studies Program,  
89 Arlington, VA; Edmonds Community College, Paralegal Program, Lynnwood, WA;  
90 Chippewa Valley Technical College, Paralegal Program, Eau Claire, WI; Madison  
91 College, Paralegal Program, Madison, WI; Western Technical College fka Western  
92 Wisconsin Technical College, Paralegal Program, La Crosse, WI; Casper College,  
93 Paralegal Studies Program, Casper, WY; and Laramie County Community College,  
94 Paralegal 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 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.

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 Standing Committee on Paralegals has completed review of the program identified below and found it to be operating in compliance with the Guidelines for the Approval of Paralegal Education Programs and is, therefore, recommending that approval be granted.

### Bunker Hill Community College, Paralegal Studies Program, Boston, MA

Bunker Hill Community College is a two-year community college accredited by the New England Association of Colleges and Schools. The college offers an Associate of Science degree and a Certificate in Paralegal Studies.

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:

University of Alaska Fairbanks, Paralegal Studies Program, Fairbanks, AK

University of Alaska Fairbanks is a four-year university accredited by the Northwest Association of Schools and Colleges. The university offers an Associate of Applied Science degree in Paralegal Studies.

Samford University, Division of Paralegal Studies, Birmingham, AL

Samford University is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers a Certificate in Paralegal Studies.

Coastline Community College, Paralegal Studies Program, Newport Beach, CA

Coastline Community College is a two-year community college accredited by the Western Association of Schools and Colleges. The college offers an Associate of Arts degree and a Certificate in Paralegal Studies.

El Camino Community College, Paralegal Studies Program, Torrance, CA

El Camino Community College is a two-year community college accredited by the Western Association of Schools and Colleges. The college offers an Associate of Arts degree and a Certificate in Paralegal Studies.

University of California Irvine, Paralegal Certificate Program, Irvine, CA

University of California Irvine is a four-year university accredited by the Western Association of Schools and Colleges. The university offers a Certificate in Paralegal Studies.

University of California San Diego, Legal Assistant Training Program, La Jolla, CA

University of California San Diego is a four-year university accredited by the Western Association of Schools and Colleges. The university offers a Certificate in Paralegal Studies.

Vincennes University, Paralegal Program, Vincennes, IN

Vincennes University is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers an Associate of Science degree in Paralegal Studies.

Sullivan University Louisville, Institute for Paralegal Studies, Louisville, KY

Sullivan University Louisville is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers an Associate of Science degree, a Bachelor of Science degree, and a Certificate in Paralegal Studies.



Baker College of Auburn Hills, Paralegal Program, Auburn Hills, MI

Baker College of Auburn Hills is a four-year college accredited by the North Central Association of Colleges and Schools. The college offers an Associate of Business degree and a Bachelor of Science degree in Paralegal Studies.

Eastern Michigan University, Paralegal Studies Program, Ypsilanti, MI

Eastern Michigan University 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 second Bachelor of Science degree in Paralegal Studies.

Henry Ford Community College, Paralegal Studies Program, Dearborn, MI

Henry Ford Community College is a two-year community college accredited by the North Central Association of Colleges and Schools. The college offers an Associate of Business degree in Paralegal Studies.

Minnesota State University Moorhead, Paralegal Program, Moorhead, MN

Minnesota State University Moorhead is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers a Bachelor of Science degree in Paralegal Studies.

University of Southern Mississippi, Paralegal Studies Program, Hattiesburg, MS

University of Southern Mississippi is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers a Bachelor of Arts degree in Paralegal Studies.

University of Montana Missoula, Paralegal Studies Program, Missoula, MT

University of Montana Missoula is a four-year university accredited by the Northwest Association of Schools and Colleges. The university offers an Associate of Applied Science degree in Paralegal Studies.

Metropolitan Community College, Paralegal Studies Program, Omaha, NE

Metropolitan Community College is a two-year community College accredited by the North Central Association of Colleges and Schools. The college offers an Associate of Applied Science degree in Paralegal Studies.

Brookdale Community College, Paralegal Studies Program, Lincroft, NJ

Brookdale 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 and a Certificate in Paralegal Studies.

Fairleigh Dickinson University, Paralegal Studies Program, Madison, NJ

Fairleigh Dickinson University is a four-year university accredited by the Middle States Association of Colleges and Schools. The university offers a Certificate in Paralegal Studies.

Raritan Valley Community College, Paralegal Studies Program, Somerville, NJ

Raritan Valley 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 and a Certificate in Paralegal Studies.

Genesee Community College, Paralegal Studies Program, Batavia, NY

Genesee Community College is a two-year community college accredited by Middle States Association of Colleges and Schools. The college offers an Associate of Applied Science degree in Paralegal Studies.

Capital University Law School, Law and Paralegal Programs, Columbus, OH

Capital University Law School is a four-year university and law school accredited by the North Central Association of Colleges and Schools. The university offers a Certificate in Paralegal Studies and a Certificate in Legal Nurse Consulting.

Delaware County Community College, Paralegal Studies Program, Media, PA

Delaware County 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 and a Certificate in Paralegal Studies.

Orangeburg-Calhoun Technical College, Paralegal Program, Orangeburg, SC

Orangeburg-Calhoun 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 in Paralegal Studies.

Technical College of the Low Country, Paralegal Program, Beaufort, SC

Technical College of the Low Country is a two-year technical college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Applied Service degree and a Certificate in Paralegal Studies.

Kaplan College, General Practice Paralegal Program, Dallas, TX

Kaplan College is a two-year college accredited by the Accrediting Council for Independent Colleges and Schools. The college offers an Associate of Applied Science degree and a Certificate in Paralegal Studies.

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 2016 Annual Meeting of the American Bar Association House of Delegates.

Auburn University Montgomery, Paralegal Education Program, Montgomery, AL;  
 NorthWest Arkansas Community College, Paralegal Studies Program, Bentonville, AR;  
 University of Arkansas Fort Smith, Legal Assistance/Paralegals Program, Fort Smith, AR;  
 Cerritos College, Paralegal Program, Norwalk, CA;  
 Cuyamaca College, Paralegal Studies Program, El Cajon, CA;  
 John F. Kennedy University, Legal Studies Program, Pleasant Hill, CA;  
 Miramar College, Legal Assistant Program, San Diego, CA;  
 Mt. San Antonio College, Paralegal/Legal Specialty Program, Walnut, CA;  
 National University, Paralegal Studies Program, Los Angeles, CA;  
 San Francisco State University, Paralegal Studies Program, San Francisco, CA;  
 Santa Ana College, Paralegal Studies Program, Santa Ana, CA;  
 University of California UCLA Ext, Paralegal Training Program, Los Angeles, CA;  
 University of LaVerne, Legal Studies Program, LaVerne, CA;  
 West Valley College, Paralegal Program, Saratoga, CA;  
 Arapahoe Community College, Paralegal Program, Littleton, CO;  
 Norwalk Community College, Legal Assistant Program, Norwalk, CT;  
 Quinnipiac University, Legal Studies Program, Hamden, CT;  
 Georgetown University, Paralegal Studies Program, Washington DC;  
 Delaware Technical and Community College, Paralegal Technology Program, Georgetown, DE;  
 Widener University Delaware Law School, Legal Education Institute, Wilmington, DE;  
 Broward College, Legal Assisting Program, Pembroke Pines, FL;  
 Seminole State College of Florida fka Seminole Community College, Legal Assistant/Paralegal Program, Sanford, FL;  
 South University, Legal Studies/Paralegal Studies Program, Royal Palm Beach, FL;  
 Athens Technical College, Paralegal Studies Program, Athens, GA;  
 South University, Legal Studies/Paralegal Studies Program, Savannah, GA;  
 Kirkwood Community College, Legal Assistant Program, Cedar Rapids, IA;  
 College of Lake County, Paralegal Studies Program, Grayslake, IL;  
 Northwestern College fka Northwestern Business College, Institute of Legal Studies, Bridgeview, IL;  
 Roosevelt University, Paralegal Studies Program, Chicago, IL;  
 Southern Illinois University Carbondale, Paralegal Studies Program, Carbondale, IL;  
 William Rainey Harper College, Paralegal Studies Program, Palatine, IL;  
 Bowling Green Community College of Western Kentucky University, Paralegal Studies Program, Bowling Green, KY;  
 Morehead State University, Paralegal Studies Program, Morehead, KY;  
 University of Louisville, Paralegal Studies Program, Louisville, KY;

Herzing University, Legal Assisting, Paralegal Studies Program, Kenner, LA;  
 Tulane University, Paralegal Studies Program, New Orleans, LA;  
 Oakland Community College, Paralegal Program, Farmington Hills, MI;  
 Oakland University, Paralegal Program, Rochester, MI;  
 Missouri Western State University, Legal Studies Program, St. Joseph, MO;  
 Mississippi University for Women, Legal Studies Program, Columbus, MS;  
 Central Piedmont Community College, Cato Campus, Paralegal Technology  
 Program, Charlotte, NC;  
 Middlesex County College, Legal Studies Department, Edison, NJ;  
 Montclair State University, Paralegal Studies Program, Montclair, NJ;  
 Suffolk County Community College, Paralegal Studies Program, Selden, NY;  
 Columbus State Community College, Paralegal Studies Program, Columbus, OH;  
 Fortis College, Paralegal Program, Centerville, OH;  
 Sinclair Community College, Paralegal Program, Dayton, OH;  
 University of Cincinnati--Clermont, Paralegal Technology Program, Batavia, OH;  
 University of Toledo, Paralegal Studies Program, Toledo, OH;  
 Ursuline College, Legal Studies Program, Pepper Pike, OH;  
 Rose State College, Paralegal Studies Program, Midwest City, OK;  
 University of Oklahoma Law Center, Legal Assistant Education, Norman, OK;  
 Central Carolina Technical College, Legal Assistant/Paralegal Program, Sumter,  
 SC;  
 Greenville Technical College, Paralegal Program, Greenville, SC;  
 Midlands Technical College, Paralegal Program, Columbia, SC;  
 Kaplan Career College, Paralegal Studies Program, Nashville, TN;  
 South College, Legal Studies and Paralegal Studies Programs, Knoxville, TN;  
 Lee College, Paralegal Studies Program, Baytown, TX;  
 Salt Lake Community College, Paralegal Studies Program, Salt Lake City, UT;  
 J. Sargeant Reynolds Community College, Paralegal Studies Program, Richmond,  
 VA;  
 Marymount University, Paralegal Studies Program, Arlington, VA;  
 Edmonds Community College, Paralegal Program, Lynnwood, WA;  
 Chippewa Valley Technical College, Paralegal Program, Eau Claire, WI;  
 Madison College, Paralegal Program, Madison, WI;  
 Western Technical College fka Western Wisconsin Technical College, Paralegal  
 Program, La Crosse, 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 2016

**GENERAL INFORMATION FORM**

Submitting Entity: Standing Committee on Paralegals

Submitted By: Laura C. Barnard, Chair

1. Summary of Resolution(s).

This Resolution recommends that the House of Delegates grant approval to one program, grant reapproval to twenty-four paralegal education programs, withdraw the approval of three programs at the request of the institutions, and extend the term of approval to sixty-seven paralegal education programs.

2. Approval by Submitting Entity.

November, 2015

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. 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.

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

Peggy C. Wallace, Staff Counsel  
Standing Committee on Paralegals  
American Bar Association  
321 North Clark Street  
Chicago, IL 60654  
(312) 988-5618  
E-Mail: [peggy.wallace@americanbar.org](mailto:peggy.wallace@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.)

Laura C. Barnard  
Chair, Business Department  
Director, Paralegal Program  
Lakeland Community College  
7700 Clocktower Drive  
Kirtland, OH 44094  
(440) 525-7352  
Cell: (517) 485-3232  
E-Mail: [lbarnard@lakelandcc.edu](mailto:lbarnard@lakelandcc.edu)

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The Standing Committee on Paralegals requests that the House of Delegates grant approval to one program, grant reapproval to twenty-four programs, withdraw the approval of three programs, and extend the term of approval of sixty-seven programs.

### 2. Summary of the Issue which the Resolution Addresses

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

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

The programs recommended for approval and 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. Summary of Minority Views

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





**AMERICAN BAR ASSOCIATION**  
**CRIMINAL JUSTICE SECTION**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges state, territorial, local, and tribal  
2 legislatures to review all statutes criminalizing consensual noncommercial sexual conduct, in  
3 private and between persons who have the legal capacity to consent, and, to repeal or amend  
4 such statutes to criminalize only sexual acts that are nonconsensual, commercial, public, or that  
5 involve individuals who lack the legal capacity to consent.

6  
7 FURTHER RESOLVED, That the American Bar Association urges state, territorial, local, and  
8 tribal legislatures to repeal or amend any statutes, regulations, or policies that denigrate persons  
9 who engage in constitutionally protected sexual conduct.



## REPORT

In 1973, the House of Delegates approved the recommendation submitted by the Section of Civil Rights and Social Justice (formerly Individual Rights and Responsibilities) urging the legislatures of the several states to repeal all laws classifying consensual, private, noncommercial adult sexual conduct as criminal.<sup>1</sup> Today, the Criminal Justice Section reiterates its commitment to personal privacy and again urges state legislatures to update their criminal laws to make explicit the protections that courts and attorneys general have concluded private adults are afforded, while maintaining statutes narrowly crafted to protect public decorum and minors below the age of consent, and to prevent prostitution and forced sexual contact. Specifically, the Section references statutes that purport to criminalize oral and anal sex (“anti-sodomy statutes”); which define oral and anal sex in pejorative terms; which prohibit unmarried persons from engaging in consensual sex (“anti-fornication statutes”); or which require – often in tandem with anti-sodomy statutes – that public schools teach that homosexuality is immoral or criminal.

The Supreme Court of the United States held twelve years ago in *Lawrence v. Texas* that the Due Process Clause of the Fourteenth Amendment protects the fundamental privacy right of all persons to engage in consensual sexual activity with another adult in private, regardless of the genders of the participants.<sup>2</sup> In so holding, the Court made clear that state laws are valid where they protect children, prevent public sexual conduct, outlaw prostitution, and punish forcible or coerced sexual conduct, stating:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due

---

<sup>1</sup> Report No. 2 of the Section of Individual Rights and Responsibilities, Recommendation, August 1973.

<sup>2</sup> *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”).

Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” *Casey, supra*, at 847, 112 S.Ct. 2791. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.<sup>3</sup>

In *Lawrence*, the Court came to a realization that the rest of the country had been moving toward for decades – that private and intimate sexual conduct between consenting adults falls outside the state’s power to criminalize. The Section’s 1973 Recommendation was appended to the American Bar Association’s *amicus* brief to the *Lawrence* Court, noting that the American Legal Institute’s Model Penal Code omitted such offenses, which did not harm others, which undermine respect for law enforcement, and which are prone to arbitrary enforcement.<sup>4</sup> The Court cited these rationales in its opinion,<sup>5</sup> which are no less true today than they were in 1955 when the ALI removed these provisions from the Code.

Whereas all fifty states outlawed sodomy in 1961, only twenty-five did so in 2003 when Justice Kennedy wrote for the Court in *Lawrence*,<sup>6</sup> and only eighteen states retain such provisions in their current criminal codes. These statutes have been declared *unenforceable* in twelve of these states,<sup>7</sup> and are of doubtful application in the remaining

<sup>3</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>4</sup> Brief of the American Bar Association as Amicus Curiae in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), Appendix A, “Official Policies and Constitutional Amendments of the American Bar Association,” at p. 12a [hereinafter “1973 Recommendation”].

<sup>5</sup> *Lawrence*, 539 U.S. at 572.

<sup>6</sup> *Id.* at 572-73.

<sup>7</sup> Ala. Code § 13A-6-60(2); *Doe v. Pryor*, 344 F.3d 1282, 1283 (11th Cir. 2003) (noting that **Alabama** Attorney General recognized anti-sodomy statute as unenforceable post-*Lawrence*); Ga. Code Ann. § 16-6-2(a)(1); *Powell v. Georgia*, 510 S.E.2d 18, 26 (Ga. 1998) (limiting application of **Georgia** statute under state constitution); Idaho Code Ann. § 18-6605; *Cook v. Reinke*, 484 F. App’x 110, 111 (9th Cir. 2012) (recognizing limited application of **Idaho** statute after *Lawrence*); Kan. Stat. Ann. § 21-5501(b); *Kansas v. Franco*, 319 P.3d 551 (Kan. Ct. App. 2014) (limiting application of **Kansas** statute under *Lawrence*); Ky. Rev. Stat. Ann. § 510.100; *Com. v. Wasson*, 842 S.W.2d 487, 501–02 (Ky. 1992) (declaring **Kentucky** statute unconstitutional under due process and equal protection analyses); La. Rev. Stat. Ann. § 14:89(A); *Louisiana Electorate of Gays & Lesbians, Inc. v. Connick*, 902 So. 2d 1090, 1095 (La. Ct. App. 2005), *writ denied*, 916 So. 2d 1062 (La. 2005) (constraining application of **Louisiana** statute); Md. Code Ann., Crim. Law §§ 3-321, 3-322; *Conaway v. Deane*, 932 A.2d 571, 642–43 (2007) (recognizing **Maryland** courts’ abrogation of state statutes pre-*Lawrence*); Mass. Gen. Laws Ann. ch. 272, §§ 34-35; *Gay & Lesbian Advocates & Defenders v. Attorney Gen.*, 763 N.E.2d 38, 40 (Mass. 2002) (constraining scope of **Massachusetts** statutes); Minn. Stat. Ann. § 609.293; *Doe v. Ventura*, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001) (limiting reach of **Minnesota** statute); N.C. Gen. Stat. Ann. § 14-177; *North Carolina v. Whiteley*, 616 S.E.2d 576, 580–81 (NC App. Ct. 2005) (limiting application of **North Carolina** statute under *Lawrence*); Okla. Stat. Ann. tit. 21, § 886; *Post v. Oklahoma*, 715 P.2d 1105,

six.<sup>8</sup> Furthermore, the Uniform Code of Military Justice was recently amended to de-list consensual oral or anal sex from the list of offenses, and to ensure punishment only for forcible acts.<sup>9</sup> This is an important step toward every adult's freedom from government intrusion into his or her private sexual expression with other adults, and freedom from the criminal stigma that attaches to prosecution for one's intimate sexual conduct.

Yet, despite this constitutionally recognized right, and despite the unenforceability of these statutes, they remain in place in eighteen states, which leads to stigmatization, harassment, and a series of collateral consequences. A related specie of statute, the anti-fornication statute, remains among the criminal codes of eight states, outlawing sexual intercourse between unmarried persons. Taken together, these state statutes restraining individual freedoms conflict with the U.S. Constitution, and with state constitutions throughout the country. They should be amended or repealed to conform with *Lawrence*, for the reasons stated by the Supreme Court, the reasons expressed in this Section's 1973 Recommendation, and the reasons that follow.

First, the fact that anti-sodomy statutes remain "on the books" perpetuates the stigmatization of gay and bisexual individuals, against whom these statutes have historically been disproportionately enforced.<sup>10</sup> Even where courts and attorneys general have deemed these laws unconstitutional or unenforceable, the unabridged statutes remain accessible to lay readers through libraries and state legislatures' websites. The effect of this is to suggest to the lay reader that certain actions are prohibited, or that certain persons engaging in such behavior have committed a criminal infraction. Further, even for those who know that a particular state's courts have addressed the enforceability of an anti-sodomy statute, the fact of the legislature's refusal – whether active or passive

---

1109 (Okla. Crim. App. 1986) (holding that *Lawrence* limits application of **Oklahoma** statute as applied to heterosexual conduct, but declining to opine on application to same-sex conduct); Tex. Penal Code Ann. § 21.06; *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding **Texas** statute unconstitutional).

<sup>8</sup> Cal. Penal Code §§ 286, 288a, 4504(b) (prohibiting certain sexual conduct among persons "in confinement," which may have some application to private, consensual, adult sexual activity taking place outside of a penological institution in **California**); Fla. Stat. Ann. §§ 800.01, 800.02; *Franklin v. State*, 257 So. 2d 21, 23–24 (Fla. 1971) (declaring one, but not the other, **Florida** anti-sodomy statute unconstitutionally vague); Mich. Comp. Laws Ann. §§ 750.158, § 750.338, 750.338a, 750.338b; *Michigan v. McPhee*, 2007 WL 912116 (Mich. Ct. App. Mar. 27, 2007) (declining to address constitutionality of **Michigan** statute, contrasting situation in *Lawrence* with situation at bar, where adult male forced sexual contact upon his intoxicated minor sister-in-law); Miss. Code. Ann. § 97-29-59 (criminalizing "the detestable and abominable crime against nature" in **Mississippi**); S.C. Code Ann. § 16-15-120 (prohibiting "buggery," undefined by **South Carolina** law); Utah Code Ann. § 76-5-403; *Berg v. Utah*, 100 P.3d 261 (Utah Ct. App. 2004) (constitutional challenge to **Utah** statute dismissed for lack of standing).

<sup>9</sup> 10 U.S.C. § 925(a) (2014); National Defense Authorization Act for Fiscal Year 2014, Pub. Law No. 113-66, at § 1707 (repealing Uniform Code of Military Justice offense of consensual sodomy).

<sup>10</sup> 1973 Recommendation at p. 12a.

– to repeal the statute suggests an endorsement of an anti-sodomy policy even for conduct that is not criminally prosecutable.<sup>11</sup>

The highest profile incidence of the refusal to amend an anti-sodomy statute may be Virginia, due to the media attention focused on Ken Cuccinelli in 2013. Cuccinelli, as a Virginia state legislator, had voted against updating Virginia’s Crimes Against Nature law to limit its application post-*Lawrence* to sexual conduct that involved minors, lack of consent, public places, or prostitution.<sup>12</sup> Only after the Fourth Circuit Court of Appeals held the law unconstitutional and wholly void<sup>13</sup> did the state’s legislature amend the statute.<sup>14</sup> Cuccinelli had openly stated that he wanted Virginia to maintain a policy that “homosexual acts” are “intrinsically wrong.”<sup>15</sup>

A symbolic statutory statement of animus against a minority population has no place in American law. These laws, however, are more than symbolic; individuals are still arrested under anti-sodomy statutes for constitutionally protected behavior. In 2006, a male Baptist minister was arrested for suggesting to a male undercover police officer that the two head into a hotel for sex.<sup>16</sup> The minister was later acquitted, but only after suffering the embarrassment of an arrest and prosecution that should never have occurred, and resigning from his position.<sup>17</sup> In 2013, a sheriff in East Baton Rouge, Louisiana, garnered attention for arresting a dozen men in a two-year sting operation where adult men were lured back to the privacy of their own homes by undercover male

---

<sup>11</sup> In Montana, for instance, sixteen years elapsed between the state’s highest court ruling the anti-sodomy statute unconstitutional and the statute’s ultimate repeal. Thus, while the statute was unenforceable, the state’s criminal code technically declared many LGBT individuals to be felons. Hermanns, Kris & Kev Hainm, *Guest opinion: ‘Former felons’ celebrate change in MT code*, Billings Gazette (online), Apr. 16, 2014, available at [http://billingsgazette.com/news/opinion/guest/guest-opinion-former-felons-celebrate-change-in-mt-code/article\\_21d8148b-5edc-5ece-a717-4c7349f0b561.html](http://billingsgazette.com/news/opinion/guest/guest-opinion-former-felons-celebrate-change-in-mt-code/article_21d8148b-5edc-5ece-a717-4c7349f0b561.html).

<sup>12</sup> Isreal, Josh, *How Ken Cuccinelli’s Position on Sodomy Could Set Numerous Sexual Predators Free*, Think Progress (online), Oct. 24, 2013, available at <http://thinkprogress.org/justice/2013/10/24/2824041/virginia-sodomy-law-homophobic/>.

<sup>13</sup> *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013), *cert. denied*, 134 S.Ct. 200 (2013).

<sup>14</sup> Va. Code Ann. § 18.2-361 (crime against nature statute, revised in 2014 to apply to sexual activity between family members and between people and animals, while other portions of the state’s criminal code pertain to acts involving minors, force, prostitution, and public acts).

<sup>15</sup> *Steve Shannon for Attorney General*, Virginia-Pilot (online), Oct. 26, 2009, available at <http://hamptonroads.com/2009/10/steve-shannon-attorney-general>.

<sup>16</sup> *Baptist Minister Acquitted of Lewdness Charge*, ACLU, June 26, 2008, available at <http://acluok.org/2008/06/baptist-minister-acquitted-of-lewdness-charge/>.

<sup>17</sup> *Pastor Accused Of Lewdness Resigns From Convention*, KOCO Oklahoma City, Jan. 6, 2006, available at <http://www.koco.com/Pastor-Accused-Of-Lewdness-Resigns-From-Convention/10723402>.

police officers for consensual sex.<sup>18</sup> Remarkably, despite the sheriff's public apologies for the invalid arrests and recognition that the anti-sodomy law was unenforceable, police there are still arresting people under the statute.<sup>19</sup>

Even where individuals cannot be successfully prosecuted, these “unenforceable” laws lead to police harassment, embarrassment, and social stigma. As the Section noted more than three decades ago, “laws relating to private, consenting, noncommercial sexual conduct between adults requires an expenditure of enforcement manpower that could better be used to protect public safety and necessitates police practices that are often reprehensible or unsavory[.]” Thirty-one years later, this truth remains unchanged.

An individual arrested under such a statute, even if conviction is technically impossible, may *fear* conviction. In some jurisdictions, the offense is a felony.<sup>20</sup> Aside from loss of liberty, a sodomy conviction could trigger a range of intimidating collateral effects, including: the requirement to register as a sex offender; notation of the conviction on job applications; adverse effects on licensure in professions with character requirements such as teaching, law, and medicine; firing from a job or position subject to a contractual morality clause; interference with child custody or visitation rights; or eviction where a lease requires the tenant's lawful conduct.<sup>21</sup> Even absent conviction, some of these consequences may materialize upon the arrest alone. In some instances, an anti-sodomy statute may serve as the springboard for a defamation suit, if the suggestion that engaging in oral or anal sex equates to suggesting someone has violated a criminal law.<sup>22</sup> Retaining these statutes without amending them to make clear that only conduct involving children, prostitution, public acts, or lack of consent is criminal, serves no purpose other than to intimidate law-abiding individuals and to cast aspersions on private sexual conduct.

The perception of government endorsement of anti-LGBT policies does not stop with the retention of anti-sodomy provisions. Thirteen states statutorily define oral and anal sex as “deviate” or in other pejorative terms (other than “sodomy”), while penile-

---

<sup>18</sup> Grindley, Lucas, *Sheriff Claims He Didn't Know Anti-Sodomy Laws Weren't Valid Anymore*, The Advocate.com, July 29, 2013, available at <http://www.advocate.com/crime/2013/07/29/sheriff-claims-he-didnt-know-anti-sodomy-laws-werent-valid-anymore?page=full>.

<sup>19</sup> McKinney, Matt, *Arrest on unconstitutional sodomy law prompts Baton Rouge police chief to send memo to all officers*, Advocate (online), Feb. 16, 2015, available at <http://theadvocate.com/news/11597150-123/arrest-on-unconstitutional-sodomy-law>.

<sup>20</sup> See, e.g., N.C. Gen. Stat. Ann. § 14-177.

<sup>21</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 575-76 (2003) (discussing collateral effects of sodomy conviction); *Doe v. Ventura*, 2001 WL 543734, at \*1 (Minn. Dist. Ct. May 15, 2001) (same).

<sup>22</sup> See 14C Mass. Prac., Summary Of Basic Law § 17.43 (4th ed.).

vaginal sex is defined as “normal” or simply as “sexual intercourse.”<sup>23</sup> LGBT individuals in those states will find a significant portion, if not all, of their intimate sexual expression denigrated with the force of law. Perhaps less self-evident is the manner in which these definitional distinctions may affect people with disabilities. For individuals with limitations on how they can express sexual intimacy, the criminalization or stigmatization of those remaining acts in which they can engage works an additional injustice.<sup>24</sup>

Despite the use of extant overly broad anti-sodomy statutes to turn LGBT individuals into political targets, and despite the history of debasing legal language surrounding oral and anal sex, repeal of these laws is possible. Montana repealed its anti-sodomy statute in 2013.<sup>25</sup> Virginia did the same the next year.<sup>26</sup> Indiana has re-defined oral and anal sex as “other sexual conduct,” rather than the prior nomenclature of “deviate sexual conduct.”<sup>27</sup>

Yet, amendment of these laws to conform with state and federal constitutional freedoms is not a foregone conclusion. A bill to amend Louisiana’s anti-sodomy statute to remove unconstitutional language was voted down on April 15, 2014, leaving in place the provision that had been used harassingly these past few years.<sup>28</sup> The repeal effort was opposed by Focus on the Family and the Family Research Council, two organizations that oppose the recognition of equal rights for LGBT individuals.<sup>29</sup> Without support from organizations that affirm the importance of a legal system that applies principles of personal rights and human dignity equally and fairly, efforts to change these criminal

---

<sup>23</sup> Ala. Code § 13A-6-60(2) (“deviate sexual intercourse”); Ark. Code Ann. § 5-14-101(1) (same); Ky. Rev. Stat. Ann. § 510.010 (same); Md. Code Ann., Crim. Law § 3-322 (“unnatural or perverted sexual practice.”); Mass. Gen. Laws Ann. ch. 272, § 34 (“the abominable and detestable crime against nature”); Mich. Comp. Laws Ann. § 750.158 (same); Miss. Code. Ann. § 97-29-59 (“the detestable and abominable crime against nature”); Mo. Ann. Stat. § 566.010 (“deviate sexual intercourse”); Okla. Stat. Ann. tit. 21, § 886 (“the detestable and abominable crime against nature”); Or. Rev. Stat. Ann. § 163.305 (“deviate sexual intercourse”); 18 Pa. Cons. Stat. Ann. § 3101 (same); S.C. Code Ann. § 16-15-120 (“buggery”); Tex. Penal Code Ann. § 21.06 (“deviate sexual intercourse”).

<sup>24</sup> See *Doe v. Ventura*, 2001 WL 543734, at \*1 (Minn. Dist. Ct. May 15, 2001) (recognizing that anti-sodomy statutes may effect “the complete elimination of possible or desired sexual intimacy for [the] disabled”).

<sup>25</sup> Mont. 2013 S.B. 107 (signed into law Apr. 18, 2013).

<sup>26</sup> Va. Code Ann. § 18.2-361 (2014).

<sup>27</sup> Ind. Code Ann. § 35-31.5-2-221.5 (2014).

<sup>28</sup> *Louisiana: Anti-Sodomy Law Stands*, New York Times (online), Apr. 15, 2014, available at [http://www.nytimes.com/2014/04/16/us/louisiana-anti-sodomy-law-stands.html?\\_r=0](http://www.nytimes.com/2014/04/16/us/louisiana-anti-sodomy-law-stands.html?_r=0).

<sup>29</sup> Ford, Zack, *Louisiana Lawmakers Refuse To Repeal State Law Banning Oral Sex*, ThinkProgress (online), Apr. 16, 2014, available at <http://thinkprogress.org/lgbt/2014/04/16/3427247/louisiana-sodomy/>.



provisions may stall, leaving countless individuals subject to these arbitrary and offensive laws.

Related to the stigmatization of same-sex sexual activity, and in some instances blatantly derivative of a state's anti-sodomy statute, at least nine states have statutory provisions that silence public schools on the topic of homosexuality, that require extolling heterosexuality above all other forms of sexual intimacy, and/or that mandate teaching that same-sex sexual intimacy is morally or legally wrong. These laws are often collectively referred to as “no promo homo” laws, as they outlaw the “promotion” of homosexuality. In reality, they may go further, requiring public school teachers to actively denigrate non-heterosexual sex.

Three states cause public schools to teach that individuals who engage in same-sex sexual conduct are putative criminals. In Texas, two separate statutes require teaching that homosexuality is an unacceptable “lifestyle,” and that homosexuality is criminal under the state's anti-sodomy statute, citing directly to Penal Code § 21.06 – despite the unenforceability of this criminal provision under *Lawrence*.<sup>30</sup> Alabama law is the same, referencing the purported criminality of homosexuality under Alabama law.<sup>31</sup> Mississippi requires teaching “the current state law” on homosexuality, which includes its anti-sodomy statute.<sup>32</sup>

A handful of other states with anti-sodomy statutes mandate relative silence on the topic of “homosexuality,” or cast aspersions that fall short of criminal condemnation, including Louisiana, North Carolina, Oklahoma, South Carolina, and Utah.<sup>33</sup> A ninth state, Arizona, has no anti-sodomy statute, but Arizona nonetheless prohibits teaching positive information regarding non-heterosexual sex.<sup>34</sup>

These laws are born of state-sponsored denigration of constitutionally protected intimate and private conduct. Anti-sodomy statutes are part and parcel of the legislative climate within which these “no promo homo” laws exist.

Three states – Kansas, Kentucky, and Texas – aim their anti-sodomy statutes solely at same-sex conduct, even if such provisions would not be enforceable.<sup>35</sup> State

---

<sup>30</sup> Tex. Health & Safety Code Ann. § 163.002(8); Tex. Health & Safety Code Ann. § 85.007(b)(2).

<sup>31</sup> Ala. Code § 16-40A-2.

<sup>32</sup> Miss. Code. Ann. § 37-13-171(e)-(f).

<sup>33</sup> La. Rev. Stat. Ann. § 17:281(A)(3); N.C. Gen. Stat. Ann. § 115C-81(e1)(4)(e); Okla. Stat. Ann. tit. 70, § 11-103.3(D)(1)-(2); S.C. Code Ann. § 59-32-30(A)(5); Utah Code Ann. § 53A-13-101(1)(c)(iii)(A)(II).

<sup>34</sup> Ariz. Rev. Stat. Ann. § 15-716(C).

<sup>35</sup> Kan. Stat. Ann. § 21-5504(a)(1); Ky. Rev. Stat. Ann. § 510.100; Tex. Penal Code Ann. § 21.06.

regulation of constitutionally protected sexual conduct, however, is not limited to the LGBT community. Eight states prohibit unmarried persons from engaging in sex through “anti-fornication” laws, while courts have only invalidated those laws in two such states.<sup>36</sup> Some of these statutes are explicitly applicable *only* to “opposite-sex” conduct. Laws that target only heterosexuals or only LGBT people have serious Equal Protection implications. By prohibiting unmarried persons from experiencing sexual intimacy, the law stigmatizes individuals who have made the private decision not to marry, or not to re-marry, including individuals who might become ineligible for certain forms of assistance if they were to marry.

These anti-fornication statutes, together with anti-sodomy statutes, either of which may regard “same-sex” or “opposite-sex” conduct, pose serious challenges for law enforcement personnel and for transgender or intersex individuals. The laws require police to conclude what gender a person is in order to determine whether they can be prosecuted for their consensual, adult, private sexual conduct. It is dehumanizing to require an individual to defend their self-identified gender if a police officer disagrees on the basis of the person’s anatomy or identifying paperwork such as a birth certificate or driver’s license.

Further, no American civil rights issue exists in a vacuum. Domestic policy on constitutional privacy rights may reverberate overseas. Justice Kennedy took note in *Lawrence* that the European Court of Human Rights had concluded that the right to privacy encompassed the right to private adult sexual conduct in 1981, well before the Supreme Court reached the same conclusion in 2003.<sup>37</sup> But he also noted Illinois repealing its anti-sodomy statute in 1961.<sup>38</sup> What states do matters. In a time when one of the world’s most populous nations, India, has *re-criminalized* sodomy,<sup>39</sup> as Russia

---

<sup>36</sup> Compare N.C. Gen. Stat. Ann. § 14-184; *Hobbs v. Smith*, 2006 WL 3103008 (N.C. Super. Aug. 25, 2006) (enjoining **North Carolina** and its agents from enforcing unconstitutional statute); Va. Code Ann. § 18.2-344; *Martin v. Zihlerl*, 607 S.E.2d 367, 370 (Va. 2005) (holding **Virginia** statute unenforceable under *Lawrence*) with Idaho Code Ann. § 18-6603 (prohibiting unmarried persons “of the opposite sex” from engaging in sexual intercourse in **Idaho**); IL ST CH 720 § 5/11-40 (forbidding sex between unmarried persons in **Illinois**, regardless of gender, “if the behavior is open and notorious”); Mass. Gen. Laws Ann. ch. 272, § 18 (criminalizing non-marital sex in **Massachusetts**); Minn. Stat. Ann. § 609.34; *Minnesota ex rel Cooper v. French*, 460 N.W.2d 2, 6 (Minn. 1990) (denying that **Minnesota** statute had fallen into disuse); S.C. Code Ann. §§ 16-15-60, -80 (forbidding heterosexual “carnal intercourse” as “fornication” in **South Carolina**); Utah Code Ann. § 76-7-104; *Berg v. Utah*, 100 P.3d 261 (Utah Ct. App. 2004) (constitutional challenge to **Utah** statute dismissed for lack of standing).

<sup>37</sup> *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

<sup>38</sup> *Id.* at 572.

<sup>39</sup> Harris, Gardiner, *India’s Supreme Court Restores an 1861 Law Banning Gay Sex*, The New York Times (online), Dec. 11, 2013, available at <http://www.nytimes.com/2013/12/12/world/asia/court-restores-indias-ban-on-gay-sex.html>. See also Brydum, Sunnive, *Anti-Sodomy Laws ‘Breed Intolerance,’ Says U.N. Chief*, Advocate (online), Jan. 17, 2015, available at <http://www.advocate.com/world/2015/01/17/anti-sodomy-laws-breed-intolerance-says-un-chief>.

arrests and prosecutes individuals for “gay propaganda,”<sup>40</sup> and as Uganda is moved to prosecute homosexuality as a capital offense,<sup>41</sup> state anti-sodomy and “no promo homo laws” provide ideological support to those who would use the law to invalidate personal freedoms and autonomy around the world.

## CONCLUSION

A handful of related laws undermine the constitutional right to privacy espoused in *Lawrence v. Texas* for all persons, regardless of gender or sexual orientation. Laws that define one type of constitutionally protected sexual conduct as “deviant” or “perverted” serve no purpose other than to stigmatize. Laws that purport to criminalize noncommercial, consensual oral and anal sex between adults in private are unenforceable, yet retention of these statutes leads to harassment and intimidation. These laws help set the tone for laws that silence public educators on the topic of homosexuality and require teaching students that anything other than heterosexual relationships and penile-vaginal sex is immoral. Further, anti-fornication statutes condemn sexual conduct between unmarried persons, sometimes applicable to all unmarried persons, and other times restricted to “opposite sex” conduct. These laws seek to constrain constitutionally protected behavior and set a policy agenda that devalues intimate human relationships. Yet, all of these provisions can be repealed or amended so that states can continue to protect public decorum and minors, and to prevent prostitution and sexual assault, without interfering with personal rights. Now is the time for states with these burdensome laws to change them, retracting any implicit support for foreign regimes which likewise seek to subjugate personal freedom.

Respectfully submitted,

**Matthew Redle, Chair-Elect**  
Criminal Justice Section  
February 2016

---

<sup>40</sup> Elder, Miriam, *Russia Passes Law Banning Gay ‘Propaganda,’* The Guardian (online), June 11, 2013, available at <http://www.theguardian.com/world/2013/jun/11/russia-law-banning-gay-propaganda>.

<sup>41</sup> Uganda enacted a law making “aggravated homosexuality” punishable by life imprisonment. The original bill included the death penalty. See Karimi, Faith & Nick Thompson, *Uganda’s President Museveni Signs Controversial Anti-Gay Bill Into Law*, CNN (online), Feb. 25, 2014, available at <http://www.cnn.com/2014/02/24/world/africa/uganda-anti-gay-bill/>. Uganda’s highest court struck down the law on a procedural basis. *Uganda court annuls anti-homosexuality law*, BBC News (online), Aug. 1, 2014, available at <http://www.bbc.com/news/world-africa-28605400>.

## GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Matthew Redle, Chair-Elect

1. Summary of Resolution(s). This resolution urges several states to review all statutes criminalizing consensual noncommercial sexual conduct, in private and between persons legally able to consent, and to repeal or amend such statutes to criminalize only sexual acts that are nonconsensual, commercial, public, or that involve minors below the age of consent. Additionally, this resolution urges several states to repeal or amend any statutes, regulations, or policies that denigrate persons who engage in constitutionally protected sexual conduct.
2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Section Council at its Fall meeting on October 24, 2015.
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?  
No.
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 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)  
None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

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

Standing Committees

Pro Bono and Public Service Committee

Commission on Sexual Orientation and Gender Identity

Special Committees and Commissions

Commission on Youth at Risk

Commission on Domestic and Sexual Violence

Sections, Divisions

Government and Public Sector Lawyers Division

Civil Rights and Social Justice

Judicial Division

Litigation

State and Local Government Law

Family Law

Young Lawyers

Legal Aid and Indigent Defense

Center for Human Rights

Ethics and Professional Responsibility

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 Section

American Bar Association

1050 Connecticut Ave. NW, Suite 400

Washington, DC 20036

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.)

Stephen Saltzburg  
The George Washington University Law School  
2000 H. Street N.W.  
Washington, DC 20052  
(202) 994-7089  
[ssaltz@law.gwu.edu](mailto:ssaltz@law.gwu.edu)

Neal Sonnett  
2 S. Biscayne Blvd.  
Ste. 2600  
Miami, FL 33131  
(305) 358- 2000  
[nrslaw@sonnett.com](mailto:nrslaw@sonnett.com)

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This resolution urges several states to review all statutes criminalizing consensual noncommercial sexual conduct, in private and between persons legally able to consent, and to repeal or amend such statutes to criminalize only sexual acts that are nonconsensual, commercial, public, or that involve minors below the age of consent. Additionally, this resolution urges several states to repeal or amend any statutes, regulations, or policies that denigrate persons who engage in constitutionally protected sexual conduct.

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

Only eighteen states retain anti-sodomy provisions in their current criminal codes. These statutes have been declared *unenforceable* in twelve of these states, and are of doubtful application in the remaining six. Furthermore, the Uniform Code of Military Justice was recently amended to de-list consensual oral or anal sex from the list of offenses, and to ensure punishment only for forcible acts. This is an important step toward every adult's freedom from government intrusion into his or her private sexual expression with other adults, and freedom from the criminal stigma that attaches to prosecution for one's intimate sexual conduct.

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

This resolution urges the legislatures of the several states to repeal all laws classifying consensual, private, noncommercial adult sexual conduct as criminal

### 4. Summary of Minority Views

None.





AMERICAN BAR ASSOCIATION  
SECTION OF INTERNATIONAL LAW  
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY  
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE  
TASK FORCE ON INTERNATIONAL TRADE IN LEGAL SERVICES

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association amends the black letter of Rule 5.5 of  
2 the ABA Model Rules of Professional Conduct as follows (insertions underlined,  
3 deletions ~~struck through~~):

**RULE 5.5: UNAUTHORIZED PRACTICE OF LAW;  
MULTIJURISDICTIONAL PRACTICE OF LAW**

- 4  
5  
6  
7  
8 (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of  
9 the legal profession in that jurisdiction, or assist another in doing so.  
10 (b) A lawyer who is not admitted to practice in this jurisdiction shall not:  
11 (1) except as authorized by these Rules or other law, establish an office or  
12 other systematic and continuous presence in this jurisdiction for the  
13 practice of law; or  
14 (2) hold out to the public or otherwise represent that the lawyer is admitted to  
15 practice law in this jurisdiction.  
16 (c) A lawyer admitted in another United States jurisdiction, and not disbarred or  
17 suspended from practice in any jurisdiction, may provide legal services on a  
18 temporary basis in this jurisdiction that:  
19 (1) are undertaken in association with a lawyer who is admitted to practice in  
20 this jurisdiction and who actively participates in the matter;  
21 (2) are in or reasonably related to a pending or potential proceeding before a  
22 tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer  
23 is assisting, is authorized by law or order to appear in such proceeding or  
24 reasonably expects to be so authorized;  
25 (3) are in or reasonably related to a pending or potential arbitration,  
26 mediation, or other alternative resolution proceeding in this or another  
27 jurisdiction, if the services arise out of or are reasonably related to the  
28 lawyer's practice in a jurisdiction in which the lawyer is admitted to  
29 practice and are not services for which the forum requires pro hac vice  
30 admission; or

31 (4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are  
 32 reasonably related to the lawyer's practice in a jurisdiction in which the  
 33 lawyer is admitted to practice.

34 (d) A lawyer admitted in another United States jurisdiction or in a foreign  
 35 jurisdiction, and not disbarred or suspended from practice in any jurisdiction or  
 36 the equivalent thereof, or a person otherwise lawfully practicing as an in-house  
 37 counsel under the laws of a foreign jurisdiction, may provide legal services  
 38 through an office or other systematic and continuous presence in this jurisdiction  
 39 that:

40 (1) are provided to the lawyer's employer or its organizational affiliates, are  
 41 not services for which the forum requires pro hac vice admission; and  
 42 when performed by a foreign lawyer and requires advice on the law of this  
 43 or another U.S. jurisdiction or of the United States, such advice shall be  
 44 based upon the advice of a lawyer who is duly licensed and authorized by  
 45 the jurisdiction to provide such advice; or

46 (2) are services that the lawyer is authorized by federal or other law or rule to  
 47 provide in this jurisdiction.

48 For purposes of paragraph (d) only, the foreign lawyer must be a member in good  
 49 standing of a recognized legal profession in a foreign jurisdiction, the members of which  
 50 are admitted to practice as lawyers or counselors at law or the equivalent, and the foreign  
 51 lawyer or foreign in-house counsel must be ~~are~~ subject to effective regulation and  
 52 discipline by a duly constituted professional body or a public authority, or, in its  
 53 discretion, be otherwise authorized by [this highest court of appellate jurisdiction] to  
 54 practice in this jurisdiction as an in-house counsel.

55  
 56 FURTHER RESOLVED, That the American Bar Association amends the ABA Model  
 57 Rule for Registration of In-House Counsel and the Commentary (deletions ~~struck~~  
 58 ~~through~~, additions underlined), dated February 2016.

## 60 **Model Rule for Registration of In-House Counsel**

### 62 **GENERAL PROVISIONS:**

63 A. A lawyer who is admitted to the practice of law in another United States  
 64 jurisdiction or is a foreign lawyer, who is employed as a lawyer and has a  
 65 continuous presence in this jurisdiction by an organization, the business of which  
 66 is lawful and consists of activities other than the practice of law or the provision  
 67 of legal services, and who has a systematic and continuous presence in this  
 68 jurisdiction as permitted pursuant to Rule 5.5(d)(1) of the Model Rules of  
 69 Professional Conduct, shall register as in-house counsel within [180 days] of the  
 70 commencement of employment as a lawyer or if currently so employed then  
 71 within [180 days] of the effective date of this Rule, by submitting to the  
 72 [registration authority] the following:

- 73 1) A completed application in the form prescribed by the [registration
- 74 authority];
- 75 2) A fee in the amount determined by the [registration authority];
- 76 3) Documents proving admission to practice law and current good standing

in all jurisdictions, U.S. and foreign, in which the lawyer is admitted to practice law.

- 4) If the jurisdiction is foreign and the documents are not in English, the lawyer shall submit an English translation and satisfactory proof of the accuracy of the translation; and
- 5) An affidavit from an officer, director, or general counsel of the employing entity attesting to the lawyer's employment by the entity and the capacity in which the lawyer is so employed, and stating that the employment conforms to the requirements of this Rule.

For purposes of this Rule, a "foreign lawyer" is a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority. For purposes of this Rule only, the [state's highest court of appellate jurisdiction] may, in its discretion, allow a lawyer lawfully practicing as in-house counsel in a foreign jurisdiction who does not meet the above requirements to register as an in-house counsel after consideration of other criteria, including the lawyer's legal education, references, and experience.

#### SCOPE OF AUTHORITY OF REGISTERED LAWYER:

B. A lawyer registered under this Rule shall have the rights and privileges otherwise applicable to members of the bar of this jurisdiction with the following restrictions:

1. The registered lawyer is authorized to provide legal services to the entity client or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer, and for employees, officers and directors of such entities, but only on matters directly related to their work for the entity and only to the extent consistent with Rule 1.7 of the Model Rules of Professional Conduct [or jurisdictional equivalent];
2. The registered lawyer shall not:
  - a. Except as otherwise permitted by the rules of this jurisdiction, appear before a court or any other tribunal as defined in Rule 1.0(m) of the Model Rules of Professional Conduct [or jurisdictional equivalent]; or
  - b. Offer or provide legal services or advice to any person other than as described in paragraph B.1., or hold himself or herself out as being authorized to practice law in this jurisdiction other than as described in paragraph B.1; and
  - c. If a foreign lawyer, provide advice on the law of this or another jurisdiction of the United States except on the basis of advice from a lawyer who is duly licensed and authorized to provide such advice.

#### PRO BONO PRACTICE:

C. Notwithstanding the provisions of paragraph B above, a lawyer registered under

this Rule is authorized to provide pro bono legal services through an established not-for-profit bar association, pro bono program or legal services program or through such 60 organization(s) specifically authorized in this jurisdiction.

#### OBLIGATIONS:

D. A lawyer registered under this Rule shall:

1. Pay an annual fee in the amount of \$\_\_\_\_\_;
2. Pay any annual client protection fund assessment;
3. Fulfill the continuing legal education requirements that are required of active members of the bar in this jurisdiction;
4. Report within [\_\_\_\_] days to the jurisdiction the following:
  - a. Termination of the lawyer's employment as described in paragraph A.5)4.;
  - b. Whether or not public, any change in the lawyer's license status in another jurisdiction, whether U.S. or foreign, including by the lawyer's resignation;
  - c. Whether or not public, any disciplinary charge, finding, or sanction concerning the lawyer by any disciplinary authority, court, or other tribunal in any jurisdiction, U.S. or foreign.

#### LOCAL DISCIPLINE:

E. A registered lawyer under this Rule shall be subject to the [jurisdiction's Rules of Professional Conduct], [jurisdiction's Rules of Lawyer Disciplinary Enforcement], and all other laws and rules governing lawyers admitted to the active practice of law in this jurisdiction. The [jurisdiction's disciplinary counsel] has and shall retain jurisdiction over the registered lawyer with respect to the conduct of the lawyer in this or another jurisdiction to the same extent as it has over lawyers generally admitted in this jurisdiction.

#### AUTOMATIC TERMINATION:

F. A registered lawyer's rights and privileges under this Rule automatically terminate when:

1. The lawyer's employment terminates;
2. The lawyer is suspended or disbarred or the equivalent thereof in any jurisdiction or any court or agency before which the lawyer is admitted, U.S. or foreign; or
3. The lawyer fails to maintain active status in at least one jurisdiction, U.S. or foreign.

#### REINSTATEMENT:

G. A registered lawyer whose registration is terminated under paragraph F.1. above, may be reinstated within [\_\_\_\_] months of termination upon submission to the [registration authority] of the following:

1. An application for reinstatement in a form prescribed by the [registration authority];
2. A reinstatement fee in the amount of \$\_\_\_\_\_;

3. An affidavit from the current employing entity as prescribed in paragraph A.5)4.

#### SANCTIONS:

H. A lawyer under this Rule who fails to register shall be:

1. Subject to professional discipline in this jurisdiction;
2. Ineligible for admission on motion in this jurisdiction;
3. Referred by the [registration authority] to this [jurisdiction's bar admissions authority]; and
4. Referred by the [registration authority] to the disciplinary authority or to any duly constituted organization overseeing the lawyer's profession, or that granted authority to practice law in the jurisdictions of licensure, U.S. and/or foreign.

#### Comment

[1] Paragraph A of this Rule provides that the [state's highest court of appellate jurisdiction] may, in its discretion, allow someone who does not meet the Rule's other definitional requirements of a foreign lawyer, but who is lawfully practicing as in-house counsel in their home foreign jurisdiction, to register. The exercise of such discretion by the court may be necessary, because some foreign jurisdictions may not permit otherwise qualified in-house counsel to be members of or admitted to the bar. Lawyers in such foreign jurisdictions who are employed as in-house counsel may be required to relinquish any bar membership or admission while so employed or they may never have obtained such admission or membership status.

[2] Paragraph F of this Rule sets forth three circumstances that result in automatic termination of in-house counsel's registrations status. In situations where a court has exercised its discretion pursuant to Paragraph A of this Rule, a registered foreign in-house counsel lacking bar admission or licensure in that individual's home country cannot "fail to maintain active status" as set forth in Paragraph F(3). There is no active status in existence. Absent the circumstances set forth in Paragraph F(2), the triggering event to terminate registration status of such foreign in-house counsel would be the termination of employment of that individual by the employer as set forth in Paragraph F(1).



## **REPORT**

### **The Regulation of Foreign Lawyers, and in Particular Foreign In-House Counsel, in the U.S.: Proposals for a Better and More Comprehensive Framework**

#### **I. Introduction**

Several ABA Model Rules address the licensing of or authorization for practice by foreign lawyers in the U.S. These ABA policies are conditioned on those lawyers being able to certify that they are a “member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.”<sup>1</sup> As such, the ABA policies dealing with foreign in-house counsel de facto exclude over 70% of foreign lawyers, particularly lawyers from civil law jurisdictions, who are either not required or not even legally allowed to be members of the bar when practicing as in-house counsel. For example, a lawyer admitted to the practice of law in France, upon going in-house, has to surrender her bar admission status, and consequently, does not fall under the current ABA definition of foreign lawyer. As a result, U.S. corporations are constrained in their hiring of legal talent from the majority of countries around the world, and foreign-based companies are equally constrained from seconding foreign lawyers from such countries to work in the U.S. Because these in-house lawyers do not meet the requirements for being authorized to practice as and being registered as foreign in-house lawyers in the U.S., the state supreme courts cannot effectively regulate them and U.S. client employers cannot rely on the protection of the attorney-client privilege for the legal advice they receive from these employed lawyers.

#### **II. Abstract**

The ABA has had a long-standing practice of recognizing the importance and value associated with the practice of foreign law and allowing foreign legal practitioners to engage in practice, on a limited basis, in the U.S. Indeed, as early as 1993, the ABA House of Delegates approved the adoption of the Model Rule for the Licensing of Legal Consultants (currently the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants) to support the work of foreign lawyers in this country. As of October 6, 2015, 32 states and the District of Columbia had adopted a rule authorizing and regulating the practice of foreign legal consultants.<sup>2</sup>

---

<sup>1</sup> The ABA Model Rule for Temporary Practice by Foreign Lawyers, Rule 5.5(d) of the ABA Model Rules of Professional Conduct, the ABA Model Rule for Registration of In-House Counsel, the ABA Model Rule on Pro Hac Vice Admission, and the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants can be viewed at [http://www.americanbar.org/groups/professional\\_responsibility/policy.html](http://www.americanbar.org/groups/professional_responsibility/policy.html).

<sup>2</sup> *Id.*

Between August 2012 and February 2013, following a three and one-half year study of how globalization and technology are transforming the practice of law and how the regulation of lawyers, including foreign lawyers, should be updated in light of those developments, the ABA Commission on Ethics 20/20 submitted ten Resolutions for adoption by the House of Delegates.

Specifically regarding foreign lawyers, the Commission examined the practice authority of foreign-trained lawyers in the U.S. who are asked to advise clients on foreign or international law issues. As the Commission noted in its report, "one important practical effect of globalization is that clients regularly expect lawyers in firms of all sizes to handle matters that involve multiple jurisdictions, domestic and international."<sup>3</sup> The Commission further recognized that "clients are encountering an increasing number of legal issues and problems that implicate foreign or international law and for which the assistance of foreign lawyers can be valuable."<sup>4</sup>

The Commission went on to propose three related Resolutions that, with appropriate client protections, would allow clients to utilize the expertise of foreign counsel. One Resolution proposed to add foreign lawyers to the ABA Model Rule on Pro Hac Vice Admission so as to provide authorization for them to appear *pro hac vice* (subject to a number of limitations). A second Resolution sought to add authorization for foreign lawyers to serve as in-house counsel from a continuous and systematic presence in the U.S. via amendments to Model Rule of Professional Conduct 5.5, and a third Resolution sought companion amendments to the ABA Model Rule for the Registration of In-House Counsel. The House of Delegates adopted all of these Resolutions, which were developed with the goal of responding to the increasing number of foreign companies with substantial operations and offices in the U.S., as well as U.S. companies with substantial operations abroad, which often find that the foreign legal advice they want of lawyers from non-U.S. jurisdictions can be offered more efficiently and effectively if those lawyers relocate to a corporate office in the U.S.

In urging adoption of these Resolutions, the Ethics 20/20 Commission noted that foreign lawyers (including foreign legal consultants) are already engaged as in-house counsel within the U.S., but are subject to little oversight. Accordingly, the Commission concluded that adding foreign lawyers to both Model Rule 5.5 (to authorize foreign lawyers to serve as in-house counsel from a continuous and systematic presence in the U.S.) and the Model Rule for the Registration of In-House Counsel would achieve the benefit of ensuring that those lawyers are identifiable, subject to monitoring, and accountable for their conduct. These Resolutions were also aimed at ensuring that the foreign lawyers are subject to the professional conduct rules of the jurisdiction where they are employed, contribute to the client protection fund, are subject to sanctions if they

---

<sup>3</sup> ABA Commission on Ethics 20/20 Introduction and Overview in Report to ABA House of Delegates, February 2013, p.3 citing Emile Loza, *Attorney Competence, Ethical Compliance, and Transnational Practice*, 52 The Advocate, no. 10, 2009 at \*28, available at <http://isb.idaho.gov/pdf/advocate/issues/adv09oct.pdf> in footnote 8)

<sup>4</sup> ABA Commission on Ethics 20/20 Introduction and Overview in Report to ABA House of Delegates, February 2013, p.5.



fail to register or do not comply with the professional conduct rules, and comply with continuing legal education requirements.

All these Resolutions have one element in common: they utilize the definition of foreign lawyer as used in longstanding ABA policy, including the ABA Model Rule for the Licensing and Practice by Foreign Legal Consultants, which a number of state supreme courts have adopted. Under such definition, a foreign lawyer is "a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority."<sup>5</sup> However, this definition does not account for the unique way in which foreign lawyers are permitted to practice in-house in most foreign countries. Thus, the goal of regulating these foreign lawyers as authorized U.S. in-house lawyers is not being maximized because in many of these in-house foreign lawyers do not meet the criteria under the current rules. A recent informal survey conducted by the Litigation Committee of the ABA Section of International Law of 70 jurisdictions across the world, from Europe to Asia to Africa and the Americas, shows that, in many countries, in-house counsel are not admitted to practice (or admitted to the bar) as we traditionally view practice licensure in the U.S., and therefore they are not subject to regulation and discipline by a professional body or a public authority in the way that their U.S. counterparts are. At the same time, many of these jurisdictions impose comparable, if not more stringent, educational requirements than those required in the U.S. for lawyers to be authorized to practice, whether in-house or in private practice.<sup>6</sup> As a result, there is a need to address, in the current versions of Model Rule 5.5 and the Model Rule for Registration of In-House Counsel, this discreet but very real issue that is unique to foreign in-house counsel and their clients.

Model Rule 5.5 (d) is where the limited practice authority for in-house counsel (foreign and domestic) who have a systematic and continuous presence in the U.S. office of their employer is provided. As noted in Comment [17] to Model Rule 5.5, such in-house counsel may also be subject to registration requirements. Not all jurisdictions that have adopted the provisions of Model Rule 5.5(d), however, require registration as provided for in the Model Rule for Registration of In-House Counsel. Further, the registration requirements set forth in the Model Rule for Registration of In-House Counsel are intended to apply to those situations where in-house counsel is practicing via a systematic and continuous presence in the jurisdiction, not a temporary (fly-in-fly-out) presence.

---

<sup>5</sup> See: <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201h.authcheckdam.pdf>.

That same definition is adopted for the licensing of Foreign Legal Consultants in New York. In support of his application as a foreign lawyer, the candidate must, under both the ABA Rule and the NY State Rule, produce certain evidence of his or her status as a foreign lawyer, in the form of "a certificate from the professional body or public authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as such attorney or counselor at law or the equivalent." See: [https://www.law.northwestern.edu/career/llm/documents/NY\\_FLC\\_rules.pdf](https://www.law.northwestern.edu/career/llm/documents/NY_FLC_rules.pdf).

<sup>6</sup> See Report "The Regulation of In-House Counsel Across International Markets", March 2015.

This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered. These courts possess the inherent authority to regulate the practice of law and the legal profession, as long recognized by the ABA, and such an exercise of discretion would be within their purview. The proposed amendments would not only bring these foreign lawyers under the regulatory umbrella, but they also would offer better protection for the advice provided by these foreign lawyers to U.S.-based clients and, thus, to clients relying on such advice. One of the cornerstones is the protection afforded to their communications by the attorney-client privilege. This protection is engrained in the status of an attorney, whether such attorney practices in private practice or in-house, or whether such attorney has obtained all licensing requirements. This privilege belongs to the client and protects his communications with his attorneys in connection with the giving of legal advice. It is important to allow these foreign lawyers to become authorized U.S. lawyers so that there is no question that the privilege applies.

### **III. The Intrinsic Limitations of the ABA Definition of Foreign Lawyer With Regard to Foreign In-House Counsel**

#### **A. In-House Counsel and the Fluctuating Concept of "Admission to Practice"**

As noted above, the definition of a foreign lawyer provides that the individual must be:

*"a member in good standing of a recognized legal profession in a foreign country, the members of which are **admitted to practice** as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority".<sup>7</sup>*

In a number of foreign countries, unlike the U.S. model, the legal profession is not unified. Different professions of the law cohabitate and there is not a one-way path to becoming a lawyer. A number of countries do not allow members of the bar to practice in-house and remain members of the bar during that time, while a large majority of in-house legal practitioners started their career in-house and never took a bar exam or engaged in law firm practice. As such, they never went through the process of a formal admission after taking a bar exam, the way it is typically done in the U.S., and yet they are all considered lawyers in these foreign jurisdictions. These lawyers derive their authority to practice law as lawyers not from bar admission, or bar membership, but from the law directly. The survey that was compiled in support of this Resolution shows that the requirement that a foreign lawyer be admitted as such to practice, and produce a certificate of good standing in the bar from his country of origin as a condition to being eligible to practice and be registered as a foreign in-house lawyer in the U.S., would de facto exclude approximately 70% of foreign lawyers, mostly from civil law jurisdictions, from the benefit of such protection and regulation.

---

<sup>7</sup> *Supra* note 1.

## **B. Regulation and Discipline of Foreign In-House Lawyers**

Under the ABA definition, a foreign lawyer must also be subject to effective regulation and discipline by a duly constituted professional body or a public authority.

Because in many foreign countries in-house lawyers are not members of the bar in the same way they are in the U.S., they are not subject to regulation and discipline in the same way either. In countries where the profession of lawyer is unified, such as the UK and most common law jurisdictions, all lawyers, whether employed in private practice or in-house, are members of a single body and subject to regulation and discipline. In others, such as France, Italy or Sweden, only lawyers in private practice are members of the bar. . Lawyers employed in-house would typically be members of a national association of in-house lawyers, such as AFJE in France, or another foreign equivalent, which has restrictive conditions for admitting members and recognizing the legal status of an in-house legal practitioner, as well as a code of ethics by which lawyers must abide. They often do not, however, have the authority to regulate or discipline these lawyers. Neither does the national bar organization, if such organization, as in France, does not have the statutory authority to regulate lawyers other than those employed in private practice. And yet, the legal status of all these lawyers, whether they work in private practice or in-house, is recognized by the law of the foreign country, and so is their ability to give legal advice and draft legal documents.

In its current drafting, the ABA definition of foreign lawyer, which links the status of a lawyer to his or her regulation or discipline by a duly constituted professional body, as is the case in the U.S., is again too restrictive with regard to the unique position of foreign in-house counsel, and fails to account for the fact that the vast majority of foreign in-house practitioners are not regulated or disciplined as such by a duly established organization such as the bar, even though they are subject to a number of duties and laws, such as the duty to maintain confidentiality, by virtue of their status as lawyers. If these lawyers, who cannot be members of the bar, were to breach those duties, they could be subject to prosecution and sanctions. These sanctions, however, would be imposed by the courts, not a bar, and come directly from the law, not from a duly established professional body. The strict interpretation of the ABA definition would exclude *de facto* all lawyers who are currently employed as in-house attorneys in most foreign countries, who are most likely to apply for authorization to practice as foreign in-house lawyers in the U.S.

## **C. The Proposed Amendments to Model Rule of Professional Conduct 5.5 and to the Model Rule for Registration of In-House Counsel**

For the reasons set forth above, the Section of International Law recommends that Model Rule 5.5 and the Model Rule for Registration of In-House Counsel be amended as follows (additions are in underlined and deletions ~~struck through~~):

Model Rule 5.5(e):

For purposes of paragraph (d) only, the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and the foreign lawyer or foreign in-house counsel must be are subject to effective regulation and discipline by a duly constituted professional body or a public authority, or, in its discretion, are otherwise authorized by [this highest court of appellate jurisdiction] to practice in this jurisdiction as an in-house counsel.

Model Rule For the Registration of In-House Counsel (at the end of Paragraph A):

For purposes of this Rule, a “foreign lawyer” is a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority. For purposes of this Rule only, the [state’s highest court of appellate jurisdiction] may, in its discretion, allow a lawyer lawfully practicing as in-house counsel in a foreign jurisdiction who does not meet the above requirements to register as an in-house counsel after consideration of other criteria, including the lawyer’s legal education, references, and experience.

In particular, where the lawyer is not, in the foreign jurisdiction, allowed to be or remain (as applicable) a member of the bar while practicing in-house, the court, in looking to the legal education, references and experiences of the applicant for registration status, may consider the following criteria in determining whether to grant the request:

- (a) The legal education (i.e. foreign equivalent of a U.S. JD degree) of the individual;
- (b) The professional experience of the individual, including the number of years that the individual has worked as in-house counsel;
- (c) The individual’s passing of the foreign jurisdiction’s bar examination;
- (d) The individual’s prior admission to the foreign bar, or other duly constituted authority;
- (e) The individual’s disciplinary record (including prosecution or sanctions as described above), if any, while admitted to the foreign bar or during the course of the individual’s employment as in-house counsel;
- (f) The individual’s eligibility to join or rejoin the foreign bar upon ceasing to be employed in-house; and
- (g) The individual’s understanding of the Model Rules of Professional Conduct.

To further explain why the language regarding the courts’ discretion is being added to enhance clarity for those seeking practice authorization under the Registration Rule or for those seeking to enforce it, the Section proposes a new Comment [1]. That new Comment states:

[1] Paragraph A of this Rule provides that the [state's highest court of appellate jurisdiction] may, in its discretion, allow someone who does not meet the Rule's other definitional requirements of a foreign lawyer, but who is lawfully practicing as in-house counsel in their home foreign jurisdiction, to register. The exercise of such discretion by the court may be necessary, because some foreign jurisdictions may not permit otherwise qualified in-house counsel to be members of or admitted to the bar. Lawyers in such foreign jurisdictions who are employed as in-house counsel may be required to relinquish any bar membership or admission while so employed or they may never have obtained such admission or membership status.

In addition, the Section proposes amending Section F of the Model Rule for Registration of In-House Counsel that addresses when registration status automatically terminates. The Section proposes that paragraph F(2) read as follows to ensure consistency with Model Rule 5.5(d):

F. The registered lawyer's rights and privileges under this Rule automatically terminate when:

1. The lawyer's employment terminates;
2. The lawyer is suspended or disbarred or the equivalent thereof in any jurisdiction; or
3. The lawyer fails to maintain active status in at least one jurisdiction, U.S. or foreign.

To further clarify when the registration status would automatically terminate for in-house counsel granted registration status pursuant to the court's discretion, the Section proposes new Comment [2], which states:

[2] Paragraph F of this Rule sets forth three circumstances that result in automatic termination of in-house counsel's registrations status. In situations where a court has exercised its discretion pursuant to Paragraph A of this Rule, a registered foreign in-house counsel lacking bar admission or licensure in that individual's home country cannot "fail to maintain active status" as set forth in Paragraph F(3). There is no active status in existence. Absent the circumstances set forth in Paragraph F(2), the triggering event to terminate registration status of such foreign in-house counsel would be the termination of employment of that individual by the employer as set forth in Paragraph F(1).

#### **D. The Proposed Amendments Also Afford Better Protection of the Attorney-Client Privilege**

Amending the current model rules on the authorization and registration of foreign in-house lawyers in the U.S. also would offer better protection to the advice provided by these foreign lawyers to their U.S.-based clients.

One of the cornerstones of the licensing of lawyers in the U.S. is the protection afforded to their communications by the attorney-client privilege. This protection is engrained in the status of an attorney, whether such attorney practices in private practice or in-house. Such privilege equally should extend to the advice given by foreign in-house lawyers in the U.S. so that U.S.-based clients relying on such advice can confidently seek out such advice without fear of their communications with those foreign lawyers being subject to disclosure.<sup>8</sup>

Such a privilege, with some variations in the scope and degree of protection, also attaches to the communication of foreign lawyers with their clients in their home jurisdiction. However, longstanding case law, in Europe in particular, has questioned such privilege attaching to legal advice given by in-house lawyers, the argument being advanced by the European Court of Justice being that in-house counsel, by virtue of their employment relationship and exclusive affiliation to one client only, i.e. their employer, lacks the independence that would otherwise be expected of lawyers giving advice to a number of clients on a non-exclusive basis. There are a number of political calls at the national and EU level to put an end to this situation, which severely undermines both the authority of in-house counsel and the protection of clients relying on such advice in Europe. This also poses a number of very practical risks for U.S. lawyers, particularly U.S.-based in-house counsel involved in communications with EU-based in-house counsel, including the risk U.S. lawyers take that their communications will be subject to an order of disclosure by a court of law in the EU, without the ability of these lawyers to successfully claim the protection of the attorney-client privilege before such court. Likewise, a U.S. in-house counsel who provides legal advice to an EU-based client or in-house colleague, knowing that such legal advice may not be subject to the attorney-client privilege in the EU, may not be able to claim the protection of the U.S. attorney-client privilege.

The issue of the lack of privilege for in-house counsel communications in the EU is not an issue that is linked to the lawyer's regulated status in countries where in-house lawyers are also members of a bar. It is an issue that is linked to their employment status. Therefore, when foreign in-house lawyers come to the U.S. to practice and start giving legal advice to U.S.-based clients, it may very well be argued in case of an EU dispute that these foreign lawyers' legal advice may not be subject to the attorney-client privilege and may be ordered to be disclosed.

---

<sup>8</sup> This is not to suggest that in every jurisdiction a lawyer must be licensed in order for the privilege to apply. The Standard Rule of the Federal Rule of Evidence defines a "lawyer" as a person licensed to practice law *in any state or nation*. Moreover the privilege extends not only to lawyers but to confidential communications with *persons reasonably believed by the client to be authorized to practice law in any state or nation*, Standard 503(a)(2). Many states, including Florida, California, Arkansas, Oregon, Idaho, Delaware, and Texas have adopted this rule. For instance, Florida Statute ("Fla. Stat.") 90.502 expressly regulates the lawyer-client privilege: "(1) For purposes of this section:

(a) *A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.*

(...) This subsection does not affect the qualification and admission of lawyers to practice in Florida, which is regulated and administered by the Florida Bar." Notably, the adoption of this rule is not universal across the U.S. Thus, it is suggested that the Model Rules be amended to broaden the categories of foreign lawyers who may serve as in-house counsel so that there is no issue that the lawyer participating in the communication is a lawyer for purposes of determining the application of the privilege.

Conversely, if some of the obligations those lawyers derive from being licensed and registered as in-house lawyers in the U.S. are that they: are subject to the professional conduct rules of the jurisdiction where they are employed, contribute to the client protection fund, are subject to sanctions if they fail to register or do not comply with the professional conduct rules, and comply with continuing legal education requirements, one could also argue that one of the key benefits a registered and properly licensed foreign in-house lawyer would gain from such status is the ability for their client to claim the benefit afforded to their foreign in-house lawyer's legal advice by the U.S. rules on the attorney-client privilege.

#### **IV. Conclusion**

For the reasons highlighted in this Report, it is recommended that Model Rule 5.5 and the ABA Model Rule for the Registration of In-House Counsel be amended to include the discretion of a court of highest appellate jurisdiction to license to practice in the U.S. a foreign in-house lawyer, who otherwise, due to his or her country's rules, would not fall under the current definition of foreign lawyer. Allowing such discretion will ensure not only that such competent and trained foreign in-house lawyers are legally able and, as a result, encouraged to seek registration in the U.S., but also that U.S.-based clients would effectively receive the full benefit of these regulations and the freedom to choose the foreign in-house lawyer who best fits their needs, including better protection of the attorney-client privilege.

Respectfully Submitted,

Lisa J. Savitt  
Chair, ABA Section of International Law

February 2016

GENERAL INFORMATION FORM

Submitting Entity: Section of International Law

Submitted By: Lisa Savitt, Chair, Section of International Law

1. Summary of Resolution(s).

Under Model Rule 5.5 (d), a foreign lawyer is "a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority." However, this definition does not account for the unique way in which foreign lawyers are permitted to practice in-house in most foreign countries.

This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be "members of the bar" to be able to practice as in-house counsel in the U.S. and to be so registered. These courts possess the inherent authority to regulate the practice of law and the legal profession, as long recognized by the ABA, and such an exercise of discretion would be within their purview. The proposed amendments would not only bring these foreign lawyers under the regulatory umbrella, but they also would offer better protection for the advice provided by these foreign lawyers to U.S.-based clients and, thus, to clients relying on such advice. One of the cornerstones is the protection afforded to their communications by the attorney-client privilege.

2. Approval by Submitting Entity.

The Council of the Section of International Law approved this recommendation and resolution at its Meeting on October 20, 2015.

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?

Several ABA Model Rules address the licensing of or authorization for practice by foreign lawyers in the U.S. These ABA policies are conditioned on those lawyers being able to certify that they are a "member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority." As such, the ABA policies dealing with foreign in-house counsel de facto exclude over 70% of foreign lawyers, particularly lawyers from civil law jurisdictions, who are either not required or not even legally allowed to be members of the bar when practicing as in-house counsel. In particular, this Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its



discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered. The court, looking to the legal education, references and experiences of the applicant for registration status, may consider the several criteria in determining whether to grant the request. Thus, the Section proposes to add a new Comment specifying that grant of discretion to the courts is necessary because some foreign jurisdictions may not permit otherwise qualified in-house counsel to be members of or admitted to the bar. In addition, the Section proposes amending Section F of the Model Rule for Registration of In-House Counsel that addresses when registration status automatically terminates. To further clarify when the registration status would automatically terminate for in-house counsel granted registration status pursuant to the court’s discretion, the Section proposes new Comment setting forth three circumstances that result in automatic termination of in-house counsel’s registrations status. Amending the current model rules on the authorization and registration of foreign in-house lawyers in the U.S. also would offer better protection to the advice provided by these foreign lawyers to their U.S.-based clients.

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.  
If this recommendation and resolution are approved by the House of Delegates, Model Rule 5.5 and the ABA Model Rule for the Registration of In-House Counsel will include the discretion of a court of highest appellate jurisdiction to license to practice in the U.S. a foreign in-house lawyer, who otherwise, due to his or her country’s rules, would not fall under the current definition of foreign lawyer. Allowing such discretion will ensure not only that such competent and trained foreign in-house lawyers are legally able and, as a result, encouraged to seek registration in the U.S., but also that U.S.-based clients would effectively receive the full benefit of these regulations and the freedom to choose the foreign in-house lawyer who best fits their needs, including better protection of the attorney-client privilege.
8. Cost to the Association. (Both direct and indirect costs)  
N/A.
9. Disclosure of Interest. (If applicable)  
N/A.

10. Referrals.

This Resolution and Report was developed by a joint working group comprised of representatives from the following entities: Task Force on International Trade in Legal Services (ITILS); Standing Committee on Professional Discipline; Standing Committee on Ethics and Professional Responsibility; Business Law Section; Litigation Section; National Organization of Bar Counsel; Tort Trial and Insurance Practice Section, Judicial Division, and the Section of Legal Education and Admissions to the Bar. The Standing Committee on Professional Discipline, the Standing Committee on Ethics and Professional Responsibility, and ITILS agreed to co-sponsor in time for the filing deadline.

Further referrals are being undertaken to the following entities: Litigation Section, Business Law Section, National Organization of Bar Counsel, Tort Trial and Insurance Practice Section, Judicial Division, Section of Legal Education and Admissions to the Bar.

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

Steven M. Richman  
CLARK HILL PLC  
502 Carnegie Center Suite 103  
Princeton, NJ 08540  
609.785.2900 (main)  
609.785.2911 (direct)  
E-mail: [SRichman@clarkhill.com](mailto:SRichman@clarkhill.com)

Glenn P. Hendrix  
Arnall Golden Gregory LLP  
Suite 2100  
171 17th Street, N.W.  
Atlanta, GA 30363  
Phone: 404/873-8692  
E-Mail: [glenn.hendrix@agg.com](mailto:glenn.hendrix@agg.com)

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.)

Steven M. Richman  
CLARK HILL PLC  
502 Carnegie Center Suite 103  
Princeton, NJ 08540  
609.785.2900 (main)  
609.785.2911 (direct)  
E-mail: [SRichman@clarkhill.com](mailto:SRichman@clarkhill.com)

## EXECUTIVE SUMMARY

1. Summary of the Resolution

This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered.

2. Summary of the Issue that the Resolution Addresses

Under Model Rule 5.5 (d), a foreign lawyer is "a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority." However, this definition does not account for the unique way in which foreign lawyers are permitted to practice in-house in most foreign countries. This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered. These courts possess the inherent authority to regulate the practice of law and the legal profession, as long recognized by the ABA, and such an exercise of discretion would be within their purview. The proposed amendments would not only bring these foreign lawyers under the regulatory umbrella, but they also would offer better protection for the advice provided by these foreign lawyers to U.S.-based clients and, thus, to clients relying on such advice. One of the cornerstones is the protection afforded to their communications by the attorney-client privilege.

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

With the proposed resolution, Model Rule 5.5 and the ABA Model Rule for the Registration of In-House Counsel will include the discretion of a court of highest appellate jurisdiction to license to practice in the U.S. a foreign in-house lawyer, who otherwise, due to his or her country’s rules, would not fall under the current definition of foreign lawyer. Allowing such discretion will ensure not only that such competent and trained foreign in-house lawyers are legally able and, as a result, encouraged to seek registration in the U.S., but also that U.S.-based clients would effectively receive the full benefit of these regulations and the freedom to choose the foreign in-house lawyer who best fits their needs, including better protection of the attorney-client privilege.

4. Summary of Minority Views

None.



**AMERICAN BAR ASSOCIATION**  
**STANDING COMMITTEE ON SPECIALIZATION**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1   RESOLVED, That the American Bar Association reaccredits the Civil Pretrial Practice Law  
2   program of the National Board of Trial Advocacy of Wrentham, Massachusetts for an additional  
3   five-year term as a designated specialty certification program for lawyers.



## **REPORT**

### **Background and Synopsis of the Recommendations**

At the 1993 Midyear Meeting, 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 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 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, the House extended the initial period of accreditation approved in the Standards from three years to five.

Sections 5.01 and 5.02 of the Standards now 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.<sup>1</sup>)

Pursuant to those current reaccreditation procedures, the Standing Committee has received, and here recommends approval of, the application for reaccreditation of the Civil Pretrial Practice program of the National Board of Trial Advocacy.

### **Reaccreditation and Evaluation Procedures for the Civil Pretrial Application**

In evaluating the application, the Standing Committee followed the Governing Rules it adopted on March 2, 1993, as amended from time to time since. The application was filed in the spring of 2015. The application was accompanied by payment of a reaccreditation fee for the program.

In order to ensure that every accredited program continues to comply with ABA Standards, the Standing Committee requires that the following accompany all reaccreditation 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.

In addition, the Standards have always included non-discrimination provisions requiring that a program not condition the grant of certification to a lawyer on the lawyer's "[m]embership in any organization or completion of educational programs offered by any specific organization" [Section 4.04(B)]; and that a program "not discriminate against any lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age" [Section 4.04(C)]. Although the Standards do not require that these non-discrimination provisions be expressly set out in a program's governing documents—merely that those provisions' mandate be kept—the Committee asked the leadership of the NBTA to incorporate the terms of the non-discrimination provisions into program governing documents, and has been assured that they will be expressly adopted into NBTA governing documents.

### **Accreditation Application and Examination Review Panelists**

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

**Shontrai DeVaughn Irving** (Hammond, Indiana), **Chair, Civil Pretrial Practice Review Panel.** Mr. Irving is the Chair of the ABA Standing Committee on Specialization. He teaches Business Law at Purdue University Calumet's School of Business.

**Wesley Avery** (Valencia, California), **Member, Civil Pretrial Practice Review Panel.** Mr. Avery is a member of the Standing Committee on Specialization. He frequently serves as a federal bankruptcy trustee in the Middle District of California, and is certified in Bankruptcy Law by the State Bar of California's Board of Legal Specialization and in Business Bankruptcy by the American Board of Certification, an ABA-accredited certification program.



**Lori Barbee** (Tucson, Arizona), **Member, Civil Pretrial Practice Review Panel.** Ms. Barbee is the Executive Director of the National Elder Law Foundation, which sponsors and administers an ABA-accredited certification program in Elder Law.

**Exam reviewer: Tracy D. Knox** Mr. Knox is a partner in the South Bend, Indiana, office of Barnes & Thornburg, where he handles product liability, commercial and real estate litigation matters

One member of the Standing Committee on Specialization, James Wren, is certified in Civil Trial Advocacy by the National Board of Trial Advocacy, and is a member of the NBTA Board of Directors. Prof. Wren recused himself from the consideration of the NBTA Civil Pretrial Practice application and from the Standing Committee's vote on reaccreditation.

Respectfully submitted,

Shontrai Irving, Chair  
Standing Committee on Specialization  
February 2016

---

<sup>i</sup> The accreditation and reaccreditation requirements appear in Sections 4 and 5 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 re-certification.

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.

## SECTION 5: ACCREDITATION PERIOD AND RE-ACCREDITATION

5.01 Initial accreditation by the Association of any Applicant shall be granted for five years.

5.02 To retain Association accreditation, 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. The organization shall be granted re-accreditation upon a showing of continued compliance with these Standards.

**GENERAL INFORMATION FORM**

Submitting Entity: American Bar Association Standing Committee on Specialization

Submitted By: Shontrai D. Irving, Chair

1. Summary of Resolution(s).

The Resolution grants reaccreditation to the Civil Pretrial Practice certification program of the National Board of Trial Advocacy, for an additional 5-year term.

2. Approval by Submitting Entity.

At its meeting on October 24, 2015, the Standing Committee on Specialization considered the application for reaccreditation and voted unanimously that it submit this resolution to the House of Delegates for consideration at the 2016 Midyear Meeting.

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

Yes. This specialty certification program has 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 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, and delegated to the Standing Committee on Specialization 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, or the period of current accreditation extended.

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. Any costs associated with the reaccreditation process are defrayed by fees charged to the organizations seeking reaccreditation.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

None.

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

Shontrai D. Irving  
Chair, Standing Committee  
on Specialization  
Purdue University Calumet  
2200 169<sup>th</sup> Street  
Hammond IN 46323  
Phone: 812-219-8697  
Email: [Shontrai.Irving@Purduecal.edu](mailto:Shontrai.Irving@Purduecal.edu)

Martin Whittaker  
Staff Counsel, Standing Committee  
on Specialization  
321 North Clark Street  
Chicago IL 60654  
Phone: 312-988-5309  
Email: [Martin.Whittaker@Americanbar.org](mailto:Martin.Whittaker@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.)

Shontrai D. Irving  
Chair, Standing Committee  
on Specialization  
Purdue University Calumet  
2200 169<sup>th</sup> Street  
Hammond IN 46323  
Phone: 812-219-8697  
Email: [Shontrai.Irving@Purduecal.edu](mailto:Shontrai.Irving@Purduecal.edu)

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The Resolution will grant reaccreditation to the Civil Pretrial Practice certification program of the National Board of Trial Advocacy.

### 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.

**AMERICAN BAR ASSOCIATION**  
**COMMISSION ON THE FUTURE OF LEGAL SERVICES**  
**STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE**  
**CRIMINAL JUSTICE SECTION**  
**LAW PRACTICE DIVISION**  
**STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS**  
**STANDING COMMITTEE ON CLIENT PROTECTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association adopts the ABA Model Regulatory Objectives  
2 for the Provision of Legal Services, dated February, 2016.

**ABA Model Regulatory Objectives for the Provision of Legal Services**

- 3
- 4
- 5
- 6 A. Protection of the public
- 7 B. Advancement of the administration of justice and the rule of law
- 8 C. Meaningful access to justice and information about the law, legal issues, and the civil and
- 9 criminal justice systems
- 10 D. Transparency regarding the nature and scope of legal services to be provided, the
- 11 credentials of those who provide them, and the availability of regulatory protections
- 12 E. Delivery of affordable and accessible legal services
- 13 F. Efficient, competent, and ethical delivery of legal services
- 14 G. Protection of privileged and confidential information
- 15 H. Independence of professional judgment
- 16 I. Accessible civil remedies for negligence and breach of other duties owed, and
- 17 disciplinary sanctions for misconduct
- 18 J. Diversity and inclusion among legal services providers and freedom from discrimination
- 19 for those receiving legal services and in the justice system
- 20

21  
22 FURTHER RESOLVED, That the American Bar Association urges that each state's highest  
23 court, and those of each territory and tribe, be guided by the ABA Model Regulatory Objectives  
24 for the Provision of Legal Services when they assess the court's existing regulatory framework  
25 and any other regulations they may choose to develop concerning non-traditional legal service  
26 providers.





## **REPORT**

### **I. Background on the Development of ABA Model Regulatory Objectives for the Provision of Legal Services**

The American Bar Association's Commission on the Future of Legal Services was created in August 2014 to examine how legal services are delivered in the U.S. and other countries and to recommend innovations that improve the delivery of, and the public's access to, those services.<sup>1</sup> As one part of its work, the Commission engaged in extensive research about regulatory innovations in the U.S. and abroad. The Commission found that U.S. jurisdictions are considering the adoption of regulatory objectives to serve as a framework for the development of standards in response to a changing legal profession and legal services landscape. Moreover, numerous countries already have adopted their own regulatory objectives.

The Commission concluded that the development of regulatory objectives is a useful initial step to guide supreme courts and bar authorities when they assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Given that supreme courts in the U.S. are beginning to consider the adoption of regulatory objectives and given that providers of legal assistance other than lawyers are already actively serving the American public, it is especially timely and important for the ABA to offer guidance in this area.

This Report discusses why the Commission urges the House of Delegates to adopt the accompanying Resolution.

### **II. The Purpose of Model Regulatory Objectives for the Provision of Legal Services**

The Commission believes that the articulation of regulatory objectives serves many valuable purposes. One recent article cites five such benefits:

First, the inclusion of regulatory objectives definitively sets out the purpose of lawyer regulation and its parameters. Regulatory objectives thus serve as a guide to assist those regulating the legal profession and those being regulated. Second, regulatory objectives identify, for those affected by the particular regulation, the purpose of that regulation and why it is enforced. Third, regulatory objectives assist in ensuring that the function and purpose of the particular [regulation] is transparent. Thus, when the regulatory body administering the [regulation] is questioned—for example, about its interpretation of the [regulation]—the regulatory body can point to the regulatory objectives to demonstrate compliance with function and purpose. Fourth, regulatory objectives can help define the parameters of the [regulation] and of public debate about proposed [regulation]. Finally, regulatory objectives may help the legal profession when it is called upon

---

<sup>1</sup> Additional information about the Commission, including descriptions of the Commission's six working groups, can be found on the Commission's [website](#) as well as in the Commission's November 3, 2014 issues [paper](#). That paper generated more than [60 comments](#).

to negotiate with governmental and nongovernmental entities about regulations affecting legal practice.<sup>2</sup>

In addition to these benefits, the Commission believes Model Regulatory Objectives for the Provision of Legal Services will be useful to guide the regulation of an increasingly wide array of already existing and possible future legal services providers.<sup>3</sup> The legal landscape is changing at an unprecedented rate. In 2012, investors put \$66 million dollars into legal service technology companies. By 2013, that figure was \$458 million.<sup>4</sup> One source indicates that there are well over a thousand legal tech startup companies currently in existence.<sup>5</sup> Given that these services are already being offered to the public, the Model Regulatory Objectives for the Provision of Legal Services will serve as a useful tool for state supreme courts as they consider how to respond to these changes.

A number of U.S. jurisdictions have articulated specific regulatory objectives for the lawyer disciplinary function.<sup>6</sup> At least one U.S. jurisdiction (Colorado) is considering the adoption of regulatory objectives that are intended to have broader application similar to the proposed ABA Model Regulatory Objectives for the Provision of Legal Services.<sup>7</sup> In addition, the development and adoption of regulatory objectives with broad application has become increasingly common around the world. Nearly two dozen jurisdictions outside the U.S. have adopted them in the past decade or have proposals pending. Australia, Denmark, England, India, Ireland, New Zealand, Scotland, Wales, and several Canadian provinces are examples.<sup>8</sup>

---

<sup>2</sup> Laurel Terry, Steve Mark & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM LAW REVIEW 2685, 2686 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2085003](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2085003). The original quote refers to “legislation” rather than “regulation,” but regulatory objectives serve the same purpose in both cases.

<sup>3</sup> As noted by the ABA Standing Committee on Paralegals in its comments to the Commission, paralegals already assist in the accomplishment of many of the Commission’s proposed Regulatory Objectives.

<sup>4</sup> Joshua Kubick, *2013 was a Big Year for Legal Startups; 2014 Could Be Bigger*, TechCo (Feb. 14, 2015), available at <http://tech.co/2013-big-year-legal-startups-2014-bigger-2014-02>.

<sup>5</sup> <https://angel.co/legal>

<sup>6</sup> For example, in Arizona “the stated objectives of disciplinary proceedings are: (1) maintenance of the integrity of the profession in the eyes of the public, (2) protection of the public from unethical or incompetent lawyers, and (3) deterrence of other lawyers from engaging in illegal or unprofessional conduct.” *In re Murray*, 159 Ariz. 280, 282, 767 P.2d 1, 3 (1988). In addition, the Court views “discipline as assisting, if possible, in the rehabilitation of an errant lawyer.” *In re Hoover*, 155 Ariz. 192, 197, 745 P.2d 939, 944 (1987). California Business & Professions Code Section 6001.1 states that “[T]he protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.” The Illinois Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (ARDC) adopted the following: “The mission of the ARDC is to promote and protect the integrity of the legal profession, at the direction of the Supreme Court, through attorney registration, education, investigation, prosecution and remedial action.”

<sup>7</sup> A Supreme Court of Colorado Advisory Committee is currently developing, for adoption by the Court, “Regulatory Objectives of the Supreme Court of Colorado.”

<sup>8</sup> For a more extensive history of the “regulatory objectives movement,” see Laurel Terry, *Why Your Jurisdiction Should Jump on the Regulatory Objectives Bandwagon*, THE PROFESSIONAL LAWYER (2013), available at [http://www.personal.psu.edu/faculty/l/s/lst3/Terry\\_Regulatory\\_Objectives\\_Bandwagon\\_2013.pdf](http://www.personal.psu.edu/faculty/l/s/lst3/Terry_Regulatory_Objectives_Bandwagon_2013.pdf).

These Model Regulatory Objectives for the Provision of Legal Services are intended to stand on their own. Regulators should be able to identify the goals they seek to achieve through existing and new regulations. Having explicit regulatory objectives ensures credibility and transparency, thus enhancing public trust as well as the confidence of those who are regulated.<sup>9</sup>

From the outset, the Commission has been transparent about the broad array of issues it is studying and evaluating, including those legal services developments that are viewed by some as controversial, threatening, or undesirable (e.g., alternative business structures). The adoption of this Resolution, however, does not predetermine or even imply a position on those issues by the ABA. If and when any other issues come to the floor of the House of Delegates, the Association can and should have a full and informed debate about them.

The Commission intends for these Model Regulatory Objectives for the Provision of Legal Services to be used by supreme courts and their regulatory agencies. As noted in the Further Resolved Clause of this Resolution, the Objectives are offered as a guide to supreme courts. They can serve as such for new regulations and the interpretation of existing regulations,<sup>10</sup> even in the absence of formal adoption. As with any ABA model, a supreme court may choose which, if any, provisions to be guided by, and which, if any, to adopt.

Although regulatory objectives have been adopted by legislatures of other countries due to the manner in which their governments operate, they are equally useful in the context of the judicially-based system of legal services regulation in the U.S., which has been long supported by the ABA.

Regulatory objectives can serve a purpose that is similar to the Preamble to the Model Rules of Professional Conduct. In jurisdictions that have formally adopted the Preamble, the Rules provide mandatory authority, and the Preamble offers guidance regarding the foundation of the black letter law and the context within which the Rules operate. In much the same way, regulatory objectives are intended to offer guidance to U.S. jurisdictions with regard to the foundation of existing legal services regulations (e.g., unauthorized practice restrictions) and the purpose of and context within which any new regulations should be developed and enforced in the legal services context.

### **III. Relationship to the Legal Profession's Core Values**

Regulatory objectives are different from the legal profession's core values in at least two respects. First, the core values of the legal profession are (as the name suggests) directed at the

---

<sup>9</sup> As Professor Laurel Terry states in comments she submitted in response to the Commission's circulation of a draft of these Regulatory Objectives, if "a regulator can say what it is trying to achieve, its response to a particular issue – whatever that response is – should be more thoughtful and should have more credibility. It seems to me that this is in everyone's interest."

<sup>10</sup> Existing court rules providing for alternatives to discipline programs exemplify how the Objective of ensuring the efficient, competent and ethical delivery of legal services should be read to encompass the need to confront legal services provider impairments in the most effective manner for the good of the legal system. *See, e.g.*, Rule 11(G) of the ABA Model Rules for Lawyer Disciplinary Enforcement.

“legal profession.”<sup>11</sup> By contrast, regulatory objectives are intended to guide the creation and interpretation of a wider array of legal services regulations, such as regulations covering new categories of legal services providers. For this reason, some duties that already exist in the Model Rules of Professional Conduct (e.g., the duty of confidentiality) are restated in the Model Regulatory Objectives for the Provision of Legal Services to emphasize their importance and relevance when developing regulations for legal services providers who are not lawyers. Second, while the core values of the legal profession remain at the center of attorney conduct rules, they offer only limited, though still essential, guidance in the context of regulating the legal profession. A more complete set of regulatory objectives can offer U.S. jurisdictions clearer regulatory guidance than the core values typically provide.<sup>12</sup>

The differing functions served by regulatory objectives and core values mean that some core values are articulated differently in the context of regulatory objectives. For example, the concept of client loyalty is an oft-stated and important core value, but in the context of regulatory objectives, client loyalty is expressed in more specific and concrete terms through independence of professional judgment, competence, and confidentiality.

#### **IV. Recommended ABA Model Regulatory Objectives for the Provision of Legal Services**

The Commission developed the Model Regulatory Objectives for the Provision of Legal Services by drawing on the expertise of its own members,<sup>13</sup> discussing multiple drafts of regulatory objectives at Commission meetings, reviewing regulatory objectives in nearly two dozen jurisdictions, and reading the work of several scholars and resource experts.<sup>14</sup> The Commission also sought input and incorporated suggestions from individuals and other entities, including the

---

<sup>11</sup> See ABA House of Delegates Recommendation 10F (adopted July 11, 2000), available at [http://www.americanbar.org/groups/professional\\_responsibility/commission\\_multidisciplinary\\_practice/mdprecom10f.html](http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html). This recommendation lists the following as among the core values of the legal profession: the lawyer’s duty of undivided loyalty to the client; the lawyer’s duty competently to exercise independent legal judgment for the benefit of the client; the lawyer’s duty to hold client confidences inviolate; the lawyer’s duty to avoid conflicts of interest with the client; the lawyer’s duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibilities for the quality of justice; and the lawyer’s duty to promote access to justice.

<sup>12</sup> The Commission notes that there also are important professionalism values to which all legal services providers should aspire. Some aspects of professionalism fold into the Objectives related to ethical delivery of services, independence of professional judgment and access to justice. Others may not fit neatly into the distinct purpose of regulatory objectives for legal services providers, just as they do not fall within the mandate of the ethics rules for lawyers.

<sup>13</sup> The Commission includes representatives from the judiciary and regulatory bodies, academics, and practitioners.

<sup>14</sup> Materials reviewed include Steve Mark, Tahlia Gordon, Marlene LeBrun & Gary Tamsitt, *Preserving the Ethics and Integrity of the Legal Profession in an Evolving Market: A Comparative Regulatory Response*, available at <http://www.olsc.nsw.gov.au/agdbasev7/wr/olsc/documents/pdf/preserving%20ethics%20integrity%20legal%20profession%20uk%20paper.pdf>; Andrew Perlman, *Towards the Law of Legal Services* (2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2561014](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561014); Laurel Terry, Steve Mark & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 *FORDHAM LAW REVIEW* 2685, 2686 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2085003](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2085003); THE LAW SOCIETY, *THE MINISTRY OF JUSTICE’S CALL FOR EVIDENCE ON THE REGULATION OF LEGAL SERVICES IN ENGLAND AND WALES: THE LAW SOCIETY’S RESPONSE* (Sept. 2, 2013), available at <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/regulation-of-legal-services/>.

ABA Standing Committee on Discipline and the ABA Standing Committee on Ethics and Professional Responsibility.

Respectfully submitted,

Judy Perry Martinez, Chair  
Andrew Perlman, Vice-Chair  
Commission on the Future of Legal Services

February 2016

**GENERAL INFORMATION FORM**

Submitting Entity: ABA Commission on the Future of Legal Services

Submitted By: Judy Perry Martinez, Chair

1. Summary of Resolution(s).

The Commission on the Future of Legal Services seeks adoption of ABA Model Regulatory Objectives for the Provision of Legal Services by the House of Delegates. The Commission further requests that the House recommend that each state's highest court, and those of each territory and tribe, be guided by clearly identified regulatory objectives such as those contained in the proposed ABA Model Regulatory Objectives for the Provision of Legal Services. Given that supreme courts in the U.S. are beginning to consider the adoption of regulatory objectives and given that providers of legal assistance other than lawyers are already actively serving the American public, it is especially timely and important for the ABA to offer guidance in this area.

It is important for regulators to be able to easily identify the goals they seek to achieve through existing and new regulations. The adoption of ABA Model Regulatory Objectives for the Provision of Legal Services would create a valuable framework to guide the courts in the face of the burgeoning access to justice crisis and fast paced change affecting the delivery of legal services in order that the courts can assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Use of ABA Model Regulatory Objectives for the Provision of Legal Services also will help courts continue to ensure credibility and transparency in the regulatory process, which enhances not only the public's trust in judicial regulation, but also the confidence of those who are regulated.

2. Approval by Submitting Entity.

The Commission on the Future of Legal Services approved the filing of this Resolution at its meeting on September 25 and 26, 2015.

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 Resolution is consistent with existing and longstanding ABA policies supporting state-based judicial regulation and does not affect them.

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 Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to successfully implement any policies relating to the regulation of the legal profession that are adopted by the House of Delegates. The Policy Implementation Committee works with the Conference of Chief Justices as part of its process. The Commission on the Future of Legal Services has been in communication with Center for Professional Responsibility volunteer leadership and the Center Director in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Commission on Ethics 20/20, Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct. The Commission will also engage the ABA Legal Services Division regarding the implementation effort should the House adopt the Resolution.

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

None

9. Disclosure of Interest. (If applicable)

10. Referrals.

On September 29, 2015 the Commission released for comment to all ABA entities, state and local bar associations, and affiliated entities a draft of this Resolution and the accompanying draft Report. In addition, the Commission consulted with the ABA Standing Committee on Professional Discipline and Standing Committee on Ethics and Professional Responsibility at an earlier stage during its study of regulatory objectives. The Commission carefully considered the feedback from those entities in the development of this Resolution.

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

Ellyn S. Rosen  
Deputy Director and Regulation Counsel  
ABA Center for Professional Responsibility  
321 North Clark Street, 17<sup>th</sup> floor  
Chicago, IL 60654-7598  
Phone: 312/988-5311  
Ellyn.Rosen@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.)

Judy Perry Martinez  
1724 Valence Street  
New Orleans, LA 70115  
Phone: 504/914-7912  
Email: [jpmartinez6@gmail.com](mailto:jpmartinez6@gmail.com)

Stephen A. Saltzburg  
George Washington University Law School  
2000 H Street NW  
Washington, DC 20052  
Phone: 202/994-7089  
Email: [ssaltz@law.gwu.edu](mailto:ssaltz@law.gwu.edu)



## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The Commission on the Future of Legal Services is proposing for House of Delegates adoption ABA Model Regulatory Objectives for the Provision of Legal Services. The Commission also requests that the House adopt the part of the Resolution that recommends that each state's highest court, and those of each territory and tribe, be guided by clearly identified regulatory objectives such as those contained in the proposed ABA Model Regulatory Objectives for the Provision of Legal Services.

The adoption of ABA Model Regulatory Objectives for the Provision of Legal Services would create a valuable framework to guide the courts as they, in the face of the burgeoning access to justice crisis and fast paced change affecting the delivery of legal services assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Use of ABA Model Regulatory Objectives for the Provision of Legal Services would also help courts continue to ensure credibility and transparency in the regulatory process, and that enhances not only the public's trust in judicial regulation, but also the confidence of those who are regulated.

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

The ABA Commission on the Future of Legal Services was created in August 2014 to examine how legal services are delivered in the U.S. and other countries and to recommend innovations that improve the delivery of, and the public's access to, those services. As one part of its multifaceted work, the Commission engaged in extensive research about regulatory developments in the U.S. and abroad. The ABA has long supported state-based judicial regulation; its policies doing so do not, however, set forth a centralized framework of broad and explicit regulatory objectives to serve as a guide for such regulation. This Resolution, if adopted, would fill this policy void and serve as a useful tool to help courts easily identify the explicit goals they seek to achieve when they assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Given that supreme courts in the U.S. are beginning to consider the adoption of broad regulatory objectives, and given that providers of legal assistance other than lawyers are already actively serving the American public, the Commission believes that it is timely and important for the ABA to offer guidance in this area.

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

The adoption of ABA Model Regulatory Objectives for the Provision of Legal Services would create the valuable and needed framework to help courts as they, in the face of the burgeoning access to justice crisis and fast paced change affecting the delivery of legal services: (1) assess their existing regulatory framework and (2) identify and implement regulations related to legal services beyond the traditional regulation of the legal profession. While allowing for jurisdictional flexibility, the centralized framework set forth in the ABA Model Regulatory Objectives for the Provision of Legal Services would also facilitate jurisdictional consistency.

Use of ABA Model Regulatory Objectives for the Provision of Legal Services would also help courts continue to ensure credibility and transparency in the regulatory process, which enhances not only the public's trust in judicial regulation, but also the confidence of those who are regulated.

#### 4. Summary of Minority Views

From the outset, the Commission on the Future of Legal Services has been committed to and implemented a process that is transparent and open. The Commission has engaged in broad outreach and provided full opportunity for input into its work. Inherent in any undertaking of this scope and complexity is the recognition that there will be disagreements about the approach to issues as well as the substance of proposals.

On September 29, 2015 the Commission released for comment to all ABA entities, state and local bar associations, and affiliated entities a draft of this Resolution and the accompanying draft Report. At the time this Executive Summary was filed with the House of Delegates, the Commission was aware only that the following disagree with the Resolution:

The New Jersey State Bar Association has expressed its belief that the Resolution is contrary to the profession's core values and promotes a tiered system of justice.

Larry Fox filed comment in opposition in his individual capacity.

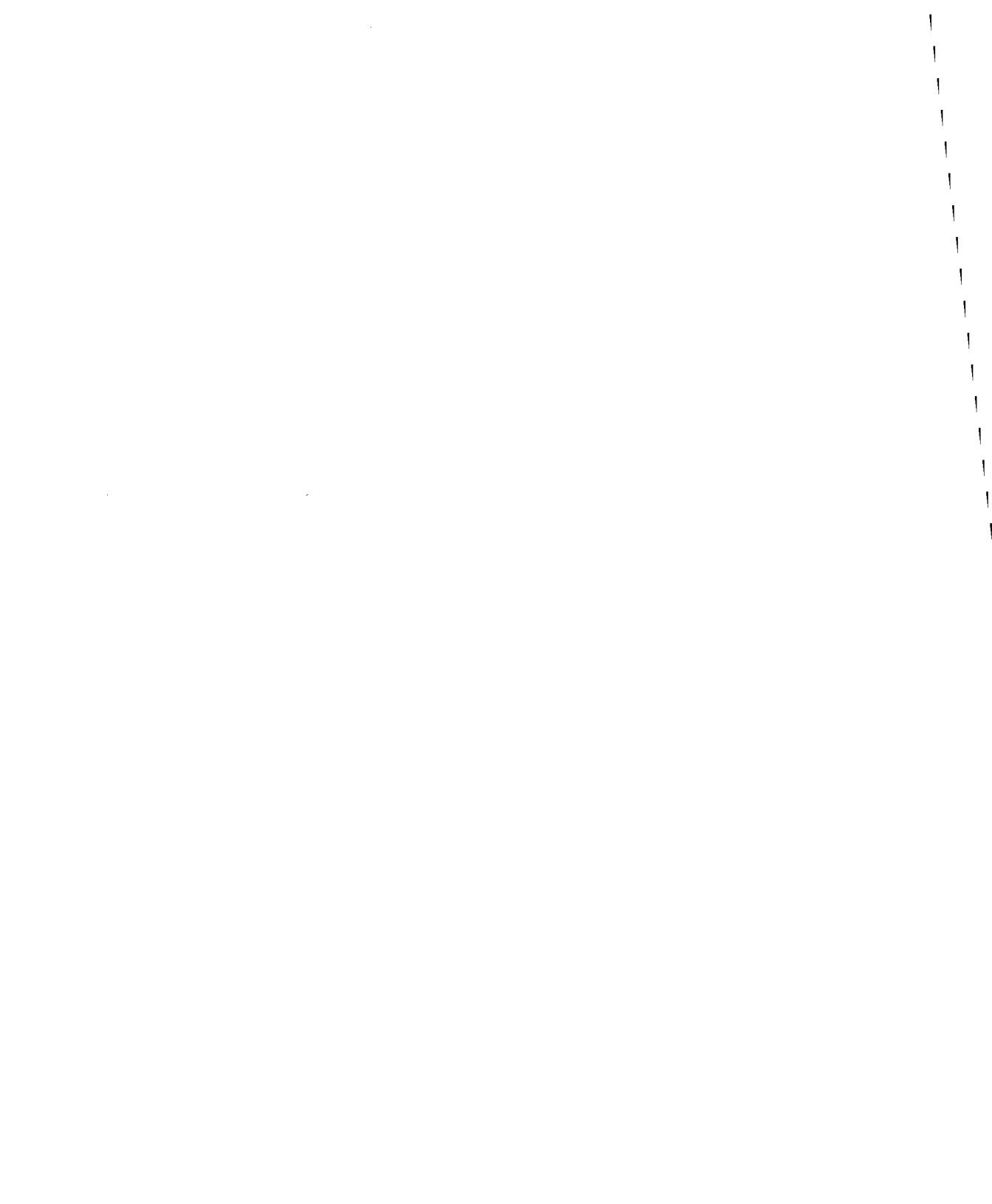
**AMERICAN BAR ASSOCIATION**  
**SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges Congress to amend 5 U.S.C.  
2 §552(a)(1) of the Freedom of Information Act (FOIA) to require that when a standard  
3 drafted by a private organization is exempted from Federal Register publication because  
4 it has been “incorporated by reference” (IBR) into a substantive rule of general  
5 applicability, the rulemaking agency must ensure meaningful free public availability of  
6 the incorporated text, such as through online access in a centralized online location or  
7 access in all government depository libraries.

8  
9 FURTHER RESOLVED, That the American Bar Association urges Congress to amend  
10 5 U.S.C. §553, the Administrative Procedure Act’s rulemaking provisions, to require  
11 meaningful free public availability of a proposed IBR standard’s text during the public  
12 comment period.

13  
14 FURTHER RESOLVED, That the American Bar Association urges Congress to ensure  
15 that private organizations, where appropriate, have access to compensation for financial  
16 losses attributable to making their standards publicly available.



REPORT**I. INTRODUCTION AND BACKGROUND**

For over two centuries, the United States has maintained a constitutive tradition of meaningful free access to our binding laws: that all citizens should be able to see the law is bedrock. Since the 1800s, Congress has provided free public access to federal statutes and, since the 1930s, to federal regulations as well, through a network of state and territorial libraries, followed by the creation of the Federal Depository Library System.<sup>1</sup> Congress further deepened the tradition by requiring the Government Printing Office to make available universal online access to statutes and regulations<sup>2</sup> and then requiring online public access to other government documents and materials in the Electronic Freedom of Information Act Amendments in 1996 and the e-Government Act of 2002.<sup>3</sup>

For numerous federal rules, however, public access is far from assured; these rules can be difficult to find and costly to read. The Freedom of Information Act generally requires Federal Register publication for all agency “substantive rules of general applicability” and “statements of general policy or interpretations of general applicability.”<sup>4</sup> However, it allows, in the so-called “incorporation by reference” provision of 5 U.S.C. § 552(a)(1), that “matter reasonably available to the class of persons affected thereby [may be] deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.”<sup>5</sup>

To save resources and build on private expertise, federal agencies have, on numerous occasions, worked with private organizations, incorporating privately drafted standards by reference into thousands of federal regulations. The Office of the Federal Register (OFR) must approve all agency incorporations by reference, but the Freedom of Information Act provides no further specifics on what level of access might be understood to make a particular standard “reasonably available” and thus eligible for incorporation by reference. Meanwhile, OFR has declined to define “reasonably available” in its regulations, despite its statutory responsibility to approve agency

---

<sup>1</sup> See H.R. Journal, 3d Cong., 2d Sess. 328-39 (1795) (describing Act of Mar. 3, 1795), Act of Dec. 23, 1817, res. 2, 3 Stat. 473; Act of Feb. 5, 1859, ch. 22, § 10, 11 Stat. 379, 381.

<sup>2</sup> 44 U.S.C. § 4102(b)(2006) (capping recoverable costs as “incremental costs of dissemination” and requiring no-charge online access in government depository libraries). The GPO charges no fee whatsoever for online access.

<sup>3</sup> Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 4(7), 110 Stat. 3048, 3049 (1996); E-Government Act of 2002, Pub. L. No. 107-347, §§ 206(a)-(d), 207(f), 116 Stat. 2899, 2915-16, 2918-19 (codified as amended at 44 U.S.C. § 3501 note (2006)).

<sup>4</sup> 5 U.S.C. § 552(a)(1).

<sup>5</sup> *Id.*

# 106A

incorporations.<sup>6</sup> See 1 C.F.R. 51.7(a). Research also has revealed no public consideration by OFR of access charges to incorporated standards.<sup>7</sup>

The Code of the Federal Register (C.F.R.) presently contains nearly 9,500 agency incorporations by reference of standards. These “IBR rules” have the same legal force as any other government rule. Some IBR rules incorporate material from other federal agencies or state entities, but thousands of these rules are privately drafted standards prepared by so-called “standards development organizations,” or “SDOs.”<sup>8</sup> Standards development organizations range from the Society of Automotive Engineers to the American Petroleum Institute. As the Office of the Federal Register has explained, “[t]he legal effect of incorporation by references is that the material is treated as if it were published in the *Federal Register* and CFR. This material, like any other properly issued rule, has the force and effect of law. . . mak[ing] privately developed technical standards Federally enforceable.”<sup>9</sup>

Federal agencies seek to use privately-drafted IBR standards on subjects ranging from toy safety,<sup>10</sup> crib, toddler bed, and stroller safety, safety standards for vehicle windshields (so they withstand fracture),<sup>11</sup> placement requirements for cranes on oil drilling platforms on the Outer Continental Shelf,<sup>12</sup> and food additive standards,<sup>13</sup> to

---

<sup>6</sup> See Incorporation by Reference, 79 Fed. Reg. 66,267, 66,270 (Nov., 7, 2014) (final rule). Beyond that, the OFR Director is to assess whether incorporation would “substantially reduce the volume of material published in the Federal Register,” and whether the material is “usable,” considering “the completeness and ease of handling of the publication; and . . . [w]hether it is bound, numbered, and organized.” 1 C.F.R. 51.7(a). In the digital age, these requirements now would seem to serve little purpose.

<sup>7</sup> E.g. Consumer Product Safety Commission, *Children’s Gasoline Burn Prevention Act* Regulation, 80 Fed. Reg. 16,961, 16,962-63 (Mar. 31, 2015) (OFR approval of incorporation by reference of ASTM F2517-15 despite lack of free access); [www.astm.org](http://www.astm.org) (charging \$43 for standard; unavailable in reading room). As of November, 2014, an agency requesting approval of incorporation by reference must itself discuss how the materials are “reasonably available to interested parties.” 1 C.F.R. 51.5(a)(1), but it is unclear whether the OFR will make any independent determination on that question or simply defer to the agency.

<sup>8</sup> Emily J. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 Harv. J. L. & Pub. Pol’y 131 (2013); Nina Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 Mich. L. Rev. 737 (2014); Peter Strauss, *Private Standards Organizations and Public Law*, 22 Wm. & Mary Bill Rts. J. 497 (2013).

<sup>9</sup> <http://www.archives.gov/federal-register/cfr/ibr-locations.html#why>. In some instances, as discussed below, a regulated entity might be able to argue that the lack of public access undermines notice sufficiently to prevent federal enforcement.

<sup>10</sup> E.g., 16 C.F.R. §§ 1505.5, 1505.6 (CPSC requirements for electrically operated toys, including toys with heating elements, intended for children’s use, incorporating by reference National Fire Protection Association and ANSI standards)

<sup>11</sup> 49 C.F.R. § 571.2015.

<sup>12</sup> 30 C.F.R. 250.108 (incorporating by reference American Petroleum Institute Recommended Practice 2D).

<sup>13</sup> See 21 C.F.R. § 172.831 (sucralose regulation, incorporating by reference the Food Chemical Codex, 4<sup>th</sup> edition).

operating storage requirements for propane tanks, aimed at limiting the tank's potential to leak or explode.<sup>14</sup> Executive policy, embodied in Circular A-119, now encourages agencies to contribute funds to private standards drafting as well as informal agency staff participation in the SDO process.

Meanwhile, public access to such standards can be extremely difficult, as it is typically impeded by privately set access charges. Unlike the U.S. Code and the rest of the C.F.R., there is no assured free access to IBR rules either online or in the nearly 1800 government depository libraries. Under OFR's approach, these standards can be freely read by the public in the Washington, D.C. reading room of the Office of the Federal Register, but only by written request for an appointment.<sup>15</sup> Apart from this, OFR refers the public to the SDO. These IBR standards accordingly are strewn across many individually-maintained private websites. SDOs also can set a fee for access, typically one that far exceeds the transactions costs, such as copying costs, of making a standard available.

Membership in an SDO usually affords discounted access to its standards, but such memberships are costly; for example, the American National Standards Institute charges \$ 750 per year. Otherwise, access to an individual standard can range from \$40 to upwards of \$1000. The incorporated safety standard for seat belts on earthmoving equipment such as bulldozers is currently priced at \$72,<sup>16</sup> the incorporated safety standard for hand-held infant carriers is \$43,<sup>17</sup> and the current edition of the Food Chemical Codex, which the FDA has incorporated by reference into food additive standards, is priced at \$ 499.<sup>18</sup> As Professor Emily Bremer has reported, the average price for just one incorporated pipeline safety standard is \$150, while a complete set of IBR standards implementing the Pipeline and Hazardous Materials Safety Act cost nearly \$10,000 as of September 2014.<sup>19</sup> The cost of reading the two newly-incorporated-by-

---

<sup>14</sup> 26 C.F.R. 1910.110(b)(3)(i) (incorporating by reference American Society for Mechanical Engineers' Boiler and Pressure Vessel Code (1968 edition)).

<sup>15</sup> See Office of the Federal Register, "Where to Find Materials Incorporated by Reference at NARA Facilities," available at <http://www.archives.gov/federal-register/cfr/ibr-locations.html#why>. Rulemaking agencies also sometimes make the text of IBR rules available for inspection in their own reading rooms, again, typically located in Washington, D.C.

<sup>16</sup> See 29 CFR 1926.602(a)(2)(i) (incorporating Society of Automotive Engineers Standard J386-1969); [standards.sae.org/j386\\_196903/](http://standards.sae.org/j386_196903/). The price of \$72 is for the current revision of Standard J386. It is unclear whether the 1969 version can be accessed at all on SAE's website.

<sup>17</sup> See 16 C.F.R. 1225.2 (incorporating by reference ASTM F 2050-13a); [www.astm.org](http://www.astm.org). The standard is inexplicably absent from the online reading room ASTM maintains for government-incorporated standards.

<sup>18</sup> See 21 C.F.R. 172.185(a) (test methods standard for TBHQ in the food additive); [https://store.usp.org/OA\\_HTML/ibeCCtPltmDspRte.jsp?item=344067](https://store.usp.org/OA_HTML/ibeCCtPltmDspRte.jsp?item=344067).

<sup>19</sup> Emily Bremer, On the Cost of Private Standards in Public Law, 63 U. Kansas L. Rev. 279 (2015).

# 106A

reference standards for the packaging and transportation of radioactive material, to avoid radiation leakage in transit, is \$ 213.<sup>20</sup>

The SDOs have no obligation to make standards available at any price, and some standards, particularly older ones, are now simply unavailable from the SDOs. On the other hand, SDOs occasionally charge more for an older version than an agency has incorporated by reference into binding law—a reflection of the newly conferred monopoly value—than for the SDO’s current version of those same standards.<sup>21</sup>

As publicly-filed comments and other public sources indicate, the fees charged for IBR rules significantly obstruct citizens and entities from seeing the text of this law. Regulated entities needing access to incorporated standards are often small businesses for whom the mass of necessary standards may be a significant cost.<sup>22</sup> For example, as the Modification and Replacement Parts Association commented in response to the petition for rulemaking, “The burden of paying high costs simply to know the requirements of regulations may have the effect of driving small businesses and competitors out of the market, or worse endanger the safety of the flying public by making adherence to regulations more difficult due to fees . . . .”<sup>23</sup>

---

<sup>20</sup> See Nuclear Regulatory Commission, Revisions to Transportation Safety Requirements and Harmonization with International Atomic Energy Agency Transportation Requirements, 80 Fed. Reg. 33,988, 34,010-11 (June 12, 2015) (reciting charges for incorporated by reference standards).

<sup>21</sup> For example, the American Herbal Products Association charges \$250 for a digital-rights-protected copy of the first edition of its Herbs of Commerce, use of which is a legal obligation under FDA regulations; the more recent second edition, a “must-have” for anyone in the business but not yet made legally obligatory, can be bought as a book for \$99. Peter Strauss, *Private Standards Organizations and Public Law*, 22 Wm. & Mary Bill Rts. J. 497 (2013).

<sup>22</sup> Public comments filed with the Office of Federal Register made this problem clear. The National Propane Gas Association, an organization whose members are overwhelmingly (over 90%) small businesses, commented in response to OFR’s notice of proposed rule that the costs of acquiring access “can be significant for small businesses in a highly regulated environment, such as the propane industry.” See Comments of Robert Helminiak, National Propane Gas Ass’n, OFR 2013-0001-0019 (Dec. 30, 2013), at 1; Comments of Jerry Call, American Foundry Society, NARA-12-0002-0147 (June 1, 2012), at 1-2 (“Obtaining IBR material can add several thousands of dollars of expenses per year to a small business, particularly manufacturers . . . [T]he ASTM foundry safety standard alone cross references 35 other consensus standards and that is just the tip of the iceberg on safety standards.”); Comments of National Tank Truck Carriers, NARA-2012-0002-0145 (small businesses “have no option but to purchase the material at whatever price is set by the body which develops and copyrights the information. . . . [W]e cite the need for many years for the tank truck industry to purchase a full publication from the Compressed Gas Association just to find out what the definition of a ‘dent’ was. . . . HM241 could impact up to 41,366 parties and . . . there is no limit on how much the bodies could charge . . . .”); Comments of American Foundry Society, NARA-2012-0002-0147 (“\$ 75 is not much for a standard, but a typical small manufacturer, including a foundry, may be subject to as many as 1000 standards. The ASTM foundry safety standard alone cross-references 35 other consensus standards and that is just the tip of the iceberg . . .”).

<sup>23</sup> See Comment of the Modification & Replacement Parts Ass’n 14 (Regulations.Gov, filed June 1, 2012), available at



And given the access fees charged, members of the public affected by regulatory frameworks relying upon IBR rules likely cannot afford to read these standards. For example, a staff attorney at Vermont Legal Aid filed a public comment indicating that the costs of accessing IBR rules interfered with the ability of Medicare recipients to know their rights.<sup>24</sup>

In a positive development, some of the many SDOs have begun to create online reading rooms in which IBR rules can be viewed without payment of a fee. But standards are still very hard to locate, not consistently available, and readers must identify themselves, waive a variety of rights, and even agree to objectionable conditions, including broad indemnification and forum selection clauses, in order to see the text of the rules. And SDOs uniformly reserve the right to revoke the access at will. This insufficiently assures meaningful public access.

Agency use of IBR rules raises two particularly pressing issues. The first is the lack of consistent and meaningful public access to the text of these binding federal rules. While IBR rules are not formally secret, the financial obstacles that must be overcome to read the text undermine any notion of meaningful public availability. Second, the lack of access to proposed IBR rules, as well as supporting data, undermines the public's right to comment on proposed agency rules under the Administrative Procedure Act.

The present resolution would put the ABA on record in support of the principle of meaningful public access to law, as well as public participation in federal regulation. The ABA should speak now for two reasons: First, as described below, the Office of the Federal Register has recently declined an opportunity to use its Freedom of Information Act implementation powers to effectuate these principles. Second, agency use of privately-drafted rules is likely to increase, given continuing agency resource constraints, as well as executive and congressional policy favoring agency use of privately drafted rules in preference to "government-unique" rules.<sup>25</sup> Unfortunately, neither policy has

---

<http://www.regulations.gov/contentStreamer?objectId=09000064810266b8&disposition=attachme&contentType=pdf>

<sup>24</sup> *E.g.*, Comments of Jacob Speidel, Senior Citizens Law Project, Vermont Legal Aid, OFR-2013-0001-0037 (Jan. 31, 2014), at 1 (price precludes "many Vermont seniors" from accessing materials). *See also* Comments of Robert Weissman, Public Citizen, OFR 2013-0001-0031 (Jan. 31, 2014), at 1 (reporting on behalf of multiple nonprofit, public interest organizations that "free access . . . will strengthen the capacity of organizations like ours to engage in rulemaking processes, analyze issues, and work for solutions to public policy challenges . . . and strengthen citizen participation in our democracy"); Comments of George Slover and Rachel Weintraub, Consumers Union and Consumers Federation of America, OFR 2013-0001-0034 (Jan. 31, 2014) (noting importance of transparent standards to identify products that are not in compliance with applicable standards so as to notify the agency and alert consumers).

<sup>25</sup> *See* National Technology Transfer and Advancement Act of 1995, sec. 12(d), 15 U.S.C. § 272 note (2012); Office of Mgmt & Budget, Circular A-119 Revised; Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities para. 1 (1998), available at [http://whitehouse.gov/omb/circulars\\_a119](http://whitehouse.gov/omb/circulars_a119).

directly engaged the resulting public access problems.<sup>26</sup> Only Congressional action will remedy this unsatisfactory situation. A clear and strong statement by the ABA on the topic should help prompt such action.

## II. DISCUSSION

### A. The Bedrock Principle of Public Access to the Law Should Be Reaffirmed in the IBR Rules Setting

IBR rules are not formally “secret”—access is not prohibited outright. Self-evidently, however, the cost of reading it, together with the difficulty of finding it, render these standards inaccessible to the public. At root, there must be meaningful free access to all incorporated rules, if the evils of “secret law” that the Freedom of Information Act was established to resist are to be avoided. In the words of Columbia Law Professor Peter Strauss, joined by numerous other professors: “[I]n the age of information, secret law, that the public must pay for to know, is unacceptable.”<sup>27</sup> The ABA accordingly should resolve that the Freedom of Information Act be clarified to ensure meaningful levels of free public access to all binding law.

#### 1. As the authors and owners of the law, the public has a right to know it

First, free public access to the law is essential in a democratic society. As the 5<sup>th</sup> Circuit explained in *Veeck v. Southern Bldg. Code Cong. Int'l*, free public access to the law serves “the very important and practical policy that citizens must have free access to the laws which govern them” if they are to be able to conform their conduct to them.<sup>28</sup> *Veeck* relied principally on the Supreme Court’s holding in *Banks v. Manchester* that “[i]t is against sound public policy to prevent [free access to judicial opinions], or to suppress and keep from the earliest knowledge of the public the statutes.”<sup>29</sup> As explained in *Veeck*, these justifications are not simply “due process” arguments. Rather, they rest on the idea that “public ownership of the law means precisely that ‘the law’ is in the ‘public domain’ for whatever use the citizens choose to make of it.”<sup>30</sup>

This “right to know” accrues to *all* citizens, not just those who must conform their conduct to the law. Broad public access to IBR material, is as important as access by directly regulated entities. “Th[e] ‘metaphorical concept of citizen authorship’” requires free public access to the law as a foundation to a legitimate democratic society. “The

---

<sup>26</sup> Concerns about the pitfalls of incorporation by reference were also highlighted in a recent recommendation of the Administrative Conference. See ACUS Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (2012).

<sup>27</sup> Incorporation by Reference, 77 Fed. Reg. 11,414, 11,415 (Feb. 27, 2012) (posting of law professors’ petition to revise IBR rules; seeking comment on same).

<sup>28</sup> 293 F.3d 791, 795-800 (5th Cir. 2002) (en banc).

<sup>29</sup> See 128 U.S. 244, 253 (1888) (quoting *Nash v. Lathrop*, 142 Mass. 29, 6 N.E. 559 (1886)).

<sup>30</sup> 293 F.3d at 799.

citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.”<sup>31</sup> Thus, even those who need not conform their conduct to regulatory requirements have a right to know. As public comments filed to the Office of the Federal Register and the Office of Management and Budget make clear, the public has an interest in reading IBR material.<sup>32</sup>

Ready access to standards that have been incorporated by reference is necessary for citizens to know what their government is doing and to hold the government accountable for serving – or not serving – the public interest. As President Obama stated in his Memorandum on Transparency and Open Government, on January 21, 2009: “Transparency promotes accountability and provides information for citizens about what their Government is doing.” This transparency, including public access to the content of regulations, is a critical safeguard against agency capture and other governance problems. Transparency regarding the content of IBR standards is particularly important when that material has been prepared, in the first instance, by private organizations rather than governmental agencies – as when, for example, natural gas pipeline safety rules and offshore oil drilling rules incorporate standards drafted by the American Petroleum Institute, and even when motor vehicle safety standards incorporate standards drafted by the Society of Automotive Engineers. We note that regulatory standards created by industry associations such as the API, compared with professionally focused organizations such as ASME, the American Society of Mechanical Engineers, may raise particular concerns warranting public awareness. Still, this is not to criticize any particular standard or organization, but to emphasize that transparency and ready access are critical to ensuring that the government makes proper use of *all* incorporated material and that adopted standards do, in fact, protect the public interest as required by statute. And as the 5<sup>th</sup> Circuit pointed out in *Veeck*, citizens need access to the law not only to guide their actions and to hold the government accountable, but “to influence future legislation” and to educate others.<sup>33</sup>

---

<sup>31</sup> *Veeck*, 293 F.3d at 799 (quoting *Building Officials & Code Adm. v. Code Technology*, 628 F.2d 730, 734 (1<sup>st</sup> Cir. 1980)).

<sup>32</sup> See *supra* note 24 (Vermont Legal Services comment); NARA-12-0002-0140 (Consumers Union, emphasizing the need for free access to standards to notify the CPSC and warn consumers regarding unsafe products); OMB-2012-0003-0074 (public interest organizations, including environmental, watchdog, and library organizations, emphasizing need for free access to engage government and public on range of public policy issues); NARA-12-0002 (“A concerned Citizen,” noting that knowledge of airbag standards allows citizen to be “a more educated consumer”). Public comments on access issues were filed in an Office of the Federal Register rulemaking on whether to revise its criteria for revising IBR rules; comments also were filed in a 2012 Office of Management Budget proceeding on whether to revise Circular A-119. As of October 2015, Circular A-119 remains unrevised.

<sup>33</sup> 293 F.3d at 799.

## 2. Limits on public access raise constitutional difficulties

The current system may raise constitutional difficulties by allowing agencies to reference incorporated material, when the public must pay to see that material. (Travel to a Washington, D.C., reading room will not, for most, be a viable alternative.) First, impediments to a regulated entity's ability to access government standards raises due process concerns. As noted, small businesses have complained that the access fees charged to read the text of the law can be a significant obstacle to their ability to learn their legal obligations. In the context of whether to sustain a changed agency interpretation of a rule, the Supreme Court has endorsed "the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires,'" and that due process thus bars the imposition of sanctions upon someone who could not have received notice of his or her obligations.<sup>34</sup>

The current use by agencies of incorporated private material without meaningful public access is constitutionally suspect for a second reason as well. The public cannot discuss or criticize the government's decisions if the substance of those decisions is not available. As the Supreme Court noted in refusing to uphold a statute that would close criminal trials, "'a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' [This] serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.'"<sup>35</sup> The potential significant charges to read IBR standards raises heightened constitutional concerns, because the thousands of IBR standards are wide-ranging in subject, affecting numerous industries, and quasi-legislative in character, with broad and prospective effect. An assurance of free access only in a Washington, D.C. reading room is insufficient. The obstacles to access that must be overcome -- the charges and travel impediments -- effectively deny the public's right to know and discuss government actions. Legislative history accompanying the Freedom of Information Act draws the same link: "The right to speak and the right to print, without the right to know, are pretty empty.'" See H. Rept. No. 1497, 89th Cong., 2d Session 2 (1966) (quoting Dr. Harold Cross). Significant access charges for regulatory standards are a real obstacle to knowing their content, and indeed, the Supreme Court has invalidated much smaller

---

<sup>34</sup> *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2167-68 (2012) (alteration in original) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)(Scalia, J).

<sup>35</sup> *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 604 (US 1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); see also *Press Enterprise v. Superior Court*, 478 U.S. 1 (1986) (refusing to approve closure of preliminary hearing). Cf. *In re Gitto Global Corp.*, 422 F.3d 1 (1<sup>st</sup> Cir. 2005) ("Only the most compelling reasons can justify non-disclosure of judicial records."); *Leigh v. Salazar*, 677 F.3d 892, 900 (9<sup>th</sup> Cir. 2012) ("[A] court cannot rubber-stamp an access restriction simply because the government says it is necessary. By reporting about the government, the media are 'surrogates for the public.'" (requiring consideration of public right of access to view Bureau of Land Management horse roundups).

charges as inconsistent with similar core principles of democratic government, such as the right to vote.<sup>36</sup>

**3. IBR rules must be broadly available; assuring meaningful free access only to regulated entities is insufficient**

The need for public notice of the contents of federal regulations goes well beyond the regulated entities tasked with complying with them. Congress enacts regulatory statutes specifically to guard wide swaths of the public, and the public accordingly has a specific interest in the content of rules. Consumers of food and toys, parents who wish to purchase infant carriers, strollers, walkers, or infant bath seats, those who rely on ocean fishing for their livelihood, or neighbors of a pipeline or propane tank – all of these individuals are obviously affected by these standards, and should be entitled to notice of them. For one last example, the Department of Transportation Pipeline and Hazardous Materials Safety Administration requires natural gas pipeline operators to institute “public awareness programs” to provide public information and public communications regarding spills according to an IBR standard of the American Petroleum Institute. 49 C.F.R. § 192.616 (incorporating API Standard 1162). Community members who reside near natural gas pipelines at risk from a spill are obviously affected by the scope of public communication requirements. Standards such as these must be meaningfully available both to pipeline operators and to the community. The content of these standards can affect individual choices of which toys or infant carriers to buy, where to live, and whether to file public comments with the regulating agency or write one’s member of Congress. In short, regulatory beneficiaries have a cognizable stake in these standards, and the content of the standards can affect their conduct. They therefore need notice of the text as well; meaningful public access without cost has to be understood as essential.

**4. The public must be able to locate the law.**

Public access principles require not only the provision of meaningful free access to the text of the law, but that the law be reasonably easy to locate. IBR rules are referenced in the Code of Federal Regulations, but the text of the rules is often very hard to find. IBR rules are distributed across a wide variety of differently-organized websites, and neither the online CFR nor Federal Register typically contains any sort of specific link to the IBR rule’s text. The current distribution of IBR rules in numerous locations

---

<sup>36</sup> Cf. *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 666-68 (1966) (invalidating state \$1.50 poll tax as effective denial of right to vote). OFR’s approval of IBR rules under this system of private fees may also raise equal protection concerns, given the central importance, in a democracy, of public access to the law’s text. In other settings, the courts have relied on equal protection grounds to invalidate comparable fees imposed upon participation in government. *Harper v. Virginia Bd. Of Elections*, *supra*; *Lubin v. Panish*, 415 U.S. 710, 717–18 (1974) (striking down \$701 filing fee requirement for California election, given “our tradition . . . of hospitality toward all candidates without regard to their economic status.”). For many rules, moreover, budget constraints may be connected with substantive interests; access constraints will distinctively, systematically disadvantage those interests. For example, consumers will likely have smaller budgets than manufacturers; neighbors to a pipeline will likely have smaller budgets than the pipeline operator.

makes each obscure, raising the same sorts of concerns that prompted the passage of the Federal Register Act.<sup>37</sup> Further, although agencies are required to “summarize” in the preamble to a final rule “the material it incorporates by reference,”<sup>38</sup> that summary does not include the full text, and in any event, preambles are published neither in the Code of Federal Regulations nor on agency websites containing regulations. The ABA accordingly should resolve not only that meaningful levels of free access be provided to IBR rules, but that such access enable the public to readily find the text of those rules.

## 5. Current law as implemented has failed to ensure sufficient public access to the law

One might think that these interests would already be protected under the Freedom of Information Act’s Section 552, which requires, as a condition of Office of Federal Register approval of incorporation by reference, that incorporated material be “reasonably available” to the “class of persons affected thereby.” 5 U.S.C. § 552(a)(1). Indeed, the legislative history accompanying 5 U.S.C. § 552’s incorporation by reference provisions made clear its concern with widespread public access, not simply that the IBR material would not be formally secret: “*Any member of the public* must be able to familiarize himself with the enumerated items . . . by the use of the Federal Register, or the statutory standards mentioned above will not have been met.” S. Rep. No. 1219, 88th Cong., 2d Sess. 5 (1964) (emphasis added).

Arguments could be made that the Freedom of Information Act’s “reasonably available” language, particularly in this age of information, already requires meaningful levels of free access to all incorporated standards not only to regulated entities, but to regulatory beneficiaries and the public at large. Implementation, however, has fallen far short of this understanding. In November 2013, the Office of the Federal Register began a rulemaking on its “incorporation by reference” approval procedures in response to a 2012 rulemaking petition led by Columbia Law School Professor Peter L. Strauss and joined by numerous law professors. The petition had asked OFR to approve IBR rules only if free read-only access to the text were provided to the public.<sup>39</sup> Despite embarking on a rulemaking, OFR ultimately declined to significantly revise its approach.<sup>40</sup> The Office of Federal Register has continued to approve the incorporation by reference of standards that remain difficult to locate and expensive to read.

<sup>37</sup> Erwin Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 Harv. L. Rev. 198, 204, 205, 294 (1934) (distribution of federal rules among “pamphlets” or upon a “single sheet of paper” amounted to “chaos” and an “intolerable” situation). See Federal Register Act of 1935, 74 Pub. L. 220, 49 Stat. 500-503 (H.R. 6323) July 26, 1935.

<sup>38</sup> 1 CFR 51.5(a)(2); 1 CFR 51.5(b)(3) (2015).

<sup>39</sup> See Office of the Federal Register, *Incorporation by Reference (Partial Grant of Petition, Notice of Proposed Rulemaking)*, 78 Fed. Reg. 60,784 (Oct. 2, 2013).

<sup>40</sup> Rather than requiring any greater public access to the text of incorporated standards, OFR essentially reaffirmed the status quo, adding only a requirement that the rulemaking agency seeking approval of an incorporation by reference explain “the ways that the materials it incorporates by reference are reasonably available to interested parties” and “summarize” the incorporated material. See 1 C.F.R. 51.5(b)(2), (3).

Accordingly, Congressional action to clarify the requirements of the Freedom of Information Act and the Administrative Procedure Act is now critical.

## **6. Other concerns do not justify sacrificing the bedrock principle of ensuring meaningful public access to the law**

SDOs typically favor and sometimes even seek having their privately drafted standards adopted as the law of the land, and agencies undoubtedly find it useful to draw upon this stock of standards. But SDOs also have raised concerns that agreeing to meaningful free public access will result in undercompensation for the cost of preparing these standards even if SDOs can still sell books of standards to the public.

These standards surely can be valuable, and SDOs consistently claim a copyright in them. The ABA need not resolve that the considerations that mandate meaningful public availability of incorporated standards necessarily require invalidation of the SDOs' copyrights in those standards. The doctrine governing whether copyright persists in text that is first developed by private-sector entities and subsequently adopted into law is complex and fact-specific, and accordingly is beyond the scope of the Resolution.<sup>41</sup> Very often, so little of a full SDO standard is incorporated by reference as to constitute fair use, and to defeat any claim that publication of the incorporated material would diminish the value of the whole. Agencies can be encouraged to minimize the extent of their incorporations to this end. Moreover, legislation to implement this resolution could also address the issue, such as by clarifying the continuing validity of copyrights in IBR materials made publicly available as recommended here or by addressing compensation an agency could offer an SDO for the use of its privately drafted standards.<sup>42</sup> Some SDOs

---

<sup>41</sup> See *Veeck v. Southern Building Code Cong. Int'l, Inc.*, 293 F.3d 791 (5<sup>th</sup> Cir. en banc 2002), cert. denied, 537 U.S. 1043 (2002); *Practice Management Info. Corp. v. American Medical Ass'n*, 121 F.3d 516 (9<sup>th</sup> Cir. 1997), cert. denied, 522 U.S. 933 (1997); *CCC Information Svc v. MacLean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), cert. denied, 516 U.S. 817 (1995).

<sup>42</sup> Though the law in this area is far from clear, an agency that republishes the text of a copyright-protected standard, over the drafting organization's objection and with harm to the standard's commercial value, could, under some circumstances, lose a "fair use" claim and instead face copyright infringement liability or even liability for taking property without just compensation. 28 U.S.C. § 1498(b) (2006); see generally Office of Legal Counsel, U.S. Department of Justice, *Whether and Under What Circumstances Government Reproduction of Copyrighted Materials is a Noninfringing "Fair Use" Under Section 107 of the Copyright Act of 1976*, 1999 WL 3390240 (1999), at \* 3-4 ("The case law provides very little guidance, [but] there is no basis for concluding that the photocopying . . . by the federal government automatically . . . constitutes a fair use."); *id.* at \*11 (concluding that although government photocopying can be "nonfringing," there is no 'per se' rule protecting government reproduction of copyrighted material). Perhaps because of the potential legal risks, we are unaware of cases in which agencies have published the text of standards over the objection of the SDO. Cf. Office of Management and Budget Circular A-119, 63 Fed. Reg. 8555 (Feb. 19, 1998) (calling on an agency publishing a voluntary standard to "observe and protect the rights of the copyright holder and any other similar obligations").

# 106A

affirmatively seek incorporation by reference of their standards; others receive financial contributions from agencies specifically to finish a particular standard that the agency can then incorporate; some may benefit because there is a larger market for either their current or superseded standards.

Providing some level of meaningful free public access to these standards, such as through online access or in government depository libraries, does seem unlikely to impair the future development of these standards or the ability of agencies to incorporate them. As noted, some SDOs have recently set up free online reading rooms for their standards that have been incorporated by reference. These actions blunt any concern that the supply of voluntary consensus standards on which agencies can draw will be significantly impacted if some level of free public access to the text is required. SDOs will still be able to earn revenue by selling books of standards, and demand may increase as a result of government incorporation of such standards. In addition, there may be other solutions to this concern, whether through agency negotiation with SDOs or payments to them. Agencies already can and do contribute funds to the SDO standards development process, and executive policy encourages agency staff participation in the SDO process.<sup>43</sup>

Agencies should seek the SDO's agreement to meaningful public access prior to utilizing a privately drafted standard. Under some circumstances, it may be appropriate for an agency to offer an SDO compensation for use of a standard as part of reaching an agreement.<sup>44</sup> Accordingly, the Resolution urges Congress to provide for such compensation.

On the other hand, it is abundantly clear that requiring individuals to pay a significant fee, or to travel to Washington, D.C., to see the text of the binding law, substantially burdens public access. The potential need in some cases for agencies to offer compensation to the drafters of private standards to ensure public access to the text should not defeat the obligation of government agencies to make legally binding regulations available to the public.

---

<sup>43</sup> Office of Mgmt. & Budget, Circular No. A-119 Revised: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities para. 1 (1998), available at [http://www.whitehouse.gov/omb/circulars\\_a119](http://www.whitehouse.gov/omb/circulars_a119).

Both the NTTAA and OMB Circular A-119 affirmatively encourage agency staff participation in the SDO processes that develop standards, *see* Pub. L. 104-113, sec. 12(d)(2) (Mar. 7, 1996), and Circular A-119 also contemplates financial contributions of the SDO process. While this may be sensible, in the absence of public access to SDO materials, it can have two problematic consequences. First, it leaves understanding of supporting science and rationales in private hands, thus evading the APA's public notice-and-comment rulemaking process not only by concealing what is being proposed, but also by hiding the support for it. Second, it creates the appearance, and potentially the reality, of agency staff promoting a regulatory agenda in an effectively *ex parte* context.

<sup>44</sup> Such opportunity for compensation, if Congress were to make it available, should not be understood to foreclose an SDO's ability to seek compensation by other means if necessary. *See supra* note 41.



The Resolution does not suggest any specific resolution of these concerns. Instead, the ABA should simply resolve that Congress enact legislation that at its core bars the outcome that requires a reader to pay significant fees in order to read the binding law of the land.

**B. To effectuate the statutory right to participate in rulemaking, the Administrative Procedure Act should be clarified to ensure that the public receives meaningful access to the substance of a proposed IBR rule.**

As well-established elements of the rulemaking process require, an agency's notice of proposed rule must be published in the Federal Register with the detail needed to facilitate a meaningful opportunity to comment.<sup>45</sup> These procedural requirements, which are fundamental to ensuring the continued validity and legitimacy of agency rulemaking, require that "interested persons" must be able to participate in rulemaking by submitting "data, views, or arguments" -- public comments--to the agency.<sup>46</sup> An "interested person" cannot meaningfully exercise his or her right to comment without access to the substance of the standard on which comment is to be filed.<sup>47</sup> Requiring an "interested person" to pay a fee to learn the content of a proposed rule is a significant obstacle impeding that person's right to comment under Section 553(c).

### III. CONCLUSION

In short, the ABA should resolve—simply—three propositions. First, the ABA should resolve that the Freedom of Information Act be clarified to require meaningful levels of free public access to the text of all binding law. That meaningful free public access could be provided online, for example, or in depository libraries. To ensure that the public can readily locate IBR standards, the access ought to be in a centralized location. If not the government depository library system or live online links in the Code of Federal Regulations, IBR standards at least should be available through a single federally-maintained website. To the extent any disruption would be triggered by this Resolution—perhaps an agency might have to negotiate some level of public access as a condition of incorporating a particular standard by reference or provide compensation to an SDO for financial losses occasioned by the use of its standard—the impact is worth bearing in order to bring FOIA's standard of "reasonabl[e] availabil[ity]" into the Information Age and to effectuate the bedrock principle that the law, in a democracy, must be meaningfully available to the public.

And second, no standard should become part of binding federal regulatory law without the public being assured of the full opportunity to participate normally afforded

<sup>45</sup> 5 U.S.C. § 553(b)(3); *Long Island Care at Home v. Coke* 551 U.S. 158, 174 (2007) ("The object [of 553(b)], in short, is one of fair notice.").

<sup>46</sup> 5 U.S.C. § 553(c).

<sup>47</sup> Cf. *Portland Cement v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977) (requiring agencies to disclose data to effectuate meaningful right to public comment).

# 106A

by section 553 of the Administrative Procedure Act. Therefore, the ABA should resolve that section 553 be clarified to require meaningful free public availability, during the public comment period, of a proposed IBR standard's text.<sup>48</sup>

Finally, the ABA should resolve that, in order to effectuate these critical principles, Congress should ensure that agencies are able, where appropriate and necessary, to compensate private organizations for financial losses attributable to making their standards publicly available.

Respectfully submitted,

Jeff Rosen, Chair  
Section of Administrative Law and Regulatory Practice

February 2016

---

<sup>48</sup>

Although 5 U.S.C. § 553(b)(3) formally authorizes an agency merely to give notice of a “description of subjects and issues involved,” as a practical matter agency notices of proposed rule generally contain text the agency is proposing to promulgate. (Advance notices of proposed rulemaking are more frequently phrased in general terms.) The ABA accordingly should resolve that the text of proposed IBR rules also be made publicly available to make meaningful the right to comment.

GENERAL INFORMATION FORM

Submitting Entity: Section of Administrative Law and Regulatory Practice

Submitted By: Jeff Rosen, Section Chair

1. Summary of Resolution(s).

To effectuate the bedrock principle of public access to the law, the resolution urges Congress to strengthen the Freedom of Information Act and Administrative Procedure Act to ensure meaningful free public access to the text of all binding federal rules. The resolution responds to the current use in federal rules, by agencies, of thousands of privately drafted standards that the public must pay to view. The resolution also urges Congress to ensure meaningful free public availability of a proposed standard's text during the public comment period.

2. Approval by Submitting Entity.

The Council of the Section of Administrative Law and Regulatory Practice voted to approve the resolution on November 10, 2015.

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?

None are directly relevant.

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.

Policy could be implemented by legislative action.

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

None.

# 106A

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

Business Law Section  
Civil Rights and Social Justice Section  
Government and Public Sectors Lawyers Division  
Intellectual Property Law Section  
Science & Technology Law Section

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

Professor Nina A. Mendelson  
University of Michigan Law School  
625 S. State St.  
Ann Arbor, MI 48109  
(734) 936-5071 (o)  
[nmendel@umich.edu](mailto:nmendel@umich.edu)

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.)

H. Russell Frisby, Jr.  
Stinson Leonard Street  
1775 Pennsylvania Ave., NW  
Suite 800  
Washington, D.C. 20006  
(202) 572-9937  
(202) 255-4320  
[russell.frisby@stinson.com](mailto:russell.frisby@stinson.com)

Professor Ronald M. Levin  
Washington University School of Law  
Campus Box 1120  
St. Louis, MO 63130  
(314) 936-6490  
(314) 882-3039 (cell)  
[levin@wulaw.wustl.edu](mailto:levin@wulaw.wustl.edu)

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

To effectuate the bedrock principle of meaningful public access to the law, the resolution urges Congress to strengthen public availability to the text of all federal regulations. Meaningful free access should be afforded both when agencies propose adoption of these standards and after promulgation as final rules.

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

Federal agencies currently “incorporate by reference” thousands of outside standards into binding federal regulations. Free public access to the text is reliably provided only in the Office of the Federal Register’s reading room in Washington, D.C. Otherwise a reader may be required to pay substantial access fees set by drafting organizations, significantly obstructing public access, particularly by individuals and small businesses. The right to comment on an agency’s proposed “incorporation by reference” of such standards into federal regulations is also impeded by the lack of public access to the text.

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

The resolution urges Congress to amend the Freedom of Information Act to ensure meaningful levels of free public availability to all federal regulations, including text that is “incorporated by reference.” Such public access could be afforded through centralized online access, for example, or in government depository libraries. The resolution also urges Congress to amend the Administrative Procedure Act’s rulemaking provisions to require meaningful free public availability of such text during the public comment period.

As a safeguard against the (probably remote) possibility that the prospect of free public access might induce a drafting organization to decline to make its standard available for incorporation, the report also recommends that Congress should ensure that agencies have access to the ability to compensate such organizations where appropriate.

### 4. Summary of Minority Views

None identified.



**AMERICAN BAR ASSOCIATION**  
**SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges Congress to amend the rulemaking  
2 provisions of the Administrative Procedure Act (“APA”). Specifically, Congress should:

3  
4 1. Codify the requirement that an agency fully disclose data, studies, and other information upon  
5 which it proposes to rely in connection with a rulemaking, including factual material that is  
6 critical to the rule that becomes available to the agency after the comment period has closed and  
7 on which the agency proposes to rely;

8  
9 2. Provide for the systematic development by the agency in each rulemaking of a rulemaking  
10 record as a basis for agency factual determinations and a record for judicial review. The record  
11 should include any material that the agency considered during the rulemaking, in addition to  
12 materials required by law to be included in the record, as well as all comments and materials  
13 submitted to the agency during the comment period. The record should be accessible to the  
14 public via an online docket, with limited exceptions allowed, such as for privileged, copyrighted,  
15 or sensitive material;

16  
17 3. Establish a minimum comment period of 60 days for “major” rules as defined by the  
18 Congressional Review Act, subject to an exemption for good cause;

19  
20 4. Clarify the definition of “rule” by deleting the phrases “or particular” and “and future effect”;  
21 update the term “interpretative rules” to “interpretive rules”; and substitute “rulemaking” for  
22 “rule making” throughout the Act;

23  
24 5. Authorize a new presidential administration to (i) delay the effective date of rules finalized but  
25 not yet effective at the end of the prior administration while the new administration examines the  
26 merits of those rules, and (ii) allow the public to be given the opportunity to comment on  
27 whether such rules should be amended, rescinded or further delayed;

28  
29 6. Promote retrospective review by requiring agencies:

- 30  
31 a. When promulgating a major rule, to publish a plan (which would not be subject to  
32 judicial review) for assessing experience under the rule that describes (i) information the  
33 agency believes will enable it to assess the effectiveness of the rule in accomplishing its  
34 objectives, potentially in conjunction with other rules or other program activities, and (ii)  
35 how the agency intends to compile such information over time;
- 36

# 106B

b. On a continuing basis, to invite interested persons to submit, by electronic means, suggestions for rules that warrant review and possible modification or repeal;

7. Add provisions related to the Unified Regulatory Agenda that would require each participating agency to (i) maintain a website that contains its regulatory agenda, (ii) update its agenda in real time to reflect concrete actions taken with respect to rules (such as initiation, issuance or withdrawal of a rule or change of contact person), (iii) explain how all rules were resolved rather than removing rules without explanation, (iv) list all active rulemakings, and (v) make reasonable efforts to accurately classify all agenda items. All agencies with rulemaking plans for a given year should also participate in the annual Regulatory Plan published in the spring Unified Agenda. These provisions should not be subject to judicial review;

8. Repeal the exemptions from the notice-and-comment process for “public . . . loans, grants [and] benefits” and narrow the exemptions for “public property [and] contracts” and for “military or foreign affairs functions”; and

9. Require that when an agency promulgates a final rule without notice-and-comment procedure on the basis that such procedure is impracticable or contrary to the public interest, it (i) invite the public to submit post-promulgation comments and (ii) set a target date by which it expects to adopt a successor rule after consideration of the comments received; provided that:

a. If the agency fails to replace the interim final rule with a successor rule by the target date, it should explain its failure to do so and set a new target date;

b. The adequacy of the agency’s compliance with the foregoing obligation would not be subject to judicial review, but existing judicial remedies for undue delay in rulemaking would be unaffected; and

c. The preamble and rulemaking record accompanying the successor rule should support the lawfulness of the rule as a whole, rather than only the differences between the interim final rule and the successor rule.

FURTHER RESOLVED, That the American Bar Association recommends that federal agencies experiment with reply comment processes in rulemaking, such as by (a) providing in advance for a specific period for reply comments; (b) re-opening the comment period for the purpose of soliciting reply comments; or (c) permitting a reply only from a commenter who demonstrates a particular justification for that opportunity, such as a specific interest in responding to specified comments that were filed at or near the end of the regular comment period.



## REPORT

The Administrative Procedure Act (APA) has been in effect for almost seventy years. The rulemaking process has evolved in many ways not anticipated in 1946. This evolution has been driven both by innovations in administrative practice and by a burgeoning body of case law. While the basic chassis of the APA has been shown to be fundamentally sound, a variety of updates to the APA's rulemaking provisions deserve serious consideration. This Report outlines nine recommendations for such updates on which a broad consensus exists within the Section of Administrative Law and Regulatory Practice. It also explains a related recommendation to encourage the use of "reply comment" processes in rulemaking.

### **I. Codify the requirement that an agency fully disclose data, studies, and information upon which it proposes to rely in connection with a rulemaking**

The opportunity to comment on the factual basis for proposed rules is fundamental to the democratic legitimacy of the rulemaking process. Empirical studies and other factual material often have an important impact on how an agency weighs competing concerns in drafting a final rule. We therefore urge amending the APA to require that agencies provide the public with an opportunity to comment on factual material upon which the agency proposes to rely in connection with a rulemaking.

The APA currently requires agencies to give notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."<sup>1</sup> A series of court decisions has interpreted this provision to require agencies to disclose the factual basis for a proposed rule.<sup>2</sup> This is critical to commenting effectively and is a standard feature of modern administrative practice. Yet the requirement is not explicit in the current APA and is still occasionally called into question in the courts.<sup>3</sup> That makes codification highly desirable.

To that end, we advocate adding a provision to 5 U.S.C. § 553 to require agencies, by means of a docket (discussed immediately below), to provide public notice of, and access to, all data, studies, and other information considered or used by the agency in connection with its determination to propose the rule that is not protected from disclosure.

Agencies should also be required to provide the public with an opportunity to respond to factual material which becomes available to the agency after the comment period has closed, which is critical to the rule, and on which the agency proposes to rely.

---

<sup>1</sup> 5 U.S.C. § 553(b)(3).

<sup>2</sup> See, e.g., *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973).

<sup>3</sup> See *Am. Radio Relay League v. FCC*, 524 F.3d 227, 245-47 (D.C. Cir. 2008) (Kavanaugh, J., concurring and dissenting); *AARP v. EEOC*, 489 F.3d 558, 567 (3d Cir. 2007).

These requirements would strike an appropriate balance between ensuring that the public has an opportunity to comment meaningfully on proposed rules and not unduly delaying the rulemaking process.

## II. Specify requirements for a “record” and “docket” for informal rulemaking

A court cannot review an agency rule without a record. Given the attention devoted in administrative case law and scholarship to judicial review of rulemaking, it is surprising that the APA does not require agencies to retain a record for judicial review. To date, the courts have filled this omission. The judicial review provisions of the APA refer to a “record,”<sup>4</sup> and the Supreme Court has long interpreted this provision to apply to informal rulemaking.<sup>5</sup>

The necessity for agencies of maintaining a rulemaking record is therefore firmly established in administrative practice but not in the APA. The ABA has long supported codifying this requirement.<sup>6</sup> To that end, we advocate adding a provision to 5 U.S.C. § 553 providing that agencies must preserve the “whole record” upon which they based an informal rule. Such codification would clarify the legal responsibilities of agencies and provide guidance to courts.

The record should include any material that the agency considered during the rulemaking, in addition to materials required by law to be included in the record, as well as all comments and materials submitted to the agency during the comment period.

The record should be accessible to the public via a docket that the agency should establish for each rulemaking. This disclosure requirement should not be absolute. For instance, agencies should be allowed to withhold privileged information and to comply with applicable copyright protections. Agencies should ensure that all relevant information is placed in the docket for a proposed rule no later than the date when the notice of proposed rulemaking is published, or as soon as possible if the agency comes into possession of the information at a later date. All information submitted in connection with comments on the proposal should also be placed promptly into the docket. An agency’s failure to place information that it possesses into the docket on a timely basis could justify extending the comment period. Given the functional migration of agency dockets to the Internet via [www.regulations.gov](http://www.regulations.gov), this provision should also clarify that such dockets must exist in both electronic and physical form.

---

<sup>4</sup> 5 U.S.C. § 706 (“[T]he court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.”).

<sup>5</sup> See, e.g., *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978).

<sup>6</sup> See 106 ABA ANN. REP. 549, 785 (1981) (1981 ABA Recommendation).

### III. Establish a minimum comment period for proposed major rules

Interested parties need sufficient time to read, consider, and draft meaningful comments on proposed rules. An insufficient comment period may make the notice-and-comment process less deliberative and democratic, produce less-than-optimal results, and increase the likelihood of judicial challenges to the rule. The APA does not, however, specify a minimum time period for which agencies must accept public comments on notice-and-comment rules.

Providing a minimum time period would help ensure that the public has ample opportunity to comment on proposed rules. The ABA has long supported amending the APA to generally require a 60-day comment period.<sup>7</sup> We note that a 60-day comment period is consistent with recommendations in a recent executive order<sup>8</sup> as well as a recent recommendation from the Administrative Conference of the United States (ACUS) for “significant regulatory actions.”<sup>9</sup> Longer comment periods may be appropriate for complex rulemakings.

At the same time, we recognize that many rules are noncontroversial and may not receive any comments. Indeed, the comment period for non-economically significant rules in recent years has averaged less than 39 days.<sup>10</sup> A 60-day comment period will thus be longer than the nature of many rulemakings warrants, or may conflict with a need for expeditious action. On the other hand, rules that qualify as “major” under the Congressional Review Act<sup>11</sup> typically will require that much time for interested persons to understand the agency’s proposal and to develop comments. We therefore support requiring a minimum comment period of 60 days for major rules. To the extent that an agency believes that even a major rule should be subject to a shorter comment period, it should be allowed to set one for good cause, provided it offers an appropriate

---

<sup>7</sup> *Id.* at ¶ 5(a) (recommending a 60-day minimum comment period).

<sup>8</sup> E.O. 13563, § 2(b), 76 Fed. Reg. 3821, 3821-22 (Jan. 21, 2011) (providing that, “[t]o the extent feasible and permitted by law,” agencies should allow “a comment period that should generally be at least 60 days”).

<sup>9</sup> ACUS Recommendation 2011-2, ¶ 2, 76 Fed. Reg. 48789, 48791 (Aug. 9, 2011) (suggesting that agencies should as a general matter allow comment periods of at least 60 days for “significant regulatory actions” and at least 30 days for all other rules).

<sup>10</sup> *See* Stephen J. Balla, Brief Report on Economically Significant Rules and the Duration of Comment Periods (April 19, 2011) (supplemental consultant report in support of ACUS Recommendation 2011-2) at 2.

<sup>11</sup> 5 U.S.C. § 804(2) (defining a “major rule” as “any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment,

# 106B

explanation. We would anticipate that courts would defer to the agency's choice in such cases to the same extent that they currently defer to agency determinations to make a rule effective sooner than 30 days after publication in the Federal Register.<sup>12</sup> The foregoing balances the need to ensure that the public has an opportunity to comment meaningfully on proposed rules with other compelling needs.

## IV. Clarify the definition of "rule"

The APA's definition of "rule"<sup>13</sup> has been a target of criticism since the statute was enacted. The opening words of the definition – "the whole or a part of an agency statement of general or particular applicability and future effect" – are out of keeping with the manner in which administrative lawyers actually use the word "rule" in two respects:

- Taken literally, the current definition's inclusion of "or particular" deems an agency decision to be a "rule" even if it applies only to one party.
- Similarly, the reference to "prospective effect" implies that agency action with retroactive effect cannot be a rule – even though rules may in appropriate circumstances have retroactive effect, particularly where Congress expressly authorizes such rules.<sup>14</sup> It makes more sense for the scope of the prohibition on retroactivity to be addressed directly by these existing administrative law principles as opposed to ambiguously in the definition of a "rule."

To avoid these unintended results, courts frequently apply the commonly understood definition of "rule" notwithstanding the APA definition.<sup>15</sup> The words "or particular" and "and future effect" should therefore be deleted from the definition, leaving the definition to hinge on whether the agency decision is addressed generally (a rule) or to named parties (an order).

---

productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.").

<sup>12</sup> 5 U.S.C. § 553(d)(3).

<sup>13</sup> 5 U.S.C. § 551(4) ("‘rule’ means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing").

<sup>14</sup> See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

<sup>15</sup> See, e.g., Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 383.

This change would reconcile the APA with commonly understood use of the term “rule.” Other prominent authorities have long recognized this common usage, and the recommended change would make the APA consistent with the Model State Administrative Procedure Act, longstanding ABA policy, and prior recommendations of ACUS.<sup>16</sup>

Accordingly, we recommend that the following definition of “rule” replace the definition that appears in 5 U.S.C. § 551(4):

(4) “rule” means the whole or a part of an agency statement of general applicability that interprets, implements or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

We also reiterate our support for updating the term “interpretative rules” to “interpretive rules.” This change would bring the Act into conformity with virtually universal usage.<sup>17</sup>

Finally, we also suggest that the Act be conformed to modern word usage by substituting “rulemaking” for the two-word version “rule making” wherever it appears.

## V. Address “midnight” rules

Outgoing administrations being replaced by one of the other political party are often criticized for issuing rules in their waning days that become effective during the new administration. ACUS recently addressed the issue.<sup>18</sup> Its recommendation opines that incoming administrations should be authorized to delay the effective date of such “midnight” rules while they examine their merits, and that the public should be given the opportunity to comment on whether such rules should be amended, rescinded or further delayed. We propose that either 5 U.S.C. § 553 of the APA be amended to track the ACUS recommendation, or a new provision be added, such as the following:

---

<sup>16</sup> Model State Administrative Procedure Act § 1-102(30) (2010); *The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, 24 ADMIN. L. REV. 389, 389-91 (1972); *Statement of the Administrative Conference on ABA Resolution No. 1 Proposing to Amend the Definition of “Rule” in the Administrative Procedure Act*, 3 A.C.U.S. 61-62 (1973).

<sup>17</sup> See, e.g., *Perez v Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1204 & n.1 (2015) (“[The term . . . ‘interpretive rule’] is the more common phrasing today, and the one we use throughout this opinion.”).

<sup>18</sup> ACUS Recommendation 2012-2, 77 Fed. Reg. 47802 (Aug. 10, 2012).

(x) RULES ADOPTED AT THE END OF A PRESIDENTIAL ADMINISTRATION.—

(A) During the 60-day period beginning on a transitional inauguration day (as defined in section 3349a), with respect to any final rule that had been placed on file for public inspection by the Office of the Federal Register or published in the Federal Register as of the date of the inauguration, but which had not yet become effective by the date of the inauguration, the agency issuing the rule may, without notice and comment, delay the effective date of the rule for not more than 60 days for the purpose of obtaining public comment on whether the rule should be amended or rescinded or its effective date further delayed.

(B) If an agency delays the effective date of a rule under subparagraph (A), the agency shall give the public not less than 30 days to submit comments on whether the rule should be amended, rescinded or allowed to go into effect as written.

## VI. Promote retrospective review

To varying degrees, most rules become out of date with the passage of time. One option for promoting continued timeliness and appropriateness is for agencies to review all of their rules over a specified timeframe. This is the approach of the Regulatory Flexibility Act, at least with respect to rules that have a significant economic impact on a substantial number of small entities.<sup>19</sup> Such an across-the-board approach has multiple shortcomings, however. First, rules are implemented over varying timeframes, and the data necessary to determine if a rule has been effective in accomplishing its objectives may or may not be available at a given date. Second, some rules may be more in need of change than others. Finally, external stakeholders will almost certainly be far more concerned about some rules than others. Agency resources devoted to retrospective review will come necessarily at the expense of issuing new rules or enforcing existing ones, and thus should be focused on the rules with the greatest impact that most warrant review.

The ABA therefore supports two reforms, neither of which would be subject to judicial review, that would take account of these considerations in promoting retrospective review.

First, we recommend that the preamble to each major rule<sup>20</sup> contain a plan that will assist the agency in assessing the effectiveness of the rule in accomplishing its regulatory objectives. Such a plan should identify those objectives and describe information the agency believes will enable it to assess the effectiveness of the rule in accomplishing its objectives. It may be that other rules or program activities of the agency are also directed toward or affect the relevant objectives. In such cases, the plan

---

<sup>19</sup> 5 U.S.C. § 610.

<sup>20</sup> *Supra* note 11

could contemplate assessment of these initiatives collectively. The plan should also describe how the agency intends to compile the relevant information over time. It would be beneficial for agencies to solicit comments on these issues in notices of proposed rulemaking to ensure that the final rule is designed to facilitate the collection of data that will allow evaluation of effectiveness. This recommendation builds upon a recent ACUS recommendation<sup>21</sup> and a memorandum from the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA).<sup>22</sup>

Second, agencies should, on an ongoing basis, invite members of the public to identify rules that particularly warrant review, and should focus on reviewing such rules. Consistent with the shift of the rulemaking process to the Internet, this invitation should permit such "nominations" to be submitted electronically. It could also provide for members of the public to vote for or "like" earlier nominations. We note that agencies need not accept the suggested reforms, prioritize them by their degree of popularity, or even respond to them. But they should at least be receptive to such suggestions from their constituencies and give due regard to the relative breadth of support for particular changes. Section 553(e) currently says: "Each agency shall give interested persons the right to petition for the issuance, amendment, or repeal of a rule." Congress could add thereafter:

Each agency shall, on a continuing basis, invite interested persons to submit, by electronic means, suggestions for rules that warrant retrospective review and possible modification or repeal.

## **VII. Codify and enhance the Unified Regulatory Agenda**

The Unified Regulatory Agenda is an important mechanism for agencies to apprise the public of their upcoming rulemaking activity. Unified Agenda requirements are currently provided by Section 4 of Executive Order 12866,<sup>23</sup> and the Unified Agenda is available on OIRA's website. However, the executive order only requires the agenda to be updated semi-annually. Some agencies now maintain websites that provide more current data on important rulemakings. We recommend codifying the executive order's requirements so they clearly apply to all agencies. Codification should also include a variety of enhancements to the Agenda contained in a recent ACUS recommendation on the topic.<sup>24</sup> The ABA recognizes that compliance with these requirements in the dynamic rulemaking process may not be perfect, and we do not address conditioning issuance of a rule on compliance with Agenda requirements. But the provisions we recommend will help move the Agenda more fully into the Information Age and enable it to fulfill its

---

<sup>21</sup> ACUS Recommendation 2014-5, ¶ 2, 79 Fed. Reg. 75114, 75116 (Dec. 17, 2014).

<sup>22</sup> Memorandum for Heads of Executive Departments and Agencies from Cass Sunstein entitled "Final Plans for Retrospective Analysis of Existing Rules," at 2 (June 14, 2011).

<sup>23</sup> Executive Order 12866, 58 Fed. Reg. 58715 (Sept. 30, 1993).

<sup>24</sup> ACUS Recommendation 2015-1, 80 Fed. Reg. 36757 (June 26, 2015).

# 106B

potential as a vital and useful source of public information about the status of agency rulemaking. We also realize that not all agencies may be able to implement these requirements immediately due to resource constraints or other reasons. Agencies could be given some period of time to comply, and should be given adequate resources to do so.

Section 4 of EO 12866 also requires agencies to issue an annual regulatory plan that describes, among other things, the agency's regulatory objectives and priorities and how they relate to the President's priorities. In recent years, some independent regulatory agencies have stopped submitting such plans. The regulatory activities of such agencies can have major public consequences, and the public deserves to know what such agencies are planning in that regard. They should therefore resume participation in the planning process.

Accordingly, the ABA recommends that:

- Each agency should maintain a website that contains its regulatory agenda. These agency agendas should be updated in real time to reflect concrete actions taken with respect to rules such as initiation, issuance or withdrawal of a rule or change of contact person. Such real-time updates would make the Agenda more useful to the public, but would be ministerial in nature and would not require agencies to continually reassess their priorities.
- The Unified Agenda website should link to agency agenda webpages.
- Agencies should be required to explain how all rules were resolved rather than removing rules without explanation.
- All active rulemakings should be reflected in an entry in the public Agenda.
- Agencies should be required to make reasonable efforts to accurately classify all Agenda items – that is, rules should not be classified as “long-term actions” when the agency contemplates issuing a proposed or final rule within the next year.
- OIRA should be required to publish the Regulatory Plan on an annual basis. Independent regulatory agencies should be required to participate in the Plan.

## VIII. Repeal and update outmoded exemptions

We urge repealing the broad and anachronistic exemption in § 553(a)(2) for “public . . . loans, grants [and] benefits.” Significant public effects arising from the activities of federal agencies are sometimes shielded from public input by this exemption. ACUS has repeatedly called for repeal of this exemption, beginning in 1969,<sup>25</sup> and the ABA has concurred with a minor reservation relating to public property and contracts.<sup>26</sup> We fear that the adverse effect of these exemptions will only increase now that the Department of Agriculture (USDA) has revoked its policy – dating back to 1971 – of

---

<sup>25</sup> ACUS Recommendation 69-8, 38 Fed. Reg. 19782 (1969).

<sup>26</sup> 1981 ABA Recommendation, *supra* note 6, at 783-84, 788.



voluntarily employing notice-and-comment in rulemakings that fall within the terms of the former exemption.<sup>27</sup>

As the ABA did in 1981, we urge Congress to narrow the exemption in § 553(a)(2) for “public property [and] contracts” so that the development and formulation of generally applicable policies with respect to public property and contracts would be governed by § 553.

We also urge narrowing the exemption in § 553(a)(1) relating to “military or foreign affairs functions.” Both the ABA and ACUS have long recommended that this exemption be limited to the scope of the Freedom of Information Act exemption for classified information.<sup>28</sup> Otherwise, rules addressing military and foreign affairs functions should be subject to the public notice-and-comment requirements of § 553 unless they are covered by another exemption.

A requirement that rules in the subject areas of both exemptions must be issued through the normal notice-and-comment process would harmonize well with this recommendation’s overall emphasis on promoting public participation and agency accountability in rulemaking.

#### **IX. Codify existing use of interim final rulemaking for the exercise of the “good cause” exemption and set requirements for the consideration of public comments in final rulemaking**

As emphasized above, the opportunity to comment on the factual basis of rules in advance of their adoption is fundamental to the democratic legitimacy of the rulemaking process. However, there are circumstances in which it is reasonable to allow an agency to engage in rulemaking without providing the public that opportunity. The APA specifically authorizes agencies to do so through the “good cause” exemption, which allows an agency to promulgate a rule without notice and comment when notice and comments would be “impracticable, unnecessary, or contrary to the public interest.”<sup>29</sup> While this allowance is appropriate, we believe that its proper exercise does not negate the public policy value, both to the public and to the agency, of public comment.

ACUS considered agency use of the “good cause” exemption in 1995, and recommended procedures by which an agency would invite “post-promulgation comments.” For instances in which the agency believes notice and comment are “unnecessary,” it recommended “direct final rulemaking,” in which any “significant adverse comment” from the public would be sufficient to prevent the rule from

---

<sup>27</sup> 78 Fed. Reg. 64194 (Oct. 28, 2013)

<sup>28</sup> 1981 ABA Recommendation at 784, 788-89; ACUS Recommendation 73-5, 39 Fed. Reg. 4847 (1974).

<sup>29</sup> 5 U.S.C. § 553(b)(3)(B).

# 106B

automatically becoming final. For instances in which the agency believes notice and comment are “impracticable” or “contrary to the public interest,” it recommended issuance of an “interim final rule,” which would serve simultaneously as a notice of final rulemaking and a request for comments. ACUS further recommended that the agency should, “as expeditiously as possible,” respond to comments and make changes to the rule. It suggested the agency consider setting a deadline for consideration of comments and a termination date for the interim final rule.

Since the 1995 ACUS recommendation, use of interim final rulemaking has become commonplace, to the point that, in some cases, Congress has required the use of interim final rulemaking to meet tight statutory deadlines for rulemaking. With the increase in interim final rulemakings, the number of instances in which agencies do not “finalize” these rulemakings by responding to public comments and making appropriate changes has also increased. This practice risks leaving in place a rule developed without public scrutiny and possibly based on an incomplete or erroneous administrative record. The public policy principles that underlie the authority of each agency to engage in the making of laws should be given full consideration, especially for those regulations initiated under exigent circumstances.

Legislation has been advanced that would address this growing problem by providing that interim rules would cease to have effect if agencies did not respond to comments and reissue the rule within 9-18 months.<sup>30</sup> We are reluctant to establish a single legally enforceable deadline by which such a response must occur – the diversity of rules and the potential scope of competing obligations on an agency both counsel allowing agencies to set a deadline. We note that Congress can – and generally should – set a deadline for the agency to “finalize” an interim final rule whenever it authorizes an agency to issue such a rule. We are also reluctant to establish such a draconian sanction. The APA already contains an adequate remedy in Section 706(1).<sup>31</sup>

Therefore, without commenting on the extent to which federal agencies are exercising the ‘good cause’ exemption appropriately, we recommend that the APA be amended to require that, when an agency promulgates a final rule without notice and comment procedure on the basis that such procedure is impracticable or contrary to the public interest, it should invite the public to submit post-promulgation comments and should set a target date by which it expects to adopt a successor rule after consideration of the comments received. If the agency fails to replace the interim final rule with a successor rule by the target date, it should explain its failure to do so and set a new target date. The adequacy of the agency’s compliance with the foregoing obligation

---

<sup>30</sup> See H.R. 185, § 3 (proposed 5 U.S.C. § 553(g)(2)(B)) (2015). This sanction would not be triggered where notice and comment was “unnecessary.”

<sup>31</sup> 5 U.S.C. § 706(1) (authorizing reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed”).

should not be subject to judicial review, but existing judicial remedies for undue delay in rulemaking should be unaffected.<sup>32</sup>

The preamble and rulemaking record accompanying the successor rule should support the lawfulness of the rule as a whole, rather than only the differences between the interim final rule and the successor rule. This does not require an agency to restate the prior preamble in the subsequent one, but it does require the agency to discuss the information or reasoning supporting the original rulemaking insofar as it is relevant to the later one.

## **X. Encourage experimentation with “reply comment” processes**

ACUS has twice recommended that federal agencies employ “reply comment” processes, in which members of the public can react to comments that have been filed earlier in a rulemaking.<sup>33</sup> Several agencies, most notably the Federal Communications Commission and the Federal Energy Regulatory Commission, have employed the practice routinely, and have indicated that the process is beneficial for two principal reasons: it results in issues being narrowed to their most essential elements, and the prospect of being the subject of reply comments discourages commenters from making maximalist claims in their initial comments.<sup>34</sup>

The ABA does not believe that Congress should mandate use of reply comment periods at this stage. However, we do believe the practice can improve rulemaking and that all agencies should experiment with the process in a way that is reasonably calculated to produce data regarding when and how it can be most beneficial. Accordingly, the ABA urges federal agencies to experiment with reply comment processes in their rulemakings. An agency could, for example, provide in advance that persons who file comments within the comment period on a proposed rule would be entitled, during a second comment round, to file comments limited to responding to points made by other commenters in the first round. An agency could also determine, after the close of a comment period, that the record would benefit if the agency solicited reply comments by reopening the comment period for a specific time. An agency might also permit a commenter to file a reply if the commenter demonstrated a particular justification for that opportunity, such as a specific interest in responding to specified comments that were filed at or near the end of the regular comment period. Agencies

---

<sup>32</sup> These include 5 U.S.C. § 706(1) and actions for mandamus.

<sup>33</sup> See ACUS Recommendation 76-3, ¶ 1(a), 41 Fed. Reg. 29654 (July 19, 1976) (recommending a second comment period in proceedings in which comments or the agency’s responses thereto “present new and important issues or serious conflicts of data”); ACUS Recommendation 2011-2, ¶ 6, 76 Fed. Reg. at 48789 (“Where appropriate, agencies should make use of reply comment periods or other opportunities for receiving public input on submitted comments, after all comments have been posted.”).

<sup>34</sup> See Stephen J. Balla, Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States (March 15, 2011) (consultant report in support of ACUS Recommendation 2011-2) at 12.

# 106B

should seek to gather information that would enable them to evaluate the merits or demerits of approaches that they try.

Respectfully submitted,

Jeffrey A. Rosen, Chair  
Section of Administrative Law and Regulatory Practice  
February 2016

**GENERAL INFORMATION FORM**

Submitting Entity: Section of Administrative Law and Regulatory Practice

Submitted By: Jeffrey A. Rosen, Section Chair

1. Summary of Resolution(s).

The resolution urges Congress to modernize the rulemaking provisions of the Administrative Procedure Act. The APA has grown outdated in a number of respects as agency practice, technology, and judicial doctrine have evolved. Congress has entertained a broad variety of proposed reforms to the Act, most of which have proven highly controversial. The resolution proposes reforms to modernize the Act that are widely supported within (and outside of) the Section of Administrative Law and Regulatory Practice. These reforms are intended to help enhance public participation in the rulemaking process and to provide clearer direction to agencies. Some codify case law or executive order and many of them build on prior recommendations of the ABA or Administrative Conference of the United States.

The resolution urges Congress to amend the Administrative Procedure Act to: 1) codify the requirement that an agency fully disclose data and other information used in rulemaking; 2) codify the requirement that agencies develop a rulemaking record and a public docket for each rulemaking; 3) establish a minimum comment period of 60 days for “major” rules, subject to an exemption for good cause; 4) tighten and clarify several outdated definitions; 5) authorize new presidential administrations to delay the effective date of rules finalized at the end of the prior administration; 6) promote retrospective review of major rules; 7) codify some provisions of the Unified Regulatory Agenda; 8) repeal or narrow several outdated exemptions from the notice-and-comment process; and 9) require agencies to seek post-promulgation comments on some rules issued without notice and comment. The resolution also encourages agencies to experiment with “reply comment” processes.

2. Approval by Submitting Entity.

The Council of the Section of Administrative Law and Regulatory Practice voted to approve the resolution on November 18, 2015.

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

No.

# 106B

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

The resolution would reaffirm multiple aspects of several long-standing ABA policies, particularly 106 ABA ANN. REP. 549, 785 (1981). *See also The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, 24 ADMIN. L. REV. 389, 389-91 (1972). This resolution does not conflict with existing ABA 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)

N/A

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

Policy could be implemented by legislative action.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

Business Law Section  
Government and Public Sectors Lawyers Division  
Intellectual Property Law Section  
Labor and Employment Law Section  
Public Contract Law Section  
Public Utility, Communications and Transportation Law Section  
Science and Technology Law Section

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

James W. Conrad, Jr.  
Conrad Law & Policy Counsel  
1155 15<sup>th</sup> St., NW, Suite 500  
Washington, DC 20005-2725  
202-822-1970  
703-405-1660 (cell)  
[jamie@conradcounsel.com](mailto:jamie@conradcounsel.com)

Connor Raso  
60 L St NE, Apt 1112  
Washington DC 20002  
650-380-8493  
[raso@aya.yale.edu](mailto:raso@aya.yale.edu)

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.)

Professor Ronald M. Levin  
Washington University School of Law  
Campus Box 1120  
St. Louis, MO 63130  
(314) 936-6490  
(314) 882-3039 (cell)  
[levin@wulaw.wustl.edu](mailto:levin@wulaw.wustl.edu)

H. Russell Frisby, Jr.  
Stinson Leonard Street  
1775 Pennsylvania Ave., NW  
Suite 800  
Washington, D.C. 20006  
(202) 572-9937  
(202) 255-4320 (cell)  
[russell.frisby@stinson.com](mailto:russell.frisby@stinson.com)

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The resolution urges Congress to modernize the rulemaking provisions of the Administrative Procedure Act.

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

While it remains a cornerstone of the administrative state, the Administrative Procedure Act has grown outdated in a number of respects as agency practice, technology, and judicial doctrine have evolved. Congress has entertained a broad variety of proposed reforms to the Act, most of which have proven highly controversial. The resolution proposes reforms to modernize the Act that are widely supported within (and outside of) the Section of Administrative Law and Regulatory Practice. These reforms are intended to help enhance public participation in the rulemaking process and to provide clearer direction to agencies. Some codify case law or executive order and many of them build on prior recommendations of the ABA or Administrative Conference of the United States.

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

The resolution urges Congress to amend the Administrative Procedure Act to: 1) codify the requirement that an agency fully disclose data and other information used in rulemaking; 2) codify the requirement that agencies develop a rulemaking record and a public docket for each rulemaking; 3) establish a minimum comment period of 60 days for “major” rules, subject to an exemption for good cause; 4) tighten and clarify several outdated definitions; 5) authorize new presidential administrations to delay the effective date of rules finalized at the end of the prior administration; 6) promote retrospective review of major rules; 7) codify some provisions of the Unified Regulatory Agenda; 8) repeal or narrow several outdated exemptions from the notice-and-comment process; and 9) require agencies to seek post-promulgation comments on some rules issued without notice and comment. The resolution also encourages agencies to experiment with “reply comment” processes.

### 4. Summary of Minority Views

None.



**AMERICAN BAR ASSOCIATION**  
**DIVERSITY AND INCLUSION 360 COMMISSION**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association encourages all state, territorial, and  
2 tribal courts, bar associations and other licensing and regulatory authorities, that have  
3 mandatory or minimum continuing legal education requirements (MCLE) to modify their  
4 rules to:

- 5
- 6 1. include as a separate credit programs regarding diversity and inclusion in the legal  
7 profession of all persons regardless of race, ethnicity, gender, sexual orientation,  
8 gender identity, or disabilities, and programs regarding the elimination of bias  
9 (“D&I CLE”); and
- 10
- 11 2. require a designated minimum number of hours for this separate credit without  
12 increasing the total number of required MCLE hours and without changing the  
13 criteria for MCLE credit.

14 FURTHER RESOLVED, That the American Bar Association, through its Goal III and  
15 other entities, assist in the development and creation of diversity and inclusion continuing  
16 legal education programs to ensure attorneys can meet their MCLE requirements.



## REPORT

### **I. Introduction**

The ABA Diversity & Inclusion 360 Commission (the “Commission”) was created in August 2015 to formulate methods, policy, standards and practices to best advance diversity and inclusion over the next ten years. The Commission was charged with reviewing and analyzing diversity and inclusion in the legal profession, the judicial system, and the American Bar Association. Moreover, the Commission was charged with recommending specific action items to move the needle on diversity and inclusion in an impactful way. The Commission has examined diversity and inclusion related continuing legal education because of its potential to significantly impact the profession, the judicial system and the rule of law.

In 2004, the House of Delegates approved Resolution 110 amending the language of the Commentary to Section 2 of the Model Rule for Minimum Continuing Legal Education. The amended language provided that regulatory systems require lawyers, either through a separate credit or through existing ethics and professionalism credits, complete as part of their mandatory continuing legal education those programs related to racial and ethnic diversity and the elimination of bias in the profession. The resolution being sponsored by the Diversity & Inclusion 360 Commission builds and expands on that prior recognition of the importance and need for programs regarding diversity and inclusion in the legal profession and further expands the definition of diversity and inclusion consistent with current ABA Goal III to include all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities. The Commission believes that while the 2004 resolution was a good start to address the need for diversity and inclusion programs, more can be and should be done to advance diversity and inclusion in a meaningful and productive manner.

The resolution encourages all state, territorial and tribal courts, bar associations and other licensing and regulatory authorities that *currently* require mandatory continuing legal education (MCLE) to modify their rules to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”). Although several states currently allow MCLE credits for D&I CLE, only California and Minnesota have adopted stand-alone D&I CLE requirements.

The resolution does not specify the number of hours for D&I CLE, or increase the total number of MCLE hours required. Rather, the resolution encourages the adoption of a separate credit within those MCLE requirements to ensure that all attorneys receive education regarding the elimination of bias, and diversity and inclusion.

## II. Current Status of MCLE and Diversity and Inclusion CLE

Forty five states currently have mandatory continuing legal education. Therefore, the proposed resolution has the potential to impact the vast majority of attorneys in the United States. As referenced above, California and Minnesota have already adopted stand-alone D&I MCLE requirements. Their requirements are as follows:  
California: California requires one (1) hour of “Recognition and Elimination of Bias in the Legal Profession and Society” as a component of its three-year MCLE requirements. <http://mcle.calbar.ca.gov/Attorneys/Requirements.aspx>.

Minnesota: Minnesota requires two (2) hours related to “Elimination of Bias” as a component of its three-year MCLE requirements. [https://www.mbcle.state.mn.us/mbcle/pages/general\\_info.asp](https://www.mbcle.state.mn.us/mbcle/pages/general_info.asp).

Additional states allow programs on elimination of bias to qualify for ethics and/or professionalism credits, but do not create separate D&I CLE requirements. Those states include Hawaii, Kansas, Illinois, Maine, Nebraska, Oregon, Washington, and West Virginia.

The Commission considered the merits of both approaches – those that create a separate D&I CLE category, and those that provide ethics credits for D&I CLE. Ultimately, the Commission concluded that the California and Minnesota models best advance the goal of diversity and inclusion by ensuring *all* attorneys actually receive D&I CLE.

Recognizing the wide array of existing MCLE requirements, the Commission declined to specify a precise number of required hours. Rather, each jurisdiction should determine the appropriate number of required hours within their current MCLE requirements

## III. The Availability of D&I Inclusion CLE

The resolution calls upon the ABA, through its Goal III and other entities, to assist in the development and creation of D&I CLE. This is to ensure that all attorneys can satisfy their new D&I CLE requirement. Although we are confident that CLE providers will ultimately develop programming in response to the new D&I CLE requirement (similar to the prevalence of ethics and professionalism CLE classes), the Commission wants to ensure that *all* attorneys have access to D&I CLE, and that a potential lack of availability of D&I CLE does not deter any jurisdiction from adopting a D&I CLE requirement.

## IV. Conclusion

The resolution encourages each jurisdiction that currently has MCLE to designate a minimum number of credit hours for D&I CLE. In order to ensure that all state and territorial bar associations’ attorneys can meet those requirements, the resolution calls upon the American Bar Association, through its Goal III and other entities, to assist in the development and creation of D&I CLE. The resolution is consistent with the ABA’s longstanding commitment to diversity and inclusion in the legal profession as evidenced

in Resolution 110 approved by the House of Delegates in 2004. It is also consistent with multiple states that have recognized the need for D&I CLE. As such, we respectfully request that House of Delegates adopt the resolution.

Respectfully submitted,

Eileen M. Letts, Co-Chair  
David B. Wolfe, Co-Chair  
Diversity and Inclusion 360 Commission

February 2016

**GENERAL INFORMATION FORM**

Submitting Entity: Diversity & Inclusion 360 Commission

Submitted By:

Darcee S. Siegel  
169 Camden Drive  
Bal Harbour, Florida 33154  
[Darcee.siegel@gmail.com](mailto:Darcee.siegel@gmail.com)  
(305) 409-9670

David B. Wolfe  
Skoloff & Wolfe PC  
293 Eisenhower Pkwy, Ste. 390  
Livingston, NJ 07039-1784  
[dwolfe@skoloffwolfe.com](mailto:dwolfe@skoloffwolfe.com)  
(973) 992-0900

Eileen M. Letts  
Greene and Letts  
55 W. Monroe St. Ste. 600  
Chicago, IL 60603-5091  
[emletts@greeneandletts.com](mailto:emletts@greeneandletts.com)  
(312) 346-1100

1. Summary of Resolution(s). The resolution encourages all state, territorial, and tribal courts, bar associations and other licensing and regulatory authorities that currently require mandatory continuing legal education (MCLE) to modify their rules to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”). Although several states currently allow MCLE credits for D&I CLE, only California and Minnesota have adopted stand-alone D&I CLE requirements.
2. Approval by Submitting Entity. The Diversity and Inclusion 360 Commission approved this Resolution at its fall meeting on October 6, 2015.
3. Has this or a similar resolution been submitted to the House or Board previously? In 2004, the House approved Resolution 110 amending the language in the Commentary to Section 2 of the Model Rule for Minimum Continuing Legal Education. The amended language provided that regulatory systems require lawyers, either through a separate credit or through existing ethics and professionalism credits, complete as part of their mandatory continuing legal education those programs related to racial and ethnic diversity and elimination of bias in the profession.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This resolution builds and expands on Resolution 110. Additionally, Goal III of our Association seeks increased awareness of diversity and inclusion, and the elimination of bias. This resolution addresses the intent of Goal III.
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.
8. Cost to the Association. (Both direct and indirect costs) None anticipated
9. Disclosure of Interest. (If applicable) n/a
10. Referrals. We have or will refer to all committees, sections, and divisions, particularly the Standing Committee on CLE, Litigation Section, TIPS, Business Law, Young Lawyers Division, and the entities within the Diversity Center, and NCBP.
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Darcee S. Siegel  
169 Camden Drive  
Bal Harbour, Florida 33154  
[Darcee.siegel@gmail.com](mailto:Darcee.siegel@gmail.com)  
(305) 409-9670

David B. Wolfe  
Skoloff & Wolfe PC  
293 Eisenhower Pkwy, Ste. 390  
Livingston, NJ 07039-1784  
[dwolfe@skoloffwolfe.com](mailto:dwolfe@skoloffwolfe.com)  
(973) 992-0900

Eileen M. Letts  
Greene and Letts  
55 W. Monroe St. Ste. 600  
Chicago, IL 60603-5091  
[emletts@greeneandletts.com](mailto:emletts@greeneandletts.com)  
(312) 346-1100

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.)

Darcee S. Siegel  
169 Camden Drive  
Bal Harbour, Florida 33154  
[Darcee.siegel@gmail.com](mailto:Darcee.siegel@gmail.com)  
(305) 409-9670

David B. Wolfe  
Skoloff & Wolfe PC  
293 Eisenhower Pkwy, Ste. 390  
Livingston, NJ 07039-1784  
[dwolfe@skoloffwolfe.com](mailto:dwolfe@skoloffwolfe.com)  
(973) 992-0900

Eileen M. Letts  
Greene and Letts  
55 W. Monroe St. Ste. 600  
Chicago, IL 60603-5091  
[emletts@greeneandletts.com](mailto:emletts@greeneandletts.com)  
(312) 346-1100

**EXECUTIVE SUMMARY**1. Summary of the Resolution

This Resolution encourages all state, territorial, and tribal courts, bar associations and other licensing and regulatory authorities who require mandatory continuing legal education (MCLE) to modify their rules to include, as a separate credit, programs regarding diversity and inclusion in the legal profession of all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”). Further, this resolution while requiring a designated minimum number of hours for a separate credit, will not increase the total number of required MCLE hours or in any way change or alter the criteria for MCLE credit.

2. Summary of the Issue that the Resolution Addresses

This Resolution addresses the need to provide stand-alone Diversity and Inclusion CLE requirements for all attorneys who practice in MCLE states. The Resolution also advances Diversity and Inclusion by assisting in the development and creation of diversity and inclusion continuing legal education programs to ensure all attorneys can meet their MCLE requirements. The Resolution is in accordance with Goal III of the American Bar Association, which is to eliminate bias and enhance diversity in the profession.

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

This Resolution will increase the legal profession’s understanding and awareness of issues relating to diversity and inclusion, and the elimination of bias, by ensuring that all attorneys who are obligated to comply with MCLE requirements receive education related to diversity and inclusion, and the elimination of bias.

4. Summary of Minority Views

No minority views or opposition to this Resolution have been identified.



**AMERICAN BAR ASSOCIATION**  
**SECTION OF INTELLECTUAL PROPERTY LAW**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1   RESOLVED, That the American Bar Association opposes intellectual property laws and agency  
2   and court interpretations of intellectual property laws that impose the payment of the  
3   government’s attorney fees on a party challenging a decision of the United States Patent and  
4   Trademark Office in federal district court, unless the statute in question explicitly directs the  
5   courts to award attorney fees.

6   FURTHER RESOLVED, That the American Bar Association supports an interpretation or a  
7   statutory clarification of 15 U.S.C. § 1071(b)(3) and 35 U.S.C. § 145, that the term “expenses” as  
8   provided for in those sections does not include government attorney fees.



## REPORT

On April 23, 2015, the U.S. Court of Appeals for the Fourth Circuit issued a split panel decision in *Shammas v. Focarino*, 784 F.3d 219 (4th Cir. 2015) (“*Shammas*”). The decision raises important questions relating to the application of the American Rule, which stands for the proposition that, absent express statutory language or a contract to the contrary, litigants will bear their own legal fees. Specifically, *Shammas* raises concerns regarding access to justice and the ability of less well-financed applicants for trademark registrations and patents to obtain judicial review of adverse agency decisions in district court. By requiring dissatisfied trademark registration and patent applicants to pay the legal fees of the United States Patent and Trademark Office (“U.S.P.T.O.”) in civil actions brought by those applicants to show their entitlement to trademark registrations or patents, whether or not wrongly denied by the agency, the case establishes a significant financial obstacle, if not a barrier, to complete judicial review of the agency’s decisions and punishes applicants for filing a civil action. Anticipating that the rule articulated in *Shammas* may be the subject of further appeals, in both the trademark and patent context, the Section of Intellectual Property Law recommends that the House of Delegates adopt this resolution to provide policy to support an Association *amicus curiae* brief in *Shammas* or in another judicial proceeding presenting the same or similar issues, and if unsuccessful, to request Congress to amend the applicable statutes consistent with this resolution.

A petition for a writ of certiorari seeking Supreme Court review of *Shammas* was filed on October 29, 2015. *Shammas v. Hirshfeld*, No. 15-563. The Section of Intellectual Property Law believes the petition is well-taken. The Section recommends that the House of Delegates approve this resolution, which would provide policy in support of an Association *amicus curiae* brief in *Shammas v. Hirshfeld*, or in other litigation presenting issues regarding whether a dissatisfied applicant for trademark registration or patent may obtain judicial review of an adverse decision of the U.S.P.T.O. in district court, as Congress has provided in 15 U.S.C. § 1071(b)(3) and 35 U.S.C. § 145, without bearing the additional burden of paying the U.S.P.T.O.’s attorney fees. Because the decision adds a new financial obstacle to those seeking to challenge agency decisions in a federal district court and acts as a penalty for bringing suit, in direct conflict with the American Rule, the resolution of these issues may have policy implications that go far beyond trademark and patent law. This resolution will provide Association policy opposing intellectual property laws and interpretations of intellectual property laws that impose the payment of the government’s attorney fees on a party challenging a decision of the United States Patent & Trademark Office in federal district court, unless the statute in question specifically and explicitly directs the courts to award attorney fees. The resolution also supports interpretations of, and if needed, a statutory clarification of 15 U.S.C. § 1071(b)(3) and 35 U.S.C. § 145, such that the term “expenses” as recited in those sections does *not* include government attorney fees.

***Trademark Registration Applicants Denied Federal Registrations by the U.S.P.T.O. May Appeal Those Decisions to Federal District Court and Must Pay the U.S.P.T.O.’s “Expenses” Even if their Appeals Succeed***

An applicant seeking to register a trademark with the U.S.P.T.O. may seek review of a denial by the U.S.P.T.O.’s Trademark Trial and Appeal Board either by appealing to the United States Court of Appeals for the Federal Circuit (“Federal Circuit”), or by commencing a *de novo* action in a federal district court. 15 U.S.C. § 1071. An appeal taken to the Federal Circuit proceeds on

# 108A

the closed record before the agency. *Id.* § 1071(a)(4). If an appeal is taken to the district court, however, the agency record is treated as if produced in the suit, and the applicant may introduce new evidence and testimony.<sup>1</sup> *Id.* § 1071(b)(1). If the applicant proceeds in a district court, and names the Director of the U.S.P.T.O. as a defendant, the applicant must pay “all the expenses of the proceeding.” *Id.* at §1071(b)(3). Under that statute, the applicant must pay the U.S.P.T.O.’s “expenses,” whether the applicant prevails or not. *Id.*

## ***Applicants Denied a Patent by the U.S.P.T.O. May Appeal that Decision to Federal District Court and Must Pay the U.S.P.T.O.’s “Expenses”***

Similarly, an applicant denied a patent may appeal to the Federal Circuit or file a civil action against the U.S.P.T.O. Director in district court, and may also introduce new evidence in the latter proceeding. 35 U.S.C. § 145; *Kappos v. Hyatt*, 132 S. Ct. 1690, 1692 (2012). As in civil trials involving denials of trademark registrations, “[a]ll the expenses of the proceedings shall be paid by the applicant.” 35 U.S.C. § 145.

## ***Shammas Holds that Applicants Successfully Appealing to a Federal District Court Must Pay the U.S.P.T.O.’s Attorney Fees as “Expenses”***

In *Shammas*, the district court granted the U.S.P.T.O.’s motion pursuant to § 1071(b)(3) that the applicant pay the U.S.P.T.O.’s expenses, including the prorated salaries of the two attorneys and one paralegal who worked on the case. *Shammas v. Focarino*, 784 F.3d 219, 221-22 (4th Cir. 2015). The Fourth Circuit affirmed. The Fourth Circuit held that “expenses” as provided for in § 1071(b)(3) included the U.S.P.T.O.’s attorney fees and paralegal fees.

On appeal, Shammas had argued that by referring to “expenses,” but not using the term “attorney fees,” the statute was not sufficiently clear to overcome the presumption created by the American Rule that each party pay his or her own legal fees in the absence of a clear statute or contract to the contrary. *Id.* at 222. A divided Fourth Circuit rejected that argument, finding that the American Rule did not apply to this statute. The Fourth Circuit defined the American Rule as “provid[ing] only that ‘the prevailing party may not recover attorneys’ fees’ from the losing party.” *Id.* at 223. The Court found that the rule did not apply to § 1071(b)(3) because the applicant must pay the U.S.P.T.O.’s expenses regardless of whether the applicant wins or loses. Quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983), the Court concluded that “a statute that mandates the payment of attorney fees without regard to a party’s success is not a fee-shifting statute that operates against the backdrop of the American Rule.” *Id.* The Fourth Circuit further reasoned that because the statute was intended to allow the U.S.P.T.O. to recoup the cost of litigating a case anew in the district court, its interpretation of the statute was consistent with the legislative history of the statute. *Id.* at 225.

---

<sup>1</sup> Where only the U.S.P.T.O. is named as a party, civil suits brought under 15 U.S.C. § 1071 must be filed in the U.S. District Court for the Eastern District of Virginia, and appeals taken therefrom are appealed to the U.S. Court of Appeals for the Fourth Circuit. *Id.* § 1071(b)(4). Thus, this case involves an appeal to the U.S. Court of Appeals for the Fourth Circuit.

***The Dissenting Opinion Provides an Alternative Definition of the American Rule and Construction for the Term “Expenses”***

The dissent in *Shammas* defines the American Rule as standing for the proposition that “courts presume that the litigants will bear their own legal costs, win or lose.” *Id.* at 227 (King, J., dissenting). The dissent argues that unless Congress “‘clearly and directly’ provides for attorney’s fees,” the statute cannot be interpreted as authorizing the award of attorney fees. *Id.* at 227-28. Accordingly, the dissent would hold that the American Rule presumption against shifting fees to the other party applies, and that the majority’s interpretation of § 1071(b)(3) violates that presumption.

Significantly, the dissent also provides an alternative rationale for interpreting the term “expenses”—as employed in § 1071(b)(3)—as excluding attorney and other legal fees. The dissent points to five instances in Title 15 in which Congress expressly provided for the award of attorney fees in instances where it wanted to provide for fee shifting, in stark contrast to Congress’s omission of that critical language in this provision. *Id.* at 228. The dissent concludes that, “[b]ecause Congress made multiple explicit authorizations of attorney’s fees awards in Chapter 22 of Title 15—but conspicuously omitted any such authorization from § 1071(b)(3)—we must presume that it acted ‘intentionally and purposely in the disparate ... exclusion.’” *Id.* (citing *Clay v. United States*, 537 U.S. 522, 528 (2003) (internal quotation marks omitted)).

Finding nothing in the statute’s legislative history to support the U.S.P.T.O.’s claim that it is entitled to attorney fees, the dissent would find it insufficient to overcome the presumption that the American Rule applies against fee shifting. *Id.* at 229-30.

***The ABA Supports the American Rule and the Fundamental Principle of Facilitating and Encouraging Access to Justice and Opposes Penalizing Parties for Bringing Suit***

The American Rule is a fundamental principle of American jurisprudence that stands for the proposition that a party should not be penalized for merely prosecuting a lawsuit. *Summit Valley Indus. v. Local 112*, 456 U.S. 717, 724 (1982) (citing *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967)). Consistent with that principle, the American Bar Association has long advocated for those needing access to the courts and opposed efforts to establish obstacles or barriers to access to justice, be they financial or otherwise.

Unfortunately, the goal of the U.S.P.T.O.’s new interpretation of this decades-old statutory language is to limit access to district court by those dissatisfied with the U.S.P.T.O.’s decisions and deprive applicants of the opportunity to introduce additional evidence to overcome the U.S.P.T.O.’s rejection. The U.S.P.T.O. seeks to recover attorney fees simply to discourage applicants from filing district court actions and from producing new evidence against the agency. If an applicant has unsuccessfully sought to persuade the U.S.P.T.O. to register its trademark or grant its patent, and needs to introduce additional evidence to overcome the rejection, an appeal to the Federal Circuit cannot serve as a viable avenue for obtaining relief from an adverse U.S.P.T.O. decision. *Kappos v. Hyatt*, 132 S. Ct. 1690, 1694 (2012) (citing *Dickinson v. Zurko*, 527 U.S. 150 (1999)).

# 108A

In contrast to district court proceedings, the Federal Circuit reviews decisions based on the closed agency record and forbids the introduction of new evidence. Thus, resort to a civil action in accordance with 15 U.S.C. § 1071(b)(3) or 35 U.S.C. § 145 may be the only viable mechanism available to such applicants seeking agency review. *Shammas* holds that, “if the dissatisfied applicant does not wish to pay the expenses of a *de novo* civil action, he may appeal the adverse decision of the PTO to the Federal Circuit.” 784 F.3d at 225. If the applicant needs to submit additional evidence to prove its case, however, an appeal to the Federal Circuit is not a viable option.

The costs to applicants of pursuing review of a U.S.P.T.O. decision in district court are already high. Those plaintiffs must take discovery and introduce new evidence, and thus often pay for experts and other expenses, as well as their own attorney fees. This decision may have the effect of lightening the U.S.P.T.O.’s civil action caseload and avoiding review of its decisions. And it will also unjustly discourage small businesses, sole inventors, and others—who cannot afford the additional cost of the agency’s attorney fees, but must introduce new evidence to establish the error committed by the U.S.P.T.O.—from filing necessary district court actions.

The U.S.P.T.O. is not a typical litigant that requires an award of attorney fees to be made whole. The agency’s annual appropriations are determined in accordance with its collection of user fees, which it uses to pay its employees and cover other overhead costs, including those related to litigation. It therefore is not similarly situated to the average litigant, which can recover its attorney fees only if it prevails and only in exceptional cases. To the contrary, and assuming the U.S.P.T.O. sets user fees at the appropriate levels, it will be made whole for its litigation-related attorney fees even without the benefit of the statutes. In fact, an automatic award of attorney fees in the manner posited by the Fourth Circuit will result in a double recovery by the U.S.P.T.O., which surely is neither equitable nor within congressional contemplation.

## ***The U.S.P.T.O.’s New Attempts to Discourage Applicants from Filing in District Court Are Consistent with Its Efforts to Have these Provisions Stricken from the Statutes***

The U.S.P.T.O. has sought legislative solutions to dispense with these district court proceedings, and having failed that, resorts to imposing attorney fees in an attempt to discourage applicants from filing these actions. Around the time that it requested fees in this case, the U.S.P.T.O. sought to have Congress repeal the portion of § 1071(b)(3) that authorizes these proceedings, in hopes of having this amendment join a companion proposal before Congress to similarly strike 35 U.S.C. § 145 patent cases and, thereby, put an end to the filing of these district court cases.<sup>2</sup> The U.S.P.T.O. believes that permitting *de novo* review in the district courts undermines its role as expert and gatekeeper on trademark registrability.

In *Shammas*, the U.S.P.T.O. did not dispute appellant’s contention that prior to 2013 the agency had never sought attorney fees in accordance with 15 U.S.C. § 1071(b)(3) and 35 U.S.C. § 145, or their predecessors. 784 F.3d at 229. Indeed, throughout the existence of this language, the U.S.P.T.O. has never before sought to recover its attorney or paralegal fees. Instead, it only sought to recover its “expenses,” such as the additional expense of hiring an expert witness to

---

<sup>2</sup> USPTO SECTION 21(b) ABROGATION PROPOSAL, ABA-IPL Section, Joint Task Force of the Trademark Legislation Committee, Trademark Litigation Committee, and Ex Parte Committee.

rebut expert testimony newly submitted by an applicant. The U.S.P.T.O. had also sought to recover the reasonable travel expenses that its employee incurred travelling to a deposition. *Robertson v. Cooper*, 46 F.2d 766, 769 (4th Cir. 1931). One case involved the reasonableness of the amount the U.S.P.T.O. wanted to collect for printing the briefs and joint appendix on appeal. *Watson v. Allen*, 274 F.2d 87, 88 (D.C. Cir. 1959); *see also Cook v. Watson*, 208 F.2d 529, 531 (D.C. Cir. 1953) (expenses not limited to costs but include printing expenses). But, until now, the U.S.P.T.O. had not attempted to erect this barrier to an appeal in district court by charging the applicant for the U.S.P.T.O.'s attorney fees. The U.S.P.T.O. appears to have resorted to expanding the scope of this expense-shifting rule in an effort to reduce or eliminate these types of cases.

The U.S.P.T.O.'s recent shift in position to include attorney fees in its request for expenses is consistent with its recent efforts to have an applicant's right to bring such proceedings in district court removed from the statutes, and an immediate reaction to the U.S. Supreme Court's holding in *Kappos v. Hyatt*, 132 S. Ct. 1690, 1692 (2012) ("*Hyatt*"). In *Hyatt*, the Supreme Court rejected the U.S.P.T.O.'s argument seeking to limit the evidence that an applicant could submit in a district court to challenge the U.S.P.T.O.'s refusal to issue a patent. The agency argued that if an applicant could have submitted the evidence to the U.S.P.T.O., it could not introduce that evidence in a district court proceeding. Consistent with American Bar Association policy, however, the Court concluded that under the statute "there are no limitations on a patent applicant's ability to introduce new evidence in a § 145 proceeding beyond those already present in the Federal Rules of Evidence and the Federal Rules of Civil Procedure." *Id.* at 1700-01. According to reports, unhappy with that decision, the U.S.P.T.O. has supported draft legislation that would eliminate § 145 actions altogether.<sup>3</sup>

### ***The Current Resolution***

The resolution calls for the Association to adopt policy relating to the rights of applicants for trademark registrations and patents to bring a civil action in district court challenging the U.S.P.T.O.'s denial of their request for a trademark registration or a patent without having to also bear the additional burden of paying the agency's attorney fees. The resolution will provide Association policy opposing intellectual property laws and interpretations of intellectual property laws that impose the payment of the government's attorney fees on a party challenging a decision of the United States Patent & Trademark Office in federal district court, unless the statute in question specifically and explicitly directs the courts to award attorney fees. The resolution also supports interpretations of, and if needed, a statutory clarification of 15 U.S.C. § 1071(b)(3) and 35 U.S.C. § 145, such that the term "expenses" as recited in those sections does *not* include government attorney fees.

---

<sup>3</sup> *Congressman Goodlatte Proposes Patent Reform to Eliminate Section 145 Actions And Exelaxis I-Type Patent Term Adjustment*, Courtenay C. Brinkerhoff, June 3, 2013, <https://www.pharmapatentsblog.com/2013/06/03/congressman-goodlatte-proposes-patent-reform-to-eliminate-section-145-actions-and-exelaxis-i-type-patent-term-adjustment/> ("Apparently, the USPTO is not content to live with this decision.")

# 108A

## *Conclusion*

The Section of Intellectual Property Law urges the House of Delegates to adopt the proposed resolution to provide ABA policy supporting an Association *amicus curiae* brief in a judicial proceeding presenting issues regarding whether a dissatisfied trademark registrant or patent applicant may obtain judicial relief from an adverse decision by the U.S.P.T.O. in district court, without also paying the U.S.P.T.O.'s attorney fees, and/or to support a legislative change consistent with that policy.

Respectfully submitted,

Theodore H. Davis Jr., Chair  
Section of Intellectual Property Law  
February 2016



GENERAL INFORMATION FORM

Submitting Entity: Section of Intellectual Property Law

Submitted by: Theodore H. Davis Jr., Section Chair

1. Summary of Resolution

The resolution calls for the Association to adopt policy opposing intellectual property laws and interpretations of intellectual property laws that impose the payment of the government's attorney fees on a party challenging a decision of the United States Patent & Trademark Office in federal district court, unless the statute in question specifically and explicitly directs the courts to award attorney fees. The resolution also call for the Association to adopt policies that support interpretations of, and if needed, a statutory clarification of 15 U.S.C. § 1071(b)(3) and 35 U.S.C. § 145, such that the term "expenses" as recited in those sections does not include government attorney fees.

Both 15 U.S.C. § 1071(b)(3) and 35 U.S.C. § 145 allow the U.S.P.T.O. to recover all reasonable "expenses" incurred by the agency in defending its decision against a challenge by a dissatisfied trademark registration or patent applicant. For the first time in the long history of these statutes, in a recent case pending in the Eastern District of Virginia, the U.S.P.T.O. requested payment of its attorney fees as part of its "expenses," and the district court granted its request.

In *Shammas v. Focarino*, 784 F.3d 219, 221-22 (4th Cir. 2015), a divided Fourth Circuit affirmed. The decision raises important questions relating to the application of the American Rule as well as concerns regarding access to justice and the ability of less well-to-do trademark registration and patent applicants to obtain complete judicial review of agency decisions. By requiring dissatisfied trademark registration and patent applicants to pay the U.S.P.T.O.'s legal fees in civil actions brought by the applicants, the case establishes a financial obstacle or barrier to complete judicial review of the agency's decisions and punishes applicants for filing a civil action. Anticipating that the decision may be the subject of further appeals, in both the trademark and patent context, the Section of Intellectual Property Law recommends that the House of Delegates adopt this Resolution to provide policy to support an Association *amicus curiae* brief in this case or in another judicial proceeding presenting the same or similar issues, and if unsuccessful, to request that Congress amend the applicable statutes consistent with this resolution.

2. Approval by Submitting Entity

The Section Council approved the resolution on November 17, 2015.

# 108A

3. Has This or a Similar Recommendation Been Submitted to the House or Board Previously?

The House of Delegates has previously adopted recommendations relating to the rights of an applicant denied a patent by the U.S. Patent & Trademark Office to bring a civil action pursuant to 35 U.S.C. §145 in a U.S. District Court to obtain a patent.

At the 2011 Annual Meeting, the House of Delegates approved a resolution supporting an ABA amicus brief to the Supreme Court in support of an interpretation of 35 U.S.C. §145 that preserves the right of such applicant—in cases brought against the agency in U.S. District Court to obtain a patent—to introduce new evidence subject only to limitations generally applicable in federal civil litigation. The resolution also expresses ABA support for, in these cases, district court de novo findings of fact on issues for which new evidence is introduced, and the application of the substantial evidence standard of the Administrative Procedure Act for findings of fact for which no new evidence was admitted and the court relies solely on the record developed before the agency.

4. What Existing Association Policies are Relevant to This Resolution and How Would They be Affected by its Adoption?

The policies referenced in paragraph 3 are similar to those in this recommendation in that they address the same issue of the right of an applicant denied a patent by the U.S. Patent & Trademark Office to bring a civil action pursuant to 35 U.S.C. §145 in a U.S. District Court to obtain a patent. But they are not directly relevant to this recommendation, and would not be affected by its adoption because the earlier resolution does not address whether the cost shifting provision of 35 U.S.C. §145 includes agency attorney fees, and do not discuss 15 U.S.C. § 1071(b)(3) at all.

5. What Urgency Exists Which Requires Action at This Meeting of the House?

A petition for a writ of certiorari seeking Supreme Court review of this decision was filed on October 29, 2015. The Section of Intellectual Property Law believes it is relatively likely that the petition will be granted. Action by the House of Delegates at the 2016 Midyear Meeting is necessary to insure that, should certiorari be granted, any Association brief on the merits could be timely filed.

6. Status of Legislation

None.

7. Plans for Implementation of the Policy if Adopted by the House of Delegates

The policy will provide authority for the preparation and filing of an Association *amicus* brief in the Supreme Court or other appropriate judicial forum in a case presenting the issues that are addressed in the policy and, if unsuccessful, to request that Congress amend the applicable statutes.

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

Adoption of the recommendations would not result in additional direct or indirect costs to the Association.

9. Disclosure of Interest

There are no known conflicts of interest with regard to this recommendation.

10. Referrals

This recommendation is being distributed to each of the Sections, Divisions, and the Standing Committees of the Association.

11. Contact Person (prior to meeting)

Theodore H. Davis Jr.  
Section Chair, Section of Intellectual Property Law  
Kilpatrick Townsend & Stockton LLP  
Suite 2800  
1100 Peachtree Street NE  
Atlanta, GA 30309-4528  
Ph: 404 815 6534  
Fax: 404 541 3172  
tdavis@kilpatricktownsend.com

Susan Barbieri Montgomery  
Section Delegate to the House of Delegates  
Foley Hoag LLP  
155 Seaport Blvd., Ste. 1600  
Boston, MA 02210-2600  
Ph: 617-832-1222  
Fax: 617-832-7000  
s.montgomery@neu.edu

12. Contact Persons (who will present the report to the House)

Susan Barbieri Montgomery  
Section Delegate to the House of Delegates  
Foley Hoag LLP  
155 Seaport Blvd., Ste. 1600  
Boston, MA 02210-2600  
Ph: 617-832-1222  
Fax: 617-832-7000  
s.montgomery@neu.edu

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The resolution calls for the Association to adopt policy opposing statutes and interpretations of statutes that establish financial penalties for prosecuting a lawsuit and limits access to federal district courts in cases challenging government action, and opposing agency and court interpretations of statutes that shift the burden of paying the government's attorney fees to a party challenging government action unless the statute specifically and explicitly directs the courts to award attorney fees.

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

The Fourth Circuit's decision to award the U.S.P.T.O. its attorney fees raises important questions relating to the application of the American Rule as well as concerns regarding access to justice and the ability of less well-to-do trademark and patent applicants to obtain complete judicial review of agency decisions. By requiring dissatisfied trademark registration and patent applicants to pay the U.S.P.T.O.'s legal fees in civil actions brought by the applicant to show that they are entitled to a trademark registration or patent, the case establishes a financial obstacle or barrier to complete judicial review of the agency's decisions and punishes applicants for filing a civil action.

### 3. Please Explain How the Proposed Policy Position will Address the Issue

The resolution expresses opposition to statutes, and interpretations of statutes in a manner that establish financial penalties for prosecuting a lawsuit and limits access to federal district courts in cases challenging government action.

The resolution also expresses opposition to agency and court interpretations of statutes that shift the burden of paying the government's attorney fees to a party challenging government action unless the statute specifically and explicitly directs the courts to award attorney fees.

### 4. Summary of Minority Views

None known at this time.

**AMERICAN BAR ASSOCIATION**  
**SECTION OF INTELLECTUAL PROPERTY LAW**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association supports interpretation and application of
- 2 the statutory six-year patent damages period (35 U.S.C. § 286) as limiting availability of the
- 3 judicially created laches defense as a bar to legal damages for patent infringement; and
- 4 FURTHER RESOLVED, That the American Bar Association supports interpretation and
- 5 application of the statutory six-year patent damages period as not limiting availability of
- 6 laches as a defense where equitable relief is sought.



REPORT

This report concerns the scope of the judicially created laches defense in patent infringement litigation—under what circumstances can a patent rights holder’s unreasonable, prejudicial delay in commencing suit bar relief on a patent infringement claim?

A divided *en banc* Federal Circuit recently preserved the laches defense for patent cases even though Congress has created a statutory six-year damages period. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, No. 2013–1564, 2015 WL 5474261, \_\_\_ F.3d \_\_\_ (Fed. Cir. Sept. 18, 2015). That decision appears to conflict with at least the U.S. Supreme Court’s reasoning in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), which held the laches defense in the copyright context was limited by a statutory three-year copyright damages period. See 17 U.S.C. § 507(b). Because both the Copyright Statutes and the Patent Statutes limit the damages recovery periods similarly, and because there is no convincing justification for treating them differently, the judicially created laches defense must give way to congressional enactment of these statutory damages periods.

This Resolution asks the ABA House of Delegates to approve policy supporting application of the Supreme Court’s *Petrella* decision in the patent context so that the doctrine of laches (1) would no longer be applied to bar pre-suit legal damages in patent cases during the statutory six-year damages period, but (2) would be available under extraordinary circumstances to curtail claims for injunctive relief and other prospective equitable relief. This policy recommendation is driven not only by applicable precedent, but also by core values of our legal system (in particular deference to statutes enacted by Congress, and policies favoring non-litigation resolutions to legal disputes).

**A. *The Supreme Court’s Decision in Petrella v. Metro-Goldwyn-Mayer*, 134 S. Ct. 1962 (2014)**

In *Petrella*, the Supreme Court held that the judicially created laches defense must give way if Congress provided a limiting statutory damages period. 134 S. Ct. at 1967–68. The Court held laches could not bar legal damages for acts of copyright infringement occurring within the three-year statutory look-back period, regardless of how long ago the copyright owner first learned of the infringement. *Id.* at 1981. Thus, delay in bringing suit forfeits only damages for infringement occurring outside the three-year look back window, but not those for infringement occurring within that window.

The Court explained laches was developed by courts of equity and its “principal application was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation” 134 S. Ct. at 1973. The Court emphasized laches serves a gap filling, not legislation overriding, purpose. *Id.* at 1974. If a statutory damages limitation period exists for legal relief, such legislation cannot be disregarded: “To the extent that an infringement suit seeks relief solely for conduct occurring within the limitations period, however, courts are not at liberty to jettison Congress’ judgment on the timeliness of suit.” *Id.* at 1967.

In a footnote, the Court declined to reach whether its holding would also apply to patents. *Id.* at 1974 n.15. The Patent Act provides a similar, albeit longer, six-year look-back period for

recovering infringement damages. 35 U.S.C. § 286. Long before *Petrella*, however, in *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020 (Fed. Cir. 1992) (*en banc*) (“*Aukerman*”) the Federal Circuit rejected the argument that the judicially created laches defense cannot bar legal damages because it conflicts with the Patent Acts’ look-back period. *Id.* at 1029–31.

In extraordinary circumstances, laches may limit awards of *equitable* relief—the grant of an injunction.

## **B. The Federal Circuit’s *En Banc* SCA Hygiene Decision**

After *Petrella* was decided, the Federal Circuit revisited *Aukerman*. Sitting *en banc*, a divided court held that the rule articulated in *Petrella* does not apply to patent law to bar legal remedies. *SCA Hygiene*, 2015 WL 5474261, at \*1. While acknowledging that Section 286 is the sort of explicit temporal damages limitation that the U.S. Supreme Court suggested would preclude the applicability of laches, the Federal Circuit concluded that the unique history of the Patent Statute compelled a different rule for patent law. *Id.* at \*3–7. According to the majority, Congress had intended to preserve laches as a defense to damages when it enacted 35 U.S.C. § 282(b)(1), and therefore the reasoning of *Petrella* does not apply to patent law. *Id.* at \*3.

The Federal Circuit relied on the comments of one of the primary statutory drafters of the 1952 Patent Act, stating that he intended to preserve equitable defenses, which includes laches. *Id.* at \*8. The court also looked to judicial practice in patent cases prior to 1952 to determine whether laches could reach legal damages. The court concluded there was a consensus among the circuit courts by 1952, which was that laches could bar legal damages as well as equitable relief. *Id.* at \*9–13.

The Federal Circuit then addressed potential policy concerns. Patent infringers are strictly liable for direct infringement. Copyright infringers are held liable only if there is at least some evidence of intentional copying. This distinction favored the application of laches to patent law, according to the court, because unwitting patent infringers can incur substantial damages during the period of delay and miss the opportunity to adopt non-infringing alternatives. *Id.* at \*14–15. The court also noted that that the amici overwhelmingly favored retaining laches as a defense. *Id.* at \*15.

Finally, the court unanimously held the laches defense could bar ongoing injunctive relief, noting that the remedy already incorporates equitable considerations—including but not limited to delay—that lie at the heart of the laches analysis. *Id.* at \*15–17. It further held that in “egregious” or “extraordinary” circumstances, a laches defense could also bar ongoing royalty damages. *Id.* at \*16.

## **C. SCA Hygiene and Aukerman are irreconcilable with Petrella**

*SCA Hygiene* and *Aukerman* both conclude that a laches defense can bar a patentee’s claim for pre-suit damages during the six-year damages recovery period of Section 286. These decisions cannot be reconciled with the Supreme Court’s reasoning in *Petrella*: If Congress has expressly spoken regarding the appropriate period for legal damages, a judge-made laches defense cannot stand. Just as the copyright damages recovery period statute reflects Congress’s judgment that a



claim for copyright infringement is not too old if brought within three years, Section 286 demonstrates Congress's judgment that a claim for patent infringement is not too old if brought within six years. Because Congress has spoken on the issue, laches should never bar patent infringement damages within the six-year window provided by Section 286.

In attempting to distinguish *Petrella*'s reasoning, the *SCA Hygiene* majority principally relies on its reading of the legislative history and related historical record. According to the majority, Congress implicitly intended to preserve laches as a defense when it codified "unenforceability" as a defense to infringement in 35 U.S.C. § 282(b)(1). Also, circuit courts prior to 1952 had applied laches as a defense to claims for legal remedies, when the statute was adopted and therefore, it was appropriate to presume that Congress had preserved that status quo.

However, Section 282(b)(1) is entirely silent on whether laches was intended to be a defense to legal damages. The majority instead relies on a treatise to show that one of the statute's drafters believed that laches was implicitly included within Section 282(b)(1). At best, that treatise is silent on the critical question: whether Congress intended to make laches a defense to *legal damages*. It is entirely plausible that the statute's drafter was merely confirming that laches could continue to bar equitable relief in some instances.

The *SCA Hygiene* majority ignores clear Supreme Court precedent—predating the 1952 statute—providing that "[l]aches within the term of the statute of limitations is no defense at law." *United States v. Mack*, 295 U.S. 480, 489 (1935). Following the canon of statutory interpretation that a statute is presumed to retain the substance of the common law, *Mack* strongly suggests that congressional enactment of Section 282 did not implicitly preserve laches as a defense to legal damages. The inclusion of a six-year damages window in Section 286 only reinforces that conclusion.

In *Aukerman*, the Federal Circuit sought to distinguish the limitation prescribed by Section 286 as "an arbitrary limitation on the period for which damages may be awarded on any claim for patent infringement" from laches, which the court said "invokes the discretionary power of the district court to limit the defendant's liability for infringement by reason of the equities between the particular parties." 960 F.2d at 1030. The court reasoned that the two limitations could coexist because "[n]othing in section 286 suggests that Congress intended by reenactment of this damages limitation to eliminate the long recognized defense of laches or to take away a district court's equitable powers in connection with patent cases." *Id.*

The Supreme Court rejected a similar argument in *Petrella*. The majority observed that the merger of law and equity did not change the substantive and remedial principles that were in effect before 1938. "Both before and after the merger of law and equity in 1938, this Court has cautioned against invoking laches to bar legal relief." 134 S. Ct. at 1973. Permitting individual judges to have discretion in setting the limitations period would upset that uniformity that Congress sought by prescribing a statutory limitations period for copyright infringement.

The Federal Circuit's attempt to identify historical differences between copyright law and patent law is unconvincing, and does not provide sufficient basis to distinguish the reasoning of *Petrella*.

## D. Sound Judicial Policy Counsels Against Applying Laches to Patent Damages

Limiting application of the laches defense is sound public policy. Adhering to the six-year damages recovery period of Section 286 gives patent rights holders and accused infringers time to resolve disputes before filing patent infringement litigation. Conversely, if the laches defense is more widely available (including during the six-year damages recovery period), patent litigation may be filed more quickly. Under the Federal Circuit's *SCA Hygiene* decision, rational patent holders may fear that any delay could lead to laches (and the risk having the bulk of damages related to the infringement stripped away). Such an incentive is contrary to the long-held judicial policy favoring out-of-court dispute resolution.

That policy has particular salience in the context of patent infringement disputes, which are among the most costly and complex to litigate. Modern patent reform has largely been animated by a desire to reduce the volume and costliness of infringement litigation. The Federal Circuit's retention and expansion of the laches defense runs contrary to that trend.

Invigorating the laches defense, as the Federal Circuit appears to have done with its *SCA Hygiene* decision, would have a disproportionate and negative effect on manufacturing patent owners and research universities. Manufacturing patent owners often view patent litigation as a last resort, preferring instead to focus on business and market place competition. Similarly, universities often seek industry partnerships instead of litigation. Such entities often have large patent portfolios, making it more challenging to actively "police" infringement. The availability of laches during the statutory six-year patent damages period would likely harm to manufacturing patent owners and universities more than non-practicing entities.

Finally, courts have other tools for policing bad actors during the six-year damages limitations period established by 35 U.S.C. § 286. Equitable estoppel remains available if a patentee engages in misleading conduct—including but not limited to delay—that causes the infringer to believe that the patentee will not assert its patent rights, and where such conduct causes prejudice. Because equitable estoppel requires more than delay, it does not create the perverse incentives that exist with laches.

For these reasons, the Section of Intellectual Property Law believes its recommendation is consistent with the law and represents sound public policy, and therefore urges its adoption by the ABA House of Delegates.

Respectfully submitted,

Theodore H. Davis Jr., Chair  
Section of Intellectual Property Law  
February 2016

GENERAL INFORMATION FORM

Submitting Entity: Section of Intellectual Property Law

Submitted by: Theodore H. Davis Jr., Section Chair

1. Summary of Resolution

The Resolution expresses Association policy in support of a clarification of the law relating to the judicially created laches defense to patent infringement. Congress enacted a statutory six-year patent damages period (35 U.S.C. § 286). This limits availability of a laches defense as a bar to legal damages for patent infringement within that six-year period. Of course, laches would still be a defense where equitable relief is sought (such as injunctive relief and ongoing royalties). This is consistent with the U.S. Supreme Court's treatment of the same defense in the copyright context.

2. Approval by Submitting Entity

The Section Council approved the resolution on November 6, 2015.

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

No.

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

None.

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

The policy would provide authority for the ABA to express views should it decide to file an amicus curiae brief relating to an expected petition for writ of certiorari or on the merits before the U.S. Supreme Court in the case of *SCA Hygiene Products AB v. First Quality Baby Products LLC*, Appeal No. 13–1564, or another judicial proceeding presenting the same or similar issues regarding the scope of the laches defense in patent infringement suits.

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 would support submission of an amicus curiae brief on behalf of the ABA relating to a petition for writ of certiorari or on the merits before the U.S. Supreme Court in the case of *SCA Hygiene Products AB v. First Quality Baby Products LLC*, Appeal No.

# 108B

13–1564, or another judicial proceeding presenting the same or similar issues regarding the scope of the laches defense in patent infringement suits.

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

Adoption of the recommendations would not result in additional direct or indirect costs to the Association.

9. Disclosure of Interest

There are no known conflicts of interest with regard to this recommendation.

10. Referrals

This recommendation is being distributed to each of the Sections and Divisions and Standing Committees of the Association.

11. Contact Person (prior to meeting)

Susan Barbieri Montgomery  
Section Delegate to the House of Delegates  
Foley Hoag LLP  
155 Seaport Blvd., Ste. 1600  
Boston, MA 02210-2600  
Ph: 617-832-1222  
Fax: 617-832-7000  
s.montgomery@neu.edu

12. Contact Persons (who will present the report to the House)

Susan Barbieri Montgomery (See item 11 above).

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The Resolution expresses ABA policy in support of a clarification of the law relating to the judicially created laches defense to patent infringement. Congress enacted a statutory six-year patent damages period (35 U.S.C. § 286). That statutory provision limits the availability of the laches defense, which cannot bar legal damages for patent infringement within that six-year damages period authorized by Congress. Of course, laches remains available as a defense where equitable relief is sought (such as injunctive relief and ongoing royalties). This is consistent with the U.S. Supreme Court's treatment of the same defense in the copyright context.

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

The U.S. Supreme Court eliminated the laches defense for copyright cases in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014). The Court reasoned that the judicially created laches defense must give way to the statutory three-year damages period in copyright. However, on September 18, 2015, the U.S. Court of Appeals for the Federal Circuit, sitting *en banc*, preserved the defense of laches for patent cases and distinguished *Petrella*. *SCA Hygiene Products AB v. First Quality Baby Products LLC*, 2015 WL 5474261 (Fed. Cir. Sept. 18, 2015) (*en banc*).

The resolution addresses whether the judicially created laches defense should bar legal relief in a patent infringement suit during the six-year damages period authorized by Section 286.

### 3. Please Explain How the Proposed Policy Position will Address the Issue

The issue relates to roles of the judicial and legislative branches of the federal government. In *Petrella*, the U.S. Supreme Court explained that congressional enactment of a statutory three-year copyright damages period (17 U.S.C. § 507(b)) has the effect of limiting availability of the judicially created laches defense as a bar to legal damages for copyright infringement.

The Resolution seeks a clarification that the same principle should apply to the patent law. Congressional enactment of a statutory six-year patent damages period (35 U.S.C. § 286) also has the effect of limiting availability of a laches defense as a bar to legal damages for patent infringement, although laches may still be a defense where equitable relief is sought (such as injunctive relief and ongoing royalties).

### 4. Summary of Minority Views

None known at this time.



**AMERICAN BAR ASSOCIATION**  
**SECTION OF INTELLECTUAL PROPERTY LAW**  
**REPORT TO THE HOUSE OF DELEGATES**  
**RESOLUTION**

- 1   RESOLVED, That the American Bar Association supports the traditional rule that the first  
2   sale of patented goods (as opposed to a mere license) by United States patent owners or their  
3   licensees (“Sellers”) triggers the defense of patent exhaustion with respect to an allegation of  
4   patent infringement related to those goods;
- 5   FURTHER RESOLVED, That the American Bar Association supports the traditional rule  
6   that, to impose contractual post-sale restrictions during the first sale of patented goods, the  
7   restrictions imposed by a Seller must: (1) relate to products reasonably within the scope of  
8   the patent grant (*i.e.*, be related to subject matter within the scope of patent claims) and;  
9   (2) not have anticompetitive effects except those justifiable under the rule of reason;
- 10   FURTHER RESOLVED, That the American Bar Association urges the courts to clarify that  
11   authorized sales of patented goods by the Sellers in the United States exhaust United States  
12   patent rights, and that a violation of contractual post-sale restrictions may not be remedied by  
13   an action for patent infringement but instead may be remedied by an action for breach of  
14   contract; and
- 15   FURTHER RESOLVED, That the American Bar Association urges the courts to clarify that  
16   authorized sales of patented goods by the Sellers outside of the United States do not exhaust  
17   United States patent rights if, at the time of sale, the Sellers expressly reserve or exclude  
18   United States patent rights by contract from such foreign sales, in which event remedies lie in  
19   both an action for patent infringement and an action for breach of contract.





## REPORT

The Federal Circuit is currently considering *en banc* two questions relating to the “patent exhaustion” doctrine in *Lexmark International, Inc. v. Impression Products, Inc.*, Appeal No. 14-1617. This common-law doctrine<sup>1</sup> permits a purchaser of patented goods the unrestricted right to sell or use those goods, notwithstanding the original seller’s patent rights. The first sale extinguishes the patent rights in those goods.

One question relates to whether a patent rights holder can impose restrictions or conditions at the time of the first sale to limit patent exhaustion. The other question relates to whether patent exhaustion applies to sales of patented goods abroad.<sup>2</sup>

This report asks the ABA House of Delegates to approve a policy supporting the traditional principles of patent exhaustion. After an authorized sale of goods embodying the invention covered by a United States patent, the patent holder’s ability to impose restrictions on the further sale and use of those patented goods is limited. Such an authorized first sale under a United States patent prevents later enforcement of the patent against resellers or users of those goods. Contractual restrictions on resale or use (if the seller imposes any) may be enforced under contract; but not patent law.

---

<sup>1</sup> Patent exhaustion, sometimes called the affirmative defense of first sale, refers to the termination of a seller’s rights to control through U.S. patent law particular patented goods that have been sold. After a seller’s first authorized sale, that seller has no further patent rights in those goods themselves. Use, sale, or other disposal of those goods by the purchaser or anyone else cannot infringe the seller’s U.S. patent rights. However, the seller retains the patent right to exclude others from making new patented goods. Patent exhaustion only applies to the goods actually sold.

<sup>2</sup> The Federal Circuit’s *en banc* order presents the following two questions:

(a) The case involves certain sales, made abroad, of articles patented in the United States. In light of *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2012), should this court overrule *Jazz Photo Corp. v. International Trade Commission*, 264 F.3d 1094 (Fed. Cir. 2001), to the extent it ruled that a sale of a patented item outside the United States never gives rise to United States patent exhaustion.

(b) The case involves (i) sales of patented articles to end users under a restriction that they use the articles once and then return them and (ii) sales of the same patented articles to resellers under a restriction that resales take place under the single-use-and-return restriction. Do any of those sales give rise to patent exhaustion? In light of *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617 (2008), should this court overrule *Mallinckrodt, Inc. v. Medi-part, Inc.*, 976 F.2d 700 (Fed. Cir. 1992), to the extent it ruled that a sale of a patented article, when the sale is made under a restriction that is otherwise lawful and within the scope of the patent grant, does not give rise to patent exhaustion?

However, exhaustion of United States patent rights may not be appropriate where the sale of patented goods outside of the United States has little or no connection with the United States. Consistent with the presumption against extraterritorial application of U.S. patents, sellers should be permitted expressly to reserve or exclude U.S. patent rights from the foreign sale, and prevent application of patent exhaustion where inappropriate.

These principles flow from the common law dating back at least to the nineteenth century and are consistent with U.S. Supreme Court precedent as set forth below.

## **A. Post-Sale Use Restrictions**

Common-law patent exhaustion flows from a deep-seated policy against restraints on alienation of personal property. Dating back to the nineteenth century, courts in this country have recognized the doctrine of patent exhaustion, whereby the initial authorized sale of a patented item terminates all patent rights to that item. *See, e.g., Adams v. Burke*, 84 U.S. (17 Wall.) 453 (1874); *see also Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625 (2008). In *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 549 (1853), the Court explained a patented good “is no longer within the limits of the [patent] monopoly” after it has been sold. This principle has been affirmed in many later Supreme Court decisions. *See, e.g., Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617, 625 (2008) (“initial authorized sale of a patented item terminates all patent rights to that item.”); *United States v. Univis Lens Co.*, 316 U.S. 241, 251-52 (1942) (sale of patented lenses exhausted patent rights and rendered post-sale price restrictions unenforceable); and *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 508-18 (1917) (post-sale restrictions that patented machine could only be used with certain motion pictures are ineffective to prevent patent exhaustion).

However, the Federal Circuit’s decision in *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992) departs from that long history of patent exhaustion and improperly narrowed the common-law doctrine of patent exhaustion. *Mallinckrodt* allows patent owners to contract around patent exhaustion through post-sale use restrictions. In *Mallinckrodt*, the patent owner had sold the patented goods, used in taking lung X-rays, for a single use only. The accused infringer was charging to refurbish those goods after that initial use. The Federal Circuit determined that a patent rights holder could impose contractual post-sale use restrictions if the patented goods were first sold, so long as the restrictions were not in conflict with antitrust laws (*i.e.*, be reasonably within the scope of the patent grant and not have anticompetitive effect that is not justifiable under the rule of reason). *Id.* at 708.

Rather than limiting relief to contract claims, *Mallinckrodt* went much further. It held that violations of post-sale use restrictions “may be remedied by action for patent infringement.” *Id.* at 709. That holding, however, is contrary to the long-standing Supreme Court precedent, which prevents patent holders from enforcing such post-sale use restrictions under the patent laws. This is because patent rights were exhausted by the first sale, and the only redress available to the patent owner should be limited to contract law claims against the original purchaser. *See Bloomer*, 55 U.S. at 549-50 (post-sale restrictions enforceable in contract law, but not patent law); *Quanta*, 554 U.S. at 637 n.7 (same).

*Mallinckrodt's* rule allows parties to forestall patent exhaustion, and is incompatible with the Supreme Court's *Quanta* decision. In *Quanta*, LGE had licensed Intel to make and sell patented components, but refused to grant a sub-license to Intel's customers that would have authorized them to combine its patented components with non-Intel parts. *Quanta*, 553 U.S. at 623. The Supreme Court rejected LGE's patent infringement claims against an Intel customer, concluding that LGE had unconditionally authorized Intel's sales to its customers with the effect of exhausting LGE's patent rights. *Id.* at 636-37.

*Mallinckrodt's* holding that a patent owner can contractually avoid exhaustion of its patent rights is also inconsistent with other Supreme Court decisions. For example, in *Adams v. Burke*, 84 US (17 Wall.) 453 (1873), the patent owner attempted to divide the U.S. patent rights geographically, by creating one territory within a ten-mile radius of Boston, and a second outside of that region. After buying the patented goods within the Boston circle, the purchaser took them outside of that geographical area and used them in the other territory. *Id.* at 455. When the patent rights holder for the area outside of the Boston circle sued, the Court refused to find the purchaser liable for patent infringement, holding that the authorized Boston sale had exhausted all patent rights. *Id.* at 456.

Similarly, in *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940), the Court rejected an attempt to rely on patents to enforce post-sale pricing restrictions, stating the initial authorized sales of the patented fuel exhausted the underlying U.S. patent rights. Therefore, the fuel could be resold without regard to the pricing restrictions. *Id.* at 457.

The key fact in *Bloomer*, *Quanta*, *Adams*, and *Ethyl Gasoline* was an authorized sale under the U.S. patent. If an authorized sale is absent, however, the U.S. patent rights are not exhausted. In *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, *aff'd on reh'g*, 305 U.S. 124 (1938), the patent owner restricted the ability of its manufacturing licensee to sell the patented goods to those who would use them for commercial purposes. The Court held that unauthorized sales by the manufacturing licensee did not exhaust the U.S. patent rights. Similarly, the patent owner in *Mitchell v. Hawley*, 83 U.S. 544 (1872) granted a license to make the patented invention for a limited term. Unauthorized sales (*i.e.*, those outside that limited term) did not exhaust the U.S. patent rights.

Prohibiting patent rights holders from enforcing post-sale use restrictions through patent infringement litigation against downstream purchasers would not mean post-sale use restrictions could not be enforced. Patent rights holders can sue the original purchaser for enforcement of the contract if the original terms of sale have been violated. The patent rights holder is in privity with the other contracting party. They have negotiated the terms of the sale, and agreed to any post-sale use restrictions. By contrast, a downstream purchaser may not be in privity with the patent rights holder, did not negotiate the terms of the first sale, and may not have been aware of the restrictions.

## **B. International Patent Exhaustion**

*Jazz Photo Corp. v. International Trade Commission*, 264 F.3d 1094 (Fed. Cir. 2001), represents another example of the Federal Circuit limiting the common law doctrine of patent exhaustion. *Jazz Photo* has been interpreted as creating a distinction between domestic sales (to which patent

exhaustion applies) and foreign sales (to which it does not). However, no Supreme Court precedent requires or even supports such a geographical distinction. No federal statutes address whether or when an authorized sale by a U.S. patent owner of a patented product outside of the U.S. exhausts the patent owner's control over that particular item. Congress has not addressed whether first sales outside the U.S. should be treated differently than any other sales.

In deciding that the sales abroad did not exhaust the U.S. patent rights, the *Jazz Photo* panel misapplied the only Supreme Court case to address a foreign sale's effect on U.S. patent rights—*Boesch v. Graff*, 133 U.S. 697 (1890). In *Boesch*, the Court held that patent exhaustion did not apply to an overseas sale, because the seller of the products sold outside of the U.S. did not hold the U.S. patent rights. The Court explained the seller could not convey U.S. patent rights he did not have: “The right which Hecht (the seller) had to make and sell the burners in Germany was allowed him under the laws of that country, and purchasers from him could not be thereby authorized to sell the articles in the United States in defiance of the rights of patentees under a United States patent.” *Id.* at 703. *Boesch* stands only for the proposition that a sale not authorized by the U.S. patent holder does not exhaust U.S. patent rights. *Boesch* does not address the effect of a U.S. patent holder's authorized foreign sales.

The common law, prior to 1952 and prior to *Jazz Photo*, established that overseas sales authorized by the patent holder could exhaust U.S. patent rights. For example, in *Curtiss Aeroplane & Motor Corp. v. United Aircraft Engineering Corp.*, 266 F. 71, 78-79 (2d Cir. 1920), the Second Circuit held the sale of patented airplanes in Canada by the U.S. patent owner exhausted U.S. patent rights. *See also Dickerson v. Matheson*, 57 F. 524, 527-28 (2d Cir. 1893) (if U.S. and foreign patent owners were the same entity, a foreign sale would exhaust the patent, but if they were different, importer required permission from the domestic rights holder); *Holiday v. Mattheson*, 24 F. 185, 185-86 (C.C.S.D.N.Y. 1885) (after selling article without restriction in England, patentee could not prevent purchaser from re-selling patented good in the United States). That was the settled state of the law prior to the Federal Circuit's 2001 *Jazz Photo* decision.

The Supreme Court's recent decision in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2012) further supports the Resolution. *Kirtsaeng* addressed the same issue in the context of copyrights. *Kirtsaeng* held that U.S. copyrights are extinguished by an authorized sale, regardless of location. In reaching that result, the Court construed the Copyright Act's first sale statute, 17 U.S.C. § 109(a). Because Section 109(a) contains no express geographic limitations, the Court presumed Congress intended to retain the substance of the common law, which also lacked any express geographic limitation. *Id.* at 1358–60, 1363–64. The Court cited writings by Lord Coke in early 17th century England explaining the general policy embodied in the common law against restraints on the alienation of personal property. *Id.* at 1363. In his discussion, Lord Coke was not addressing copyright law in particular, and this rationale applies as equally to patent rights as it does for copyrights or any other property rights.

Lexmark has argued that copyright law differs from patent law in ways that make *Kirtsaeng* inapplicable. Specifically, in 1994 Congress gave patentees the exclusive right to bar importation of patented goods brought into the U.S. *See* 35 U.S.C. §§ 154(a)(1), 271. This freestanding statutory importation provision creates “geographical distinctions” in patent law that are absent

from copyright law. But these importation provisions merely describe basic patent rights and the judicially-created exhaustion doctrine applies to the importation rights, just as it applies to all of the other statutory patent rights.

The importation provisions do not create a geographic limitation on patent exhaustion. To the contrary, the legislative history underlying these 1994 amendments indicates that they “do[] not affect U.S. law or practice relating to parallel importation.” Uruguay Round Agreements Act Statement of Administrative Action, 1994 U.S.C.C.A.N. 4040, 4280. Therefore, these statutory provisions are no obstacle to applying Lord Coke’s principles (as recognized in *Kirtsaeng*) in the patent law.

However, the fact a foreign sale can exhaust U.S. patent rights does not mean it must do so. Courts have traditionally permitted U.S. patent rights holders to reserve their U.S. patent rights even when patented goods are sold abroad. For example, in *Dickerson v. Matheson*, 57 F. 524 (2d Cir. 1893), the seller held both the U.S. and foreign patent rights, but the overseas purchaser accepted conditions of sale that specifically prohibited importation into the U.S. Because those conditions excluded use in the U.S., the sale did not exhaust the U.S. patent rights. *Id.* at 527 (citing *Boesch*, 133 U.S. 697); *see also Dickerson v. Tinling*, 84 F. 192, 194 (8th Cir. 1897) (purchase of patented item “in a foreign country ... subject to the express condition that it should not be imported into the United States, or sold within their limits” does not abridge “exclusive right to sell the patented article within the United States”); *Curtiss Aeroplane*, 266 F. at 77 (distinguishing between foreign sales with and without reservations).

Forcing patent rights holders expressly to reserve their U.S. patent rights (if they choose to do so) when selling abroad is good public policy. First, it puts the onus on patent holders to make clear what patent rights are being transferred. These patent holders are in the best position to know what rights they own and what restriction already exist on those rights. This also would allow purchasers to bargain for those rights and to adjust the price accordingly. Second, it would eliminate an implied restraint on the trade of patented articles. The reasons espoused by Lord Coke for disfavoring such restraints centuries ago continue to apply today. Third, adopting this rule will help to avoid satellite litigation regarding the sites of patent good sales, which could be quite complex and costly.

For the above reasons, the Section of Intellectual Property Law believes its recommendation is consistent with the law and represents sound public policy, and therefore urges its adoption by the ABA House of Delegates.

Respectfully submitted,

Theodore H. Davis Jr., Chair  
Section of Intellectual Property Law  
February 2016

## GENERAL INFORMATION FORM

Submitting Entity: Section of Intellectual Property Law

Submitted by: Theodore H. Davis Jr., Section Chair

1. Summary of Resolution

The Resolution expresses Association policy in support of the continued vitality of traditional patent exhaustion. An authorized sale of patented goods under a United States patent conveys to the purchaser all of the seller's authority under that patent. Such a sale exhausts the seller's United States patent rights, and prevents later enforcement of the patents against those goods. Contractual restrictions, if imposed at the time of the first sale of the patent goods, may not be enforced under patent law.

The reach of patent exhaustion is not unlimited, however. Sales outside the United States may have little or no connection with the United States. Therefore, an overseas seller of patented goods should be permitted to expressly reserve or exclude the United States patent rights from a foreign sale to prevent application of patent exhaustion.

2. Approval by Submitting Entity

The Section Council approved the resolution on November 6, 2015.

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

No.

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

None.

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

The policy would provide authority for the ABA to express views should it file an amicus brief in the *Lexmark* case that is under active consideration by the U.S. Court of Appeals for the Federal Circuit and may soon come before the U.S. Supreme Court.

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 would support submission of an Amicus Brief on behalf of the ABA relating to a petition for writ of certiorari or on the merits before the U.S. Supreme Court in the currently pending en banc Federal Circuit case of *Lexmark International, Inc. v. Impression Products, Inc.*, Appeal No. 14-1617, or another judicial proceeding presenting the same or similar issues regarding the scope of the exhaustion doctrine in patent infringement cases.

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

Adoption of the recommendations would not result in additional direct or indirect costs to the Association.

9. Disclosure of Interest

There are no known conflicts of interest with regard to this recommendation.

10. Referrals

This recommendation is being distributed to each of the Sections and Divisions and Standing Committees of the Association.

11. Contact Person (prior to meeting)

Susan Barbieri Montgomery  
Section Delegate to the House of Delegates  
Foley Hoag LLP  
155 Seaport Blvd., Ste. 1600  
Boston, MA 02210-2600  
Ph: 617-832-1222  
Fax: 617-832-7000  
s.montgomery@neu.edu

12. Contact Persons (who will present the report to the House)

Susan Barbieri Montgomery (See item 11 above).

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The Resolution expresses ABA policy in support of traditional, common-law patent exhaustion. After an authorized sale under a United States patent, the patent holder's ability to impose restrictions on patented goods is limited. Such a sale prevents later enforcement of the patent against those goods. Contractual restrictions (if imposed at the time of the first sale) may be enforced under contract; not patent law. However, an overseas sale of patented goods may have little or no connection with the United States. Such sellers should be permitted to expressly reserve or exclude United States patent rights from the foreign sale and to prevent application of patent exhaustion.

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

*Lexmark International, Inc. v. Impression Products, Inc.*, Appeal No. 14-1617, is pending before the U.S. Court of Appeals for the Federal Circuit (en banc). The questions under consideration are:

- 1) The case involves certain sales, made abroad, of articles patented in the United States. In light of *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2012), should this court overrule *Jazz Photo Corp. v. International Trade Commission*, 264 F.3d 1094 (Fed. Cir. 2001), to the extent it ruled that a sale of a patented item outside the United States never gives rise to United States patent exhaustion.
- 2) The case involves (i) sales of patented articles to end users under a restriction that they use the articles once and then return them and (ii) sales of the same patented articles to resellers under a restriction that resales take place under the single-use-and-return restriction. Do any of those sales give rise to patent exhaustion? In light of *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617 (2008), should this court overrule *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992), to the extent it ruled that a sale of a patented article, when the sale is made under a restriction that is otherwise lawful and within the scope of the patent grant, does not give rise to patent exhaustion?

### 3. Please Explain How the Proposed Policy Position will Address the Issue

The Resolution supports traditional, common-law patent exhaustion. First, the Resolution supports overturning *Jazz Photo* to the extent it has been interpreted as holding that an overseas sale can never exhaust a U.S. patent. Instead, the Resolution urges that an overseas seller of patented goods may avoid U.S. patent exhaustion by expressly excluding U.S. patent rights from the foreign sale. Second, the Resolution supports overturning *Mallinckrodt*. Patent holders are permitted to impose contractual restrictions at the time of the first sale, but such restrictions cannot avoid patent exhaustion.



4. Summary of Minority Views

None known at this time.



AMERICAN BAR ASSOCIATION  
LAW STUDENT DIVISION  
LAW PRACTICE DIVISION  
NATIONAL CONFERENCE OF BAR EXAMINERS  
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR  
SENIOR LAWYERS DIVISION  
TORT TRIAL AND INSURANCE PRACTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges the bar admission authorities in
- 2 each state and territory to adopt expeditiously the Uniform Bar Examination.



## REPORT

### Introduction

The Uniform Bar Examination (“UBE”) is now in its fifth successful year. It has been more than five years since the Conference of Chief Justices and the Council of the American Bar Association’s Section of Legal Education and Admissions to the Bar adopted resolutions urging “the bar admission authorities in each state and territory to consider participating in the development and implementation of a uniform bar examination.”<sup>1</sup>

Seventeen jurisdictions are currently scheduled to administer the exam in February 2016.<sup>2</sup> In July 2016, New York will become the eighteenth UBE jurisdiction when it administers its first UBE.<sup>3</sup> Other jurisdictions have held discussions in favor of adopting the UBE: the Vermont Supreme Court has conveyed its support to the state Board of Bar Examiners for adopting the UBE and recommended that rule amendments be prepared for public comment before the end of 2015;<sup>4</sup> the District of Columbia Court of Appeals has published for comment rule amendments to adopt the UBE;<sup>5</sup> and Massachusetts and New Jersey have formed committees to study the possibility of adopting the UBE.<sup>6</sup> Additionally, Dean Erwin Chemerinsky of the University of California Irvine School of Law has called for California to adopt the UBE.<sup>7</sup>

---

<sup>1</sup> Resolution of the Conference of Chief Justices, “Endorsing Consideration of a Uniform Bar Examination,” adopted as proposed by the CCJ Professionalism and Competence of the Bar Committee at the 2010 Annual Meeting (July 28, 2010), <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07252012-Endorsing-Consideration-of-a-Uniform-Bar-Examination.ashx>; Resolution “Endorsing Consideration of a Uniform Bar Examination,” adopted by the Council of the Section of Legal Education and Admissions to the Bar on August 6, 2010, [http://www.abajournal.com/files/Uniform\\_Bar\\_Exam\\_2010\\_Council\\_\(9-14\)\\_v2.pdf](http://www.abajournal.com/files/Uniform_Bar_Exam_2010_Council_(9-14)_v2.pdf).

<sup>2</sup> See Appendix A for a full listing of all of the jurisdictions that have adopted the UBE.

<sup>3</sup> *Notice: Uniform Bar Examination (UBE)*, NEW YORK STATE BOARD OF LAW EXAMINERS (May 5, 2015), <http://www.nybarexam.org/>.

<sup>4</sup> *Board Of Bar Examiners Announces That Vermont Expects To Adopt Uniform Bar Examination For July 2016 Bar Exam*, VERMONT JUDICIARY LEGAL COMMUNITY, <https://www.vermontjudiciary.org/LC/d-BBELibrary/Uniform%20Bar%20Exam%20Announcement.pdf>.

<sup>5</sup> See Notice Number M-252-15 at <http://www.dccourts.gov/internet/appellate/notices/main.jsf>.

<sup>6</sup> *Supreme Judicial Court Announces Uniform Bar Examination Advisory Committee* at <http://www.mass.gov/courts/news-pubs/sjc/sjc-announces-uniform-bar-exam-advisory-committee.html>; *Committee to Study Uniform Bar Exam Formed*, at <http://www.judiciary.state.nj.us/pressrel/2015/pr151028a.pdf>.

<sup>7</sup> Erwin Chemerinsky, *It’s time for California to accept the Uniform Bar Exam*, L.A. TIMES, May 11, 2015 available at <http://www.latimes.com/opinion/op-ed/la-oe-0511-chemerinsky-standard-bar-exam-20150511-story.html>.

National adoption of the UBE would make the bar examination process more efficient and less costly for recent law graduates who are already saddled with significant debt. Because the UBE results in a portable score for bar applicants that can be transferred to other UBE jurisdictions to seek admission, the UBE increases the opportunity for bar admission for recent graduates and provides them with mobility and flexibility necessary to find employment. UBE jurisdictions maintain local control over bar admissions while administering a uniform, high-quality examination of minimum competence to practice law.

### **Bar Exam History**

The history of the written bar exam tells the tale of a steady path towards a national bar examination.<sup>8</sup> In 1972, the National Conference of Bar Examiners (“NCBE”) introduced the Multistate Bar Examination (“MBE”).<sup>9</sup> The MBE is now offered in 54 jurisdictions.<sup>10</sup> Over time, NCBE developed additional exams, including: (1) the Multistate Professional Responsibility Examination (“MPRE”), first offered in 1980<sup>11</sup> and now used in all but 3 jurisdictions;<sup>12</sup> (2) the Multistate Essay Examination (“MEE”), first offered in 1988<sup>13</sup> and now used in 31 jurisdictions;<sup>14</sup> and (3) the Multistate Performance Test (“MPT”), first offered in 1997<sup>15</sup> and now used in 41 jurisdictions.<sup>16</sup>

---

<sup>8</sup> See generally Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359 (1996).

<sup>9</sup> *Id.* at 378.

<sup>10</sup> The exceptions are the civil law states of Louisiana and Puerto Rico. See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2015 at 25 (Erica Moeser & Claire Huisman eds., 2015), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2015\\_comprehensive\\_guide\\_to\\_bar\\_admission\\_requirements.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2015_comprehensive_guide_to_bar_admission_requirements.authcheckdam.pdf); see also Appendix B.

<sup>11</sup> Arthur Karger, *The Continuing Role of the NCBE in the Bar Admission Process*, BAR EXAMINER, at 14, 19, available at [http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia\\_files%2FBar-Examiner%2Farticles%2F1996%2F650296\\_karger.pdf](http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F1996%2F650296_karger.pdf)

<sup>12</sup> Maryland, Wisconsin, and Puerto Rico are the exceptions. See *Comprehensive Guide*, *supra* note 9.

<sup>13</sup> Jane Smith, *Testing, Testing*, BAR EXAMINER, Nov. 1998, at 24, available at [https://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia\\_files%2FBar-Examiner%2Farticles%2F1998%2F670498\\_Testingtesting.pdf](https://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F1998%2F670498_Testingtesting.pdf).

<sup>14</sup> See *Comprehensive Guide*, *supra* note 9, and Appendix B.

<sup>15</sup> Judith A. Gundersen, *Happy Birthday, MPT!*, BAR EXAMINER, Nov. 2007, at 18, 20, available at [http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia\\_files%2FBar-Examiner%2Farticles%2F2007%2F760407\\_Gundersen.pdf](http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2007%2F760407_Gundersen.pdf).

<sup>16</sup> See *Comprehensive Guide*, *supra* note 9, and see also Appendix B for a table of jurisdictions using these tests.

Today, given that nearly all jurisdictions use the MBE and the MPRE, and most utilize one or more of the other NCBE multistate examinations, “in effect, a common licensing test is already in force.”<sup>17</sup>

### **UBE Composition and Administration**

The UBE is prepared and coordinated by NCBE and is composed of the MEE, the MPT, and the MBE.<sup>18</sup> It is uniformly graded and offers test-takers a portable score that can be transferred to any other UBE jurisdiction. Jurisdictions that use the UBE continue to control the admission process locally and set their own admission requirements, including the following: deciding who may sit for the bar exam and who will be admitted to practice; determining underlying educational requirements; making all character and fitness decisions; setting their own policies regarding the number of times applicants may retake the bar examination; making disability accommodations decisions; grading the MEE and the MPT; accepting MBE scores earned in a previous examination or concurrently in another jurisdiction for purposes of making local admission decisions if they wish to; and setting their own passing scores. Additionally, each jurisdiction retains its own autonomy, through optionally assessing each candidate’s knowledge of jurisdiction-specific content through a separate test, course, or some combination of the two if the jurisdiction so chooses.<sup>19</sup>

More than 26,800 examinees took the UBE between February 2011 and July 2015. The number of transferred scores has increased from year to year as the number of UBE jurisdictions has grown. As of October 2015, approximately 2,300 scores have been transferred.<sup>20</sup> With the addition of New York in July 2016, the number of UBE scores earned and transferred is expected to increase significantly because New York typically tests more than 15,000 candidates each year.<sup>21</sup>

### **Benefits of Nationwide UBE Adoption**

Nationwide adoption of the UBE would have numerous benefits for new law graduates and young lawyers, jurisdictions, and the legal profession as a whole.

---

<sup>17</sup> Frederic, *A Uniform Bar Examination: An Idea Whose Time Has Come*, BAR EXAMINER, Feb. 2009, at 6, 6-7, available at [https://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia\\_files%2FBar-Examiner%2Farticles%2F2009%2F780109\\_UBEEssays\\_01.pdf](https://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2009%2F780109_UBEEssays_01.pdf).

<sup>18</sup> *Jurisdictions that Have Adopted the UBE*, NATIONAL CONFERENCE OF BAR EXAMINERS (last visited Sept. 27, 2015), <http://www.ncbex.org/exams/ube/>.

<sup>19</sup> *See Policies Set by UBE Jurisdictions*, National Conference of Bar Examiners (last visited Sept. 27, 2015), available at <http://www.ncbex.org/exams/ube/>.

<sup>20</sup> See Appendix C.

<sup>21</sup> See Statistics Archives published by NCBE, <http://www.ncbex.org/publications/statistics/>.

## I. Reducing the Burden on New Law Graduates and Young Lawyers

The practice of law has become multi-jurisdictional and global. Lawyers, like all professionals, are increasingly mobile, changing firms and locations more frequently than ever.<sup>22</sup> While moving and transferring jurisdictions has become a more common practice, that fact is even truer for women. One study found of Ohio bar takers found that women were significantly more likely to move out of state than men within their first five years of practice, putting them at a greater disadvantage under current bar transfer rules.<sup>23</sup>

Reciprocity agreements between jurisdictions, however, are generally only available to seasoned lawyers with several years of experience,<sup>24</sup> while young lawyers have to “study for, pay for, wait for, and take multiple bar exams with uncertain results.”<sup>25</sup> This limits a recent law graduate or young lawyer’s ability to transfer their legal license from state to state if a new job opportunity were to present itself. Because UBE scores can be transferred to other UBE jurisdictions, widespread adoption of the UBE would help alleviate this burden.<sup>26</sup>

The need for greater mobility for recent graduates is particularly acute given the state of the legal job market. Currently, law graduates might have to choose a jurisdiction in which to take the bar exam before they have even found employment. If these graduates subsequently find employment in another jurisdiction, they will be forced to take the bar examination again,

---

<sup>22</sup> See Hon. Rebecca White Berch, *The Case for the Uniform Bar Exam*, BAR EXAMINER, Feb. 2009, at 9, 10, available at [http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia\\_files%2FBar-Examiner%2Farticles%2F2009%2F780109\\_UBEEssays\\_01.pdf](http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2009%2F780109_UBEEssays_01.pdf); Mary Kay Kane, *A Uniform Bar Exam: One Academic’s Perspective*, BAR EXAMINER, Feb. 2009, at 19, 20, available at [http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia\\_files%2FBar-Examiner%2Farticles%2F2009%2F780109\\_UBEEssays\\_01.pdf](http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2009%2F780109_UBEEssays_01.pdf);

<sup>23</sup> See Deborah Jones Merritt, *What Happened to the Class of 2010? Empirical Evidence of Structural Change in the Legal Profession* (April 8, 2015). 2015 MICH. ST. L. REV. (forthcoming); Ohio State Public Law Working Paper No. 290; HLS Center on the Legal Profession Research Paper No. 2015-3, available at <http://ssrn.com/abstract=2577272> (reporting that among new lawyers admitted to the Ohio bar in 2010 women were significantly more likely than men to move out of state within their first five years of practice - 18.4% of women left Ohio after gaining bar admission, while just 14.1% of the men did so).

<sup>24</sup> See *Comprehensive Guide*, supra note 9, at 34.

<sup>25</sup> New York Court of Appeals Chief Judge Jonathan Lippman, Address at the Court of Appeals for Law Day 2015 (May 5, 2015), available at <http://www.nycourts.gov/ctapps/news/LawDay2015.pdf>.

<sup>26</sup> Carla J. DeVelder, *Working for Uncle Sam*, STUDENT LAWYER, Sep. 2011, [http://www.americanbar.org/publications/student\\_lawyer/2011-12/september/working\\_for\\_uncle\\_sam.html](http://www.americanbar.org/publications/student_lawyer/2011-12/september/working_for_uncle_sam.html).



adding thousands of dollars to their already-considerable debt load.<sup>27</sup>

## II. Reducing the Burden on Jurisdictions

Some jurisdictions still have their individual board of bar examiners drafting essay questions, even though the topics are largely similar to those tested on the MEE and include little or no local content.<sup>28</sup> Adopting the UBE would reduce these duplicative efforts, freeing jurisdiction resources to focus on other areas of importance in bar admissions, such as conducting character and fitness examinations, enforcing rules for admission, and administering CLE programs.

Critics of the UBE often highlight that certain areas of the law vary considerably from one jurisdiction to another, such as probate, trusts and estates, and family law. However, a test of minimum competency should not require specialized knowledge of these areas of the law. Furthermore, the law is increasingly uniform throughout the states and territories, due to adoption of measures like the uniform codes and principles in the Restatements.

Although the UBE does not test specialized areas of practice or unique aspects of state-specific law, jurisdictions that adopt the UBE are free to develop supplementary jurisdiction-specific components in any areas they deem significant to practicing in their borders. Some UBE jurisdictions require completion of online courses, online open-book tests, or live seminars as an admission requirement in order to focus on significant and unique aspects of practicing in the jurisdiction.<sup>29</sup> New York, for example, will require both an online course and an online examination on New York law.<sup>30</sup> In New Mexico, which has a significant Native

---

<sup>27</sup> There are expenses not only in registering for exams, but also in preparation for the examination itself. Popular courses “cost between \$3,000 and \$4,000, and many finance those fees—as well as their living expenses while they study—with a bar review loan of up to \$16,000.” Sarah Mui, *Did you take a bar exam prep course? If so, did you take out a loan to finance it? Any regrets?*, ABA JOURNAL, June 5, 2013, [http://www.abajournal.com/news/article/did\\_you\\_take\\_a\\_bar\\_preparation\\_course](http://www.abajournal.com/news/article/did_you_take_a_bar_preparation_course).

<sup>28</sup> See White, *supra* note 16, at 6-7.

<sup>29</sup> Completion of a jurisdiction-specific component before admission is required by the following jurisdictions that adopted the UBE prior to 2015:

1. Alabama: An online course on Alabama law is required for applicants seeking admission by examination or by UBE score transfer.
2. Arizona: An online course on Arizona law is required prior to admission for all applicants.
3. Missouri: Applicants have to complete an open-book online test, the Missouri Educational Component Test (MECT), as a condition of licensure. Review materials are posted to assist applicants.
4. Montana: The Montana Law Seminar, which covers Native American Law and Jurisdiction, the Montana Constitution, and Labor and Employment law, among other topics, is required prior to admission.
5. Washington: Washington Law Component (WLC) is an open-book, timed, online multiple-choice test with Washington-specific study materials available online to review prior to and during the test.

See *Comprehensive Guide*, *supra* note 11, at 32-33.

<sup>30</sup> See <http://www.nybarexam.org/>.

American population, applicants must attend and complete a course approved by the New Mexico Supreme Court, which includes Indian law, as well as community property law and professionalism.<sup>31</sup> Likewise, the Washington Law Component includes Indian law and community property law, among other subjects deemed important for newly licensed lawyers to be educated about.<sup>32</sup> Jurisdictions can provide applicants access to outlines containing critical information about local law, and administer a corresponding online open-book test, as is the case in Missouri. Such materials can easily be updated to remain a relevant, accessible resource for the entire legal community.<sup>33</sup>

### III. Ensuring the Quality and Consistency of the Bar Exam

Widespread adoption of the UBE would help ensure the consistency and quality of the bar exam.<sup>34</sup> States can lack the resources to retain test writers, which can result in exam questions that are unreliable tests of legal competency. Diverse committees composed of practicing attorneys, law professors, and judges draft the tests prepared by NCBE. Moreover, NCBE employs test editors who are lawyers to support these committees. NCBE's test questions are reviewed by outside subject matter experts and are pre-tested.<sup>35</sup>

The UBE also has the ability to potentially improve exam grading. NCBE provides jurisdictions with uniform model answers and grading materials, and offers extensive opportunities for graders to participate in question-specific training, which takes place after the exam is administered and before grading begins. Graders of the MEE and the MPT rank-order the answers of candidates from best to worst. The raw scores are then converted to the MBE scaled score distribution in order to make the scores comparable from one exam

---

<sup>31</sup> N.M. Ct. R. 15-103.G, *available at* [http://www.nmcompcomm.us/nmrules/NMRules/15-103\\_10-15-2015.pdf](http://www.nmcompcomm.us/nmrules/NMRules/15-103_10-15-2015.pdf).

<sup>32</sup> See WASHINGTON LAW COMPONENT RESEARCH MATERIALS, <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Admissions/Uniform-Bar-Exam>.

<sup>33</sup> Cindy L. Martin, *Local Law Distinctions in the Era of the Uniform Bar Examination: The Missouri Experience (You Can Have Your Cake and Eat It, Too)*, BAR EXAMINER, Sep. 2011, at 7, *available at* [https://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2011/800311Martin.pdf](https://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2011/800311Martin.pdf).

<sup>34</sup> Susan M. Case, Ph.D., *A Uniform Bar Examination: What's in It for Me?*, BAR EXAMINER, Feb. 2010, at 50, 52, *available at* [https://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2010/790110\\_TestingColumn.pdf](https://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2010/790110_TestingColumn.pdf).

<sup>35</sup> See C. Beth Hill, *MBE Test Development: How Questions are Written, Reviewed, and Selected for Test Administrations*, BAR EXAMINER, Sept. 2015, at 23, *available at* <http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fuploads%2FBFBE-Sept2015-MBETestDev.pdf>; Judith A. Gundersen, MEE and MPT Test Development: A Walk-Through From First Draft to Administration, BAR EXAMINER, June 2015, at 29, *available at* <http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fuploads%2F840215-Gundersen.pdf>.

administration to another.<sup>36</sup> A more detailed explanation of scaling written component scores to the MBE can be found in the December 2014 issue of *The Bar Examiner*.<sup>37</sup>

#### IV. Benefit to the Public and to the Profession

The UBE is consistent with several current ABA policies that help shape the profession and its service to the public.

In 2006, the ABA House of Delegates adopted a resolution concerning minorities in the pipeline to the profession. Among other policies within the resolution, it urged state and territorial bar examiners to address significant problems facing minorities within the pipeline to the profession. A barrier in the form of duplicative and expensive tests and administrative hurdles for each jurisdiction is just the type of significant problem that should be addressed.<sup>38</sup>

In addition, in August 2014, the ABA House of Delegates adopted Resolution 108, sponsored by the Legal Access Job Corps Task Force, regarding the access-to-justice gap.<sup>39</sup> Resolution 108 outlines that “most states have substantial rural areas and some of them have an aging lawyer population. As a result, many communities are now without lawyers. For example, in one South Dakota community, the nearest lawyer is 120 miles away. State bars

---

<sup>36</sup> Judith A. Gundersen, *The Testing Column: Essay Grading Fundamentals*, BAR EXAMINER, Mar. 2015, at 54, available at [http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia\\_files%2FBar-Examiner%2Farticles%2F2015%2F840115-TestingColumn.pdf](http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2015%2F840115-TestingColumn.pdf).

<sup>37</sup> Mark A. Albanese, *The Testing Column: Scaling: It's Not Just for Fish or Mountains*, BAR EXAMINER, Dec. 2014, at 50, available at [http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia\\_files%2FBar-Examiner%2Farticles%2F2014%2F830414-testingcolumn.pdf](http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2014%2F830414-testingcolumn.pdf).

<sup>38</sup> Resolution 113 of the American Bar Association, also referred to as the “Pipeline Diversity Resolution” adopted at the 2006 Annual Meeting, available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/diversity/pipeline\\_diversity\\_resolution.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/diversity/pipeline_diversity_resolution.authcheckdam.pdf) (calling upon bar associations and bar examiners to provide greater collaboration and assurance to address potential disparate impact on minorities in the pipeline to the profession). While Resolution 113 specifically addressed possible disparate impact on bar passage rates of minority candidates, Judge Cynthia Martin testified to the NY Advisory Committee that “no one has voiced a concern that the UBE has negatively impacted the gap between general pass rates, and the pass rates for certain demographics,” and speaking anecdotally given the lack of data “readily available in the public domain,” she noted that at the one school she spoke with, the “pass rate for... minority demographic groups... actually increased.” See Supplemental Testimony before the Advisory Committee on the Uniform Bar Examination by the Honorable Cynthia L. Martin at <https://www.nycourts.gov/ip/bar-exam/pdf/Supplemental-Testimony-Hon.C.Martin-NYUBE-Advisory-Comm.pdf>. See also “New York County Lawyers Association Report on the New York Uniform Bar Exam Proposal, available at [https://www.nycla.org/siteFiles/Publications/Publications1746\\_0.pdf](https://www.nycla.org/siteFiles/Publications/Publications1746_0.pdf).

<sup>39</sup> Resolution 108 of the American Bar Association, adopted at the 2014 Annual Meeting, [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2014\\_hod\\_annual\\_meeting\\_108.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2014_hod_annual_meeting_108.authcheckdam.pdf).

faced with this challenge are creating rural placement projects designed to encourage and give incentives for recently admitted lawyers to set up or assume practices in these communities.” Wider adoption of the UBE provides greater portability of bar examination scores, which would make it significantly easier for new law graduates to seek employment in areas with under-served populations. Consequently, this helps to alleviate the problems of both recent graduate unemployment and the lack of access to legal services that Resolution 108 addresses.<sup>40</sup>

Moving toward greater adoption of the UBE will also help align the legal field with other professions, such as accounting and medicine, that already utilize a uniform exam for board licensure. In the late 1980s, the National Board of Medical Examiners went through the same process that NCBE is going through now. Specifically, it established a uniform exam that ensured the competency of medical professionals and eased the expenses of state and territorial medical boards in administering separate exams across the country.<sup>41</sup>

## Summary

The recommended resolution will enable the ABA to remain a leader in representing the interests of law students, young lawyers, and the bar in new and innovative ways. The time has come for widespread adoption of the UBE, which would better reflect today’s multijurisdictional practice of law, while ensuring a standard level of competency for all lawyers throughout the United States. The exam greatly assists law school graduates who face tremendous challenges finding employment and managing student debt. At the same time, it reduces inefficiency and expenses by eliminating duplicative efforts among state bar examiners. Finally, because many states already administer the functional equivalent of the UBE, formal adoption is the next logical step.

Respectfully submitted,

Fabiani Duarte  
Chair, Law Student Division  
February 2016

---

<sup>40</sup> See New York Advisory Committee on the Uniform Bar Examination, *Ensuring Standards and Increasing Opportunities for the Next Generation of New York Attorneys*, April 2015, at 40, <http://www.nycourts.gov/ip/bar-exam/>. (“The portability afforded by the UBE also may result in the increased provision of legal assistance to traditionally under-served areas, such as low income or rural communities. Likewise, it may help funnel students into public interest practice, where employers often do not hire until the spring of applicants’ final year of law school, after students have chosen which bar to take.”)

<sup>41</sup> See Susan M. Case, Ph.D., *A Uniform Licensure Examination: It Can Be Done*, BAR EXAMINER, Feb. 2009, at 30, 31-32, available at [https://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia\\_files%2FBar-Examiner%2Farticles%2F2009%2F780109\\_UBEEssays\\_01.pdf](https://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2009%2F780109_UBEEssays_01.pdf).

## APPENDIX A: UBE Jurisdictions by State and Passing Score

State	First UBE Administration	Passing Score
Alabama	July 2011	260
Alaska	July 2013	280
Arizona	July 2012	273
Colorado	February 2012	276
Idaho	February 2012	280
Iowa	February 2016	266
Kansas	February 2016	266
Minnesota	February 2014	260
Missouri	February 2011	260
Montana	July 2013	270
Nebraska	February 2012	270
New Hampshire	February 2014	270
New Mexico	February 2016	260
New York	July 2016	266
North Dakota	February 2011	260
Utah	February 2013	270
Vermont (proposed)	July 2016	270
Washington	July 2013	270
Wyoming	July 2013	270

## APPENDIX B: Multistate Bar Exam Components Already in Use

Jurisdiction	Multistate Bar Examination (MBE)	Multistate Essay Examination (MEE)	Multistate Performance Test (MPT)	Multistate Professional Responsibility Examination (MPRE)
Alabama	X	X	X	X
Alaska	X	X	X	X
Arizona	X	X	X	X
Arkansas	X	X	X	X
California	X			X
Colorado	X	X	X	X
Connecticut	X	X	X	X
Delaware	X		X	X
Dist. of Columbia	X	X	X	X
Florida	X			X
Georgia	X		X	X
Hawaii	X	X	X	X
Idaho	X	X	X	X
Illinois	X	X	X	X
Indiana	X		X	X
Iowa	X	X	X	X
Kansas	X			X
Kentucky	X	X		X
Louisiana				X
Maine	X		X	X
Maryland	X		X	
Massachusetts	X			X
Michigan	X			X
Minnesota	X	X	X	X
Mississippi	X	X	X	X
Missouri	X	X	X	X
Montana	X	X	X	X
Nebraska	X	X	X	X
Nevada	X		X	X
New Hampshire	X	X	X	X
New Jersey	X			X
New Mexico	X	X	X	X
New York	X		X	X
North Carolina	X			X
North Dakota	X	X	X	X
Ohio	X		X	X
Oklahoma	X			X
Oregon	X	X	X	X
Pennsylvania	X			X
Rhode Island	X	X	X	X
South Carolina	X			X
South Dakota	X	X	X	X
Tennessee	X		X	X
Texas	X		X	X
Utah	X	X	X	X
Vermont	X		X	X
Virginia	X			X
Washington	X	X	X	X
West Virginia	X	X	X	X
Wisconsin	X	X	X	
Wyoming	X	X	X	X
Guam	X	X	X	X
N. Mariana Islands	X	X	X	X
Palau	X	X	X	X
Puerto Rico				
Virgin Islands	X			X

Excerpted from  
[http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2015\\_comprehensive\\_guide\\_to\\_bar\\_admission\\_requirements.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2015_comprehensive_guide_to_bar_admission_requirements.authcheckdam.pdf)

## APPENDIX C

## UBE Scores Earned and Transferred by Exam Date

(as of October 27, 2015)

	FEBRUARY		JULY		TOTAL BY YEAR	
Year	Scores Earned	Scores Transferred	Scores Earned	Scores Transferred	Scores Earned	Scores Transferred
2011	216	11	1237	40	1453	51
2012	936	68	3169	364	4105	432
2013	1401	228	4670	593	6071	821
2014	2166	222	5475	448	7641	670
2015	2340	165	5197	174	7537	339
<b>TOTALS</b>	7059	694	19748	1619	26807	2313

Data provided by the National Conference of Bar Examiners.

GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Law Student Division

Submitted By: Fabiani Duarte, Chair of the Law Student Division

1. Summary of Resolution(s).

The American Bar Association urges the bar admission authorities in each state and territory to expeditiously adopt the Uniform Bar Examination in their respective jurisdictions.

2. Approval by Submitting Entity.

October 2014, LSD Board of Governors

August 2015, LSD Assembly

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?

Supporting the UBE would be consistent with several ABA policies. For instance, the ABA, along with the National Conference of Bar Examiners and the Association of American Law Schools, has adopted a Code of Recommended Standards for Bar Examiners. The House of Delegates adopted the latest version of this code in August 1987. This code is consistent with using the UBE to test general subject matter taught in law school primarily for the purpose of testing legal reasoning and communication skills, rather than for the purpose of testing knowledge of specific local laws. Specifically, the code states that “[i]n selection of subjects for bar examination questions, the emphasis should be upon the basic and fundamental subjects that are regularly taught in law schools.”<sup>42</sup>

The ABA adopted in 1992 the recommendations from a report of the Task Force on Law Schools and the Profession. Among other recommendations, the task force urged “licensing authorities to consider modifying bar examinations which do not give appropriate weight to the acquisition of lawyering skills and professional

---

<sup>42</sup> See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2015 at ix (Erica Moeser & Claire Huisman eds., 2015), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2015\\_comprehensive\\_guide\\_to\\_bar\\_admission\\_requirements.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2015_comprehensive_guide_to_bar_admission_requirements.authcheckdam.pdf)



values.”<sup>43</sup> Adopting the UBE is consistent with this recommendation.

In 2006, the ABA House of Delegates adopted a resolution concerning minorities in the pipeline to the profession. Among other policies within the resolution, it urged state and territorial bar examiners to address significant problems facing minorities within the pipeline to the profession. Certainly, erecting a barrier in the form of duplicative and expensive tests for each state and territory is just the type of significant problem that should be addressed.<sup>44</sup>

Finally, in August 2014, the ABA House of Delegates adopted Resolution 108 of the Legal Access Job Corps Task Force regarding the access-to-justice gap.<sup>45</sup> Resolution 108 outlines that “most states have substantial rural areas and some of them have an aging lawyer population. As a result, many communities are now without lawyers. For example, in one South Dakota community, the nearest lawyer is 120 miles away. State bars faced with this challenge are creating rural placement projects designed to encourage and give incentives for recently admitted lawyers to set up or assume practices in these communities.” The UBE by its very nature encourages portability of bar licensure and would remove barriers to access-to-justice in rural regions.

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. None.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Law Student Division will work with the National Conference of Bar Examiners, the Conference of Chief Justices, the Young Lawyers Division and the ABA HOD members to disseminate official ABA policy to local bar examiners to encourage their adoption of the UBE expeditiously.

8. Cost to the Association. N/A

---

<sup>43</sup> American Bar Association Section on Legal Education and Admissions to the Bar, Legal Education and Professional Development - An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992), at 334 (recommendation #D.2.), *available at* [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_professional\\_development\\_maccrate\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report.authcheckdam.pdf).

<sup>44</sup> See Resolution 113, *supra* note 38.

<sup>45</sup> See Resolution 108, *supra* note 39.

9. Disclosure of Interest. None.
10. Referrals.  
National Conference of Bar Examiners  
Conference of Chief Judges  
Law Practice Division  
Young Lawyers Division  
Senior Lawyers Division  
Section of Legal Education and Admission to the Bar  
National Conference of Bar Presidents  
National Association of Bar Executives  
Diversity Entities  
Diversity and Inclusion Commission  
Commission on Racial and Ethnic Diversity in the Profession
11. Contact Name and Address Information. (Prior to House of Delegates Meeting.)  
  
Christopher Jennison  
13408 Bingham Court  
Silver Spring, MD 20906  
(301) 538-5705  
[csjennis@syr.edu](mailto:csjennis@syr.edu)
12. Contact Name and Address Information. (Who will present the Report to the House.)  
  
Christopher Jennison  
13408 Bingham Court  
Silver Spring, MD 20906  
(301) 538-5705  
[csjennis@syr.edu](mailto:csjennis@syr.edu)

**EXECUTIVE SUMMARY****1. Summary of the Resolution**

The American Bar Association urges the bar admission authorities in each state and territory to expeditiously adopt the Uniform Bar Examination in their respective jurisdictions.

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

Currently, law students must often choose a bar admission jurisdiction before they know where they will be employed, limiting the applicability of their first bar admission given limitations on admission by motion and transferability. Some state bar examiners draft essay questions, even though the topics are those tested on the MEE and include little local variation. States may also have variability in bar exam grading. The Uniform Bar Exam addresses these concerns and is also consistent with several ABA policies.

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

Through greater adoption of the UBE, the model of a portable exam becomes more effective because test-takers are able to transfer their scores to more jurisdictions.

**4. Summary of Minority Views**

While some critics of the UBE wish to retain local bar exams, no known ABA entities have formally presented any opposing views to this resolution.



**AMERICAN BAR ASSOCIATION  
YOUNG LAWYERS DIVISION  
REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association urges the United States Supreme Court to
- 2 record and make available video recordings of its oral arguments.



## REPORT

The Supreme Court currently provides transcripts<sup>1</sup> and audio recordings of its oral arguments.<sup>2</sup> It does not, however, provide video recordings of those same proceedings. The ABA has previously taken positions that touch on the issue of cameras in the courtroom, generally, but not specifically on recordings of U.S. Supreme Court arguments. The resolutions that have touched on this issue are Resolution 106 (Midyear, 1995), which had urged the U.S. Judicial Conference to “authorize further experimentation with cameras in federal civil proceedings by re-instituting a pilot project to permit . . . recording and broadcasting of civil proceedings in selected federal courts . . . .” The other is Resolution 113 (Midyear, 2005) which had, among other things, stated that “[i]f cameras are permitted to be used in the courtroom, they should not be allowed to record or transmit images of the jurors’ faces.” Again, neither resolution spoke directly to recordings of U.S. Supreme Court arguments, though the ABA has previously lobbied in support of cameras in the courtroom generally – including in the Supreme Court.<sup>3</sup>

There is a qualitative difference in the understanding one can get from listening to a recording of an argument, versus watching that same argument. The audio recording does not capture the justices’ non-verbal reactions to the lawyers’ arguments, the lawyers’ answers to the justices’ questions, or the justices’ reaction to each others’ questions.

Commentators have remarked for years on the issues the lack of video recordings cause.<sup>4</sup> They have noted the Supreme Court is the lone branch of government whose proceedings citizens cannot watch.<sup>5</sup> Indeed, there is even question whether denying access to video cameras in the Court is consistent with its own First Amendment jurisprudence.<sup>6</sup>

Commentators have also remarked on how the inability to watch arguments contributes to the narrowing of the number of lawyers competent to practice before it.<sup>7</sup> As reported by the New York Times, 66 lawyers were involved in 43 percent of the cases the Supreme Court heard.<sup>8</sup> Of those, “63 of the 66 lawyers were white, 58 were men, and 51 worked for firms with

---

<sup>1</sup> [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcript.aspx](http://www.supremecourt.gov/oral_arguments/argument_transcript.aspx)

<sup>2</sup> [http://www.supremecourt.gov/oral\\_arguments/argument\\_audio.aspx](http://www.supremecourt.gov/oral_arguments/argument_audio.aspx)

<sup>3</sup> [http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/judiciary/051117letter\\_cameras.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/judiciary/051117letter_cameras.authcheckdam.pdf) (summarizing the history of support for cameras in the court within the ABA and its sections);

[http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014dec9\\_sushineincourtroom.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014dec9_sushineincourtroom.authcheckdam.pdf) (same, as of 2014).

<sup>4</sup> <http://www.nytimes.com/2014/12/26/opinion/the-best-lawyers-money-can-buy.html>;

<http://www.nytimes.com/2015/04/24/opinion/open-the-supreme-court-to-cameras.html>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> <http://www.nytimes.com/2014/12/26/opinion/the-best-lawyers-money-can-buy.html>;

[http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac\\_2013/54\\_%20cameras\\_are\\_in\\_the\\_courts.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/54_%20cameras_are_in_the_courts.authcheckdam.pdf).

<sup>8</sup> <http://www.nytimes.com/2014/12/26/opinion/the-best-lawyers-money-can-buy.html>.

primarily corporate clients.”<sup>9</sup> This narrowing of expertise is not consistent with our commitment to ensuring access to justice or to fostering diversity within the profession.

The Supreme Court’s gallery can seat approximately 250 people. This severely limits the number of people who can view its proceedings. That, and the fact that one must travel to Washington, D.C., to view the proceedings, limits the ability of lawyers to learn from seeing its arguments. It also limits the ability of citizens to view the process of deciding important constitutional issues. More open proceedings would thus help increase educational opportunities for lawyers, and citizens’ access to – and ability to understand – the process of decisions being made. This would likely enhance respect for the judiciary and the rule of law, both of which are critical in light of the current climate of hostility to the judiciary.

Indeed, the ABA itself has remarked on how providing access to video recordings of arguments could further the above-referenced purposes in letters to Congressional Committees charged with considering the issue:

The ABA remains committed to the belief that all federal courts, including the Supreme Court, should experiment with and expand electronic media coverage of both civil and criminal proceedings. We, like many congressional supporters of this legislation, believe that courts that conduct their business under public scrutiny protect the integrity of the federal judicial system by advancing accountability and providing an opportunity for the people they serve to learn about the role of the federal courts in civic life.<sup>10</sup>

At the time of the referenced letters (the most recent of which was sent in 2014), however, the ABA took the position that the decision to broadcast proceedings should be made on a case-by-case basis.<sup>11</sup>

There is also pending legislation in Congress on this issue. H.R. 94, introduced on January 6, 2015, is called the “Cameras in the Courtroom Act.” It “[r]equires the Supreme Court to permit television coverage of all open sessions of the Court unless it decides by majority vote that allowing such coverage in a particular case would violate the due process rights of any of the parties involved.”<sup>12</sup> This legislation has been referred to the Subcommittee on Courts,

---

<sup>9</sup> *Id.*

<sup>10</sup>

[http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014dec9\\_sushineincourtroom.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014dec9_sushineincourtroom.authcheckdam.pdf);

[http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/judiciary/051117letter\\_cameras.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/judiciary/051117letter_cameras.authcheckdam.pdf).

<sup>11</sup> *Id.*

<sup>12</sup> <https://www.congress.gov/bill/114th-congress/house-bill/94> (proposing an amendment to add § 678 to Title 28, U.S.C.). This legislation is more strongly worded than an earlier proposal, which would have merely authorized cameras – not mandated them.

<http://www.scotusblog.com/2014/12/congress-again-considers-cameras-in-the-courtroom-including-at-the-supreme-court/>



Intellectual Property, and the Internet – a subcommittee that received the letter quoted above from the ABA.

States' experience has shown that it can work. Arizona, for example, provides live and archived video recordings of its proceedings on the Court's webpage, and offers its archived video on YouTube.<sup>13</sup> Likewise, the Ninth Circuit offers both live and archived video of its proceedings.<sup>14</sup> The United States Supreme Court should do the same.

This resolution is consistent with, and furthers, ABA policy.<sup>15</sup> The ABA's goals include the following:

**Goal II: Improve Our Profession.**

Objectives:

1. Promote the highest quality legal education.
2. Promote competence, ethical conduct and professionalism.

**Goal III: Eliminate Bias and Enhance Diversity.**

Objectives:

1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
2. Eliminate bias in the legal profession and the justice system.

**Goal IV: Advance the Rule of Law.**

Objectives:

1. Increase public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world.
2. Hold governments accountable under law.<sup>16</sup>
3. Work for just laws, including human rights, and a fair legal process.
4. Assure meaningful access to justice for all persons.
5. Preserve the independence of the legal profession and the judiciary.

For the reasons stated above, this resolution furthers the above goals.

Respectfully submitted,

Lacy L. Durham, Chair  
Young Lawyers Division  
February 2016

---

<sup>13</sup> <http://www.azcourts.gov/AZSupremeCourt/LiveArchivedVideo.aspx>;  
<https://www.youtube.com/watch?v=F-ru9GL6qKI>;

<sup>14</sup> [http://www.ca9.uscourts.gov/media/live\\_oral\\_arguments.php](http://www.ca9.uscourts.gov/media/live_oral_arguments.php);  
<http://www.ca9.uscourts.gov/media/>.

<sup>15</sup> [http://www.americanbar.org/about\\_the\\_aba/aba-mission-goals.html](http://www.americanbar.org/about_the_aba/aba-mission-goals.html).

<sup>16</sup> *Id.*

## GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Young Lawyers Division

Submitted By: Lacy L. Durham, Chair, ABA Young Lawyers Division

1. Summary of Resolution(s). The purpose of this resolution is to urge the United States Supreme Court to provide video recordings of its oral arguments.
2. Approval by Submitting Entity. Approved by the Assembly of the ABA Young Lawyers Division on July 31, 2015.
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 resolution is consistent with Goals II, III, and IV of the American Bar Association.

The resolution is also consistent with Resolution 106 (Midyear, 1995), which had urged the U.S. Judicial Conference to “authorize further experimentation with cameras in federal civil proceedings by re-instituting a pilot project to permit . . . recording and broadcasting of civil proceedings in selected federal courts . . . .”

The resolution, which pertains only to arguments before the U.S. Supreme Court, does not impact Resolution 113 (Midyear, 2005) which had, among other things, stated that “[i]f cameras are permitted to be used in the courtroom, they should not be allowed to record or transmit images of the jurors’ faces.”

In August 2014, the ABA deleted its endorsement of electronic media coverage in its Fair Trial and Free Press Criminal Justice Standards and replaced it with a best-practice standard advising courts to think proactively and develop plans that address electronic media coverage and other methods for accommodating the public interest in criminal proceedings.<sup>17</sup>

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

---

<sup>17</sup>[http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014dec9\\_sushineincourtroom.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014dec9_sushineincourtroom.authcheckdam.pdf);  
[http://www.americanbar.org/groups/criminal\\_justice/standards/crimjust\\_standards\\_fairtrial\\_blk.html#3.8](http://www.americanbar.org/groups/criminal_justice/standards/crimjust_standards_fairtrial_blk.html#3.8).

6. Status of Legislation. (If applicable)

H.R. 94, introduced on January 6, 2015, is called the “Cameras in the Courtroom Act.” It “[r]equires the Supreme Court to permit television coverage of all open sessions of the Court unless it decides by majority vote that allowing such coverage in a particular case would violate the due process rights of any of the parties involved.”<sup>18</sup>

Fed. R. Crim. P. 53 currently prohibits cameras in the courts for criminal proceedings. The Judicial Conference of the United States had a pilot program pertaining to cameras in the courts, which started on July 18, 2011. The 14 participating courts (some district courts, some circuit) volunteered to participate in the experiment. Although the data collection portion of the pilot concluded July 18, 2015, participating courts may continue to record proceedings and post them on [uscourts.gov](http://uscourts.gov) until the Judicial Conference considers recommendations regarding the pilot, which may occur at its March 2016 session. There is nothing pending applicable to U.S. Supreme Court arguments.

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

A copy of the resolution would be distributed to the Justices of the United States Supreme Court.

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

None, other than the costs of distributing the resolution.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

American Judicial System as well as all sections/divisions/forums.

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

Stefan M. Palys  
 Assembly Speaker, ABA Young Lawyers Division  
 Stinson Leonard Street LLP  
 1850 N. Central Avenue, Suite 210  
 Phoenix, AZ 85004-4584  
 602.212.8523  
[stefan.palys@stinson.com](mailto:stefan.palys@stinson.com)

---

<sup>18</sup> <https://www.congress.gov/bill/114th-congress/house-bill/94>.

Lacy L. Durham  
Chair, ABA Young Lawyers Division  
Deloitte Tax, LLP  
2200 Ross Avenue, Suite 1600  
Dallas, TX 75201  
214.840.1926  
lacydurhamlaw@yahoo.com

Andrew M. Schpak  
House of Delegates Representative, ABA Young Lawyers Division  
Barran Liebman LLP  
601 SW 2nd Avenue, Suite 2300  
Portland, OR 97204  
503.276.2156  
ASchpak@barran.com

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.)

Andrew M. Schpak  
House of Delegates Representative, ABA Young Lawyers Division  
Barran Liebman LLP  
601 SW 2nd Avenue, Suite 2300  
Portland, OR 97204  
503.276.2156  
ASchpak@barran.com

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The purpose of this resolution is to urge the United States Supreme Court to provide video recordings of its oral arguments.

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

The United States Supreme Court is the only branch of government whose proceedings are not easily accessible to the public. The Supreme Court's gallery can seat only 250 people—which severely limits the number of people who can view its proceedings—and necessitates travel to Washington, D.C. This limits the ability of citizens to view the process of deciding important constitutional issues.

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

Video recordings of oral arguments will allow citizens to access—and better understand—the process through which the United States Supreme Court arrives at its decisions. This would enhance respect for the judiciary and the rule of law.

### 4. Summary of Minority Views

No minority views were expressed; the resolution passed unanimously on the Young Lawyers Division Assembly's consent calendar.



**AMERICAN BAR ASSOCIATION**  
**COMMISSION ON YOUTH AT RISK**  
**COMMISSION ON HOMELESSNESS AND POVERTY**  
**HEALTH LAW SECTION**  
**SECTION ON SCIENCE AND TECHNOLOGY LAW**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1           RESOLVED, That the American Bar Association urges state, territorial, local and tribal  
2 child welfare and juvenile justice agencies to provide adequate resources for assessing and  
3 treating emotional and behavioral disorders of children in their custody, including psychosocial  
4 and clinical interventions, recreational opportunities and supportive services that can reduce the  
5 need for prescribing psychotropic drugs.

6  
7           FURTHER RESOLVED, That the American Bar Association urges state, territorial, local  
8 and tribal child welfare and juvenile justice agencies to develop comprehensive policies, based  
9 on best practice guidelines developed in collaboration with medical professional organizations  
10 medical, mental health and disability experts, and other stakeholders designed to facilitate  
11 medically appropriate use of psychotropic medications needed by children in the custody of child  
12 welfare and juvenile justice systems, while ensuring that medications are not used solely to  
13 control behavior.

14  
15          FURTHER RESOLVED, That the American Bar Association urges state, territorial, local  
16 and tribal courts to work with medical professional organizations and other stakeholder groups to  
17 develop oversight protocols administered by child and adolescent psychiatrists to ensure that  
18 these policies are successfully implemented in child welfare and juvenile justice cases under  
19 their jurisdiction, and to ensure that medication regimens are evaluated, and, if appropriate,  
20 continue without interruption when placement changes occur or when the child is transitioning  
21 out of the foster care or juvenile justice systems.

22  
23          FURTHER RESOLVED, That the American Bar Association urges attorneys, judges, bar  
24 associations, and law school clinical programs on children's issues to promote education and to  
25 develop technical assistance resources on the rights of children in the custody of child welfare  
26 and juvenile justice agencies, including legal issues related to appropriate use of psychotropic  
27 medication.

28  
29          FURTHER RESOLVED, That the American Bar Association urges Congress to enact  
30 legislation requiring state, territorial, local and tribal governments to report de-identified data,  
31 consistent with children's privacy rights under federal and state law, to appropriate federal  
32 agencies on the ongoing use of psychotropic medication for children in foster care and in the  
33 juvenile justice system under their jurisdiction.





## REPORT<sup>1</sup>

### Introduction

Almost every week, a newspaper in some part of this country calls to our attention an upsurge in the number of children and youth who are prescribed psychotropic medications<sup>2</sup>, those substances that are capable of affecting a person's mind, emotions, and behavior.<sup>3</sup> This increase is reported not just in children in the general population, but in even greater numbers by children and youth who are poor. The highest percentage of use is in children and youth who have been removed from their families and live in foster care, in residential group homes, or in juvenile justice facilities.<sup>4</sup> Investigation into the high rates of use reveals that children in government custody are treated without appropriate medical procedures most parents would insist on and without the court oversight and supervision that these children need.<sup>5</sup> The result is that these children and youth are denied their right to constitutional right to adequate medical care, including the right to avoid the over-administration of psychotropic medications.<sup>6</sup>

Children in foster care and children involved in the juvenile justice system are prescribed psychotropic medications at rates that are termed "alarming".<sup>7</sup> Foster children are given psychotropic medications at a rate nine times higher than children not in foster care.<sup>8</sup> And, while the data on usage in juvenile justice facilities is much harder to locate, those jurisdictions that gather information are finding that the rate of use is much the same. One report estimates that over fifty percent of the children involved in the juvenile justice system are prescribed

---

<sup>1</sup>Allison Flood, Class of 2015 of the Maurice A. Deane School of Law at Hofstra University, researched and authored this report. The ABA Commission on Youth at Risk is grateful for her important contribution and excellent work.

<sup>2</sup> See, e.g., Alan Schwarz, *Still in a Crib, Yet Being Given Antipsychotics*, NY Times (Dec. 10, 2015).

<sup>3</sup> See page 6 herein for a more detailed explanation of psychotropic medication.

<sup>4</sup>Vicki Martin, MD, *The Overmedication of Vulnerable Youth with Psychiatric Medication: A Call for New Regulations*, (Jan. 19, 2014), <http://www.madinamerica.com/wp-content/uploads/2014/01/VMpaper.pdf>

<sup>5</sup> *AACAP Position Statement on Oversight of Psychotropic Medication Use for Children in State Custody: A Best Principles Guideline*, American Acad. of Child and Adolescent Psychiatrists, [http://www.aacap.org/App\\_Themes/AACAP/docs/member\\_resources/practice\\_information/foster\\_care/FosterCare\\_BestPrinciples\\_FINAL.pdf](http://www.aacap.org/App_Themes/AACAP/docs/member_resources/practice_information/foster_care/FosterCare_BestPrinciples_FINAL.pdf) (last visited Feb. 17, 2015) [hereinafter *AACAP*]; *Resolution Regarding Judicial Oversight of Psychotropic Medications for Children Under Court Jurisdiction*, National Council of Juvenile and Family Court Judges, [http://www.ncjfcj.org/sites/default/files/Fnl\\_PsychMedsResolution\\_071313.pdf](http://www.ncjfcj.org/sites/default/files/Fnl_PsychMedsResolution_071313.pdf) (last visited Feb. 17, 2015) [hereinafter *Resolution*].

<sup>6</sup> See *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982); *Henry A. v. Willden*, 678 F.3d 991, 1000 (9th Cir. 2012); *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 292 (8th Cir. 1993); *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 891 (10th Cir. 1992); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 505 (D.N.J. 2000).

<sup>7</sup> See Rachel Camp, *A Mistreated Epidemic: State and Federal Failure to Adequately Regulate Psychotropic Medications Prescribed to Children in Foster Care*, 83 Temp. L. Rev. 369, 373 (2011) (discussing the over-administration of psychotropic drugs to foster children as a nationwide epidemic); see also Camilla L. Lyons et al., *Psychotropic Medication Patterns Among Youth in Juvenile Justice*, 40 Admin. & Pol'y Mental Health 58, 59 (2013).

<sup>8</sup> Dr. Mark Abdelmalek et al., *New Study Shows U.S. Government Fails to Oversee Treatment of Foster Children With Mind-Altering Drugs*, ABCNews (Nov. 30, 2011), <http://abcnews.go.com/US/study-shows-foster-children-high-rates-prescription-psychiatric/story?id=15058380> (citing a 2010 study conducted by Rutgers University of nearly 300,000 foster children).

psychotropic medications within one month of intake.<sup>9</sup> Pennsylvania reported in October, 2015, that, over a seven-year period, enough antipsychotics were ordered to treat one-third of its youth in juvenile correctional facilities, on average, at any given time.<sup>10</sup>

The reasons for the high level of psychotropic medication use among children who are in foster care or in juvenile justice facilities lie in the trauma, neglect and abuse that these children and youth have suffered.<sup>11</sup> State agencies and court systems avoid investing in a range of psychosocial treatments and therapies to treat children and youth, and instead look to psychotropic medication as a quick solution to the emotional and behavioral disorders these children have and that make them difficult to place in foster care, residential group homes or juvenile facilities. In many cases, these drugs are prescribed without a full medical history, without a diagnosis, with no informed consent, in combination with other psychotropic meds, for off-label use, in amounts greater than the recommended dosage, without monitoring, without utilizing any other treatment alternatives before or during the use of these meds, and as a first resort instead of a last resort.<sup>12</sup>

The American Academy of Pediatrics states that children in care should receive treatment that, *if* indicated after a full mental health evaluation, incorporates appropriate therapy, including trauma-informed care, with appropriate education and support of the child's caregivers and caseworkers. Recommended therapies include parent-child interaction therapy, child-parent psychotherapy, trauma-focused cognitive behavioral therapy, and the attachment, self-regulation, and competency model. Unfortunately, not all therapies are widely available, shortages of trained mental health professionals exist and funding is insufficient to ensure that all children can access these interventions.<sup>13</sup> Federal legislation passed in 2014 also requires states to provide normalcy to children in foster care so that a full range of extra-curricular activities, recreation and part-time jobs are available to enhance their overall well-being.<sup>14</sup> Those activities are critical to a child's development and sense of self-esteem, and also contribute to positive mental health outcomes.<sup>15</sup>

Psychotropic medications can be a useful part of a child's treatment plan under appropriate circumstances and oversight, and when correct medical protocol is followed. AAP

---

<sup>9</sup> See Lyons et al., *supra* note 7, at 59.

<sup>10</sup> Halle Stockton, *Pennsylvania Juvenile Offenders Given Psychiatric Drugs at High Rates*, Juvenile Justice Information Exchange (Oct. 25, 2015), <http://jjie.org/pennsylvania-juvenile-offenders-given-psychiatric-drugs-at-high-rates/>

<sup>11</sup> Puja Umaretiya and Cordelia Ross, *AAP Recommends Close Monitoring of Foster Children by Pediatricians* (Sept. 28, 2015), <http://www.2minutemedicine.com/aap-recommends-close-monitoring-of-foster-children-by-pediatricians/>

<sup>12</sup> American Academy of Pediatrics, *Policy Statement: Health Care Issues for Children and Adolescents in Foster Care and Kinship Care* (Oct., 2015), <http://pediatrics.aappublications.org/content/136/4/e1131>

<sup>13</sup> *Id.*

<sup>14</sup> *Preventing Sex Trafficking and Strengthening Families Act* (HR 2940, 2014)

<sup>15</sup> See, Texas CASA Mental Health Task Force, *Respecting the Needs of Children and Youth in the Texas Foster Care: Acknowledging Trauma and Promoting Positive Mental Health Throughout the System*, Dec. 2014, <http://texascasa.org/wp-content/uploads/2015/01/Texas-CASA-Mental-Health-Task-Force-Report-final-webversion.pdf>

recommends that use of these medications should be “diagnosis-specific and evidence-based”, initiated at low doses and altered slowly, with close monitoring for efficacy and adverse effects. No patient should receive therapy with more than one psychotropic medication from any given class.<sup>16</sup>

Psychotropic medication causes unwanted side effects in children and youth that are not completely known to the medical community. Children report that they feel “like zombies”, unable to function in school and uninterested in outside activities.<sup>17</sup> Some contemplate suicide, or worse, commit suicide. The short-term effects of over-medication are endless, continue to be studied, and the long-term effects in children and youth are in fact unknown. Short-term complaints range from, but are not limited to, the less severe to the most extreme – anxiety, dizziness, confusion, and changes in behavior, to excessive weight gain, seizures, and even death from liver failure.<sup>18</sup>

A number of organizations weigh in on this issue. The American Academy of Child and Adolescent Psychiatry (“AACAP”) created a Position Statement on the Oversight of Psychotropic Medication Use for Children in State Custody: A Best Principles Guideline, and the National Council of Juvenile and Family Court Judges (“NCJFCJ”) passed a resolution in 2013, both of which are intended to improve the oversight and regulation of psychotropic medication use in the child welfare and juvenile justice systems.<sup>19</sup> The ABA Center on Children and the Law also published a practice and policy brief in 2011 for advocates and judges; the report concluded that children in care are especially vulnerable to the overuse of psychotropic

---

<sup>16</sup> See, *AAP, supra*, note 12, citing Texas Department of Family and Protective Services and The University of Texas at Austin College of Pharmacy, *Psychotropic medication Utilization Parameters for Children and Youth in Foster Care* (Sept. 2013), [www.dfps.state.tx.us/documents/Child\\_Protection/pdf/TxFosterCareParameters-September2013.pdf](http://www.dfps.state.tx.us/documents/Child_Protection/pdf/TxFosterCareParameters-September2013.pdf)

<sup>17</sup> See *Freed from a Pharmaceutical Fog, A Young Man's Life Changes*, Children's Rights (Aug. 5, 2011), <http://www.childrensrights.org/news-events/cr-blog/freed-from-a-pharmaceutical-fog-a-young-mans-life-changes/>; see also *Broward Child's Suicide Raises Questions About Medication*, Alliance for Human Research Protection (Apr. 24, 2009), <http://www.ahrp.org/cms/content/view/580/108/>; see also JoAnne Solchany, *Psychotropic Medication and Children in Foster Care: Tips for Advocates and Judges*, Am. Bar Ass'n (Oct. 2011), available at [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/PsychMed.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/PsychMed.authcheckdam.pdf) (acknowledging that these children and youth often have trauma and legitimate health conditions that do need attention).

<sup>18</sup> Citizens Comm'n on Human Rights Int'l, *A Report on the Side Effects of Common Psychiatric Drugs*, CCHR Int'l (2008), available at [http://www.cchr.org/sites/default/files/The\\_Side\\_Effects\\_of\\_Common\\_Psychiatric\\_Drugs.pdf](http://www.cchr.org/sites/default/files/The_Side_Effects_of_Common_Psychiatric_Drugs.pdf); see also Nat'l Institute of Mental Health, *Mental Health Medications*, NIMH (2008), available at <http://www.nimh.nih.gov/health/publications/mental-health-medications/index.shtml>.

<sup>19</sup> See Laura K. Leslie et al., *Multi-State Study on Psychotropic Medication Oversight in Foster Care*, TUFTS CLINICAL & TRANSNATIONAL SCIENCE INST. (Sept. 2010), available at <http://www.tuftsetsi.org/~media/Files/CTSI/Library%20Files/Psychotropic%20Medications%20Study%20Report.a> shx; see also Barbara J. Burns et al., *Effective Treatment for Mental Disorders in Children and Adolescents*, 2 CLINICAL CHILD & FAM. PSYCHOL. REV. 199, 213-16 (1999) (discussing that a common side effect of psychotropic medications is sedation); Kristin G. Cloyes, et. al., *PRESCRIPTION AND USE OF PSYCHOTROPIC MEDICATIONS IN UTAH DIVISION OF JUVENILE JUSTICE SECURE CARE FACILITIES 4* (2008); *AACAP, supra*, note 5; *Resolution, supra*, note 5.

medication and that medication use should be supported with other treatments and therapies to avoid any risk of harm to a child or youth in care.<sup>20</sup>

This resolution urges states and the agencies that oversee child welfare and juvenile justice systems to develop comprehensive policies consistent with best practice guidelines recommended by AACAP to correct abuses with prescribing psychotropic medication to children.<sup>21</sup> The resolution encourages attorneys and judges to increase their awareness of the issues around psychotropic medication use in children and to insure that court oversight processes are implemented as recommended by NCJFCJ to insure that children in both systems receive appropriate treatment for mental health conditions and trauma, and that the treatment continues without interruption when placement changes occur or when children and youth transition out of either or both systems. The resolution further encourages attorney and judges to increase education of the legal issues around psychotropic medication use in children. Finally, the resolution urges Congress to enact legislation that will require states to collect de-identified data, consistent with all children's privacy rights under federal and state law, and to monitor the use of psychotropic medication for all children in state custody.

### **I. The Over-Administration of Psychotropic Medications to Children in State Custody is a Nationwide Problem**

Psychotropic medications are defined as “substances that act directly on the brain to chemically alter mood, cognition, or behavior.”<sup>22</sup> Their effect is typically achieved by altering the process of the brain's neurotransmission.<sup>23</sup> Psychotropic medications are typically divided into six classes: stimulants, antidepressants, depressants, antipsychotics, mood stabilizers, and anxiolytics (anti-anxiety).<sup>24</sup>

Of all the psychotropic medications, antipsychotics are, by far, the most frequently prescribed medicines to foster children and youth involved in the juvenile justice system.<sup>25</sup> Antipsychotics were initially designed to treat schizophrenia and bipolar disorder in adults, but are commonly prescribed to these children to treat behavioral issues for which the FDA has not approved, including agitation, anxiety, acting out, and irritability.<sup>26</sup> The most commonly prescribed antipsychotics, which are also among the most powerful medications, include

---

<sup>20</sup> Solchany, *supra* note 17.

<sup>21</sup> The juvenile justice system is a state system, with the exception of federal jurisdiction over Native American juvenile offenses committed on reservations. In the District of Columbia, juveniles are sent to federally operated facilities as well. For purposes of this resolution, the District should be viewed as a state, and the Bureau of Prisons as a state agency.

<sup>22</sup> Angela Olivia Burton, “*They Use it Like Candy*”: *How the Prescription of Psychotropic Drugs to State-Involved Children Violates International Law*, 35 BROOK. J. INT'L L. 453, 466 (2010).

<sup>23</sup> *Id.*

<sup>24</sup> Matthew M. Cummings, *Sedating Forgotten Children: How Unnecessary Psychotropic Medication Endangers Foster Children's Rights and Health*, 32 B.C. J.L. & SOC. JUST. 357, 359 (2012).

<sup>25</sup> Michael Piraino, *Another Prescription Drug Abuse Problem: The Overmedication of Foster Kids*, THE HUFFINGTON POST (May 5, 2011), [http://www.huffingtonpost.com/michael-piraino/prescription-drug-abuse\\_b\\_855547.html](http://www.huffingtonpost.com/michael-piraino/prescription-drug-abuse_b_855547.html); see also CLOYES ET AL., *supra* note 19, at 8.

<sup>26</sup> Abdelmalek et al., *supra* note 8.

Seroquel, Abilify, Risperdal, Zyprexa, Geodon, Invega, Latuda, Fanapt, Clozaril, Saphris, and Solian.<sup>27</sup> Only Seroquel, Abilify, Risperdal, and Zyprexa have very limited FDA-approval for use in children.<sup>28</sup>

Foster children and youth involved in the juvenile justice system are prescribed psychotropic medications at rates that deserve close scrutiny. At a nation-wide level, studies have shown that up to fifty percent of all children in foster care are prescribed one or more of these psychotropic medications at any given time, a rate nine times higher than children not in foster care.<sup>29</sup> While published national data on the rates of psychotropic medication use in either detained or incarcerated juvenile populations does not currently exist, recent studies conducted in various states indicate that these youth are also prescribed psychotropic medications at rates higher than youth in the general population.<sup>30</sup> A study of the Utah Juvenile Justice System indicated that fifty-six percent of youth involved in the juvenile justice system were prescribed psychotropic medications.<sup>31</sup> A study of the Washington State Juvenile Justice System indicated that thirty-six percent of youth involved in the juvenile justice system were prescribed psychotropic medications.<sup>32</sup> And, a study of the Oregon State Juvenile Justice System indicated that fifty-eight percent of females and thirty-two percent of males involved in the juvenile justice system were prescribed psychotropic medications.<sup>33</sup>

The most commonly prescribed psychotropic medications to foster children and youth involved in the juvenile justice system are antipsychotics. Foster children are given antipsychotics at a rate nine times higher than children not in foster care, according to a 2010 sixteen state analysis by Rutgers University.<sup>34</sup> An estimated fifty percent of youth under eighteen who are within the juvenile justice system are prescribed antipsychotics, compared to just eight to ten percent in the general population.<sup>35</sup> Additionally, a 2007 study of the Florida Department of Juvenile Justice indicated that in twenty-four months, the Department of Juvenile Justice purchased 326,081 tablets of antipsychotic medications for use in state-operated jails –

---

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See Camp, *supra* note 7, at 373; see also *Prescription Psychotropic Drug Use Among Children in Foster Care: Hearing Before the Subcomm. on Income Sec. and Family Support of the H. Comm. on Ways and Means*, 110th Cong. 11 (2008), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg45553/html/CHRG-110hhrg45553.htm> (citing the testimony of Laurel K. Leslie, M.D., in which she stated that the research studies available show rates of psychotropic drug medication use ranging from 13-50% among children in foster care and the testimony of Tricia Lea, Ph.D., in which she stated that that in 2003, twenty-five percent of children in Tennessee foster care were prescribed psychotropic drugs); Melissa D. Carter, *Medicating Trauma: Improving Prescription Oversight of Children in Foster Care*, 46 CLEARINGHOUSE REV. 398, 399 (2013).

<sup>30</sup> See Lyons et al., *supra* note 7, at 59; see also Alison Evans Cuellar et al., *Incarceration and Psychotropic Drug Use by Youth*, 163 PEDIATRIC ADOLESCENT MED. 219 (2008).

<sup>31</sup> See CLOYES ET AL., *supra* note 7, at 8.

<sup>32</sup> See Lyons et al., *supra* note 7, at 59.

<sup>33</sup> *Id.*

<sup>34</sup> Abdelmalek et al., *supra* note 8.

<sup>35</sup> Ashley A. Norton, *The Captive Mind: Antipsychotics as Chemical Restraint in Juvenile Detention*, 29 J. CONTEMP. HEALTH L. & POL'Y 152, 162-63 (2012).

enough to hand out 446 pills a day, seven days a week, for two years in a row to the 2,300 youth involved in the Florida juvenile justice system.<sup>36</sup>

Not only are foster children and youth involved in the juvenile justice system prescribed psychotropic medications – the majority of which are antipsychotics – at rates that are disturbing, but they are also heavily over-medicated.<sup>37</sup> Polypharmacy, the use of prescribed psychotropic medications concomitantly, or in combination, is common<sup>38</sup> even though medical experts consistently state that children and youth should rarely take multiple psychotropic medications at the same time.<sup>39</sup>

A recent study of forty-seven states and the District of Columbia indicated that 38.3 percent of states were administering multiple psychotropic medications simultaneously to foster children and 21.3 percent of states were engaging in polypharmacy before monopharmacy.<sup>40</sup> Additionally, a recent United States Government Accountability Office (“GAO”) study of 100,000 foster children across five states found that, in Texas, foster children were fifty-three times more likely to be prescribed five or more psychotropic medications at the same time than non-foster care children.<sup>41</sup> And, a recent study of the Utah Juvenile Justice system indicated that sixty-two percent of the youth prescribed psychotropic medications were taking more than one medication concomitantly, while thirty-eight percent were only taking one psychotropic medication.<sup>42</sup> GAO experts stated, upon review of these findings, that they did not find any evidence supporting the use of five or more psychotropic medications in adults, let alone in children.<sup>43</sup>

Psychotropic medications have a number of adverse effects on children.<sup>44</sup> Side effects include tics, increased heart rate and blood pressure, vomiting, increased appetite and weight gain, sleepiness, sedation, stomachaches, dizziness, diarrhea, tremor, hair loss, unusual bleeding or bruising, rash or hives with itching, and suicidal thoughts and attempts.<sup>45</sup> Other side effects include akathisia (motor restlessness, desire to remain in constant motion), acute dystonia (spasms of upper body, face, tongue and eyes), neuroleptic malignant syndrome (rare but potentially fatal, it is characterized by muscular rigidity and altered consciousness), tardive dyskinesia (involuntary movements of various body parts, which can be irreversible), and an

<sup>36</sup> Mai Szalavitz, *Drugging the Vulnerable: Atypical Antipsychotics in Children and the Elderly*, TIME, May 26, 2011, <http://healthland.time.com/2011/05/26/why-children-and-the-elderly-are-so-drugged-up-on-antipsychotics/>.

<sup>37</sup> See Burton, *supra* note 22, at 477; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-270T, FOSTER CHILDREN: HHS GUIDANCE COULD HELP STATES IMPROVE OVERSIGHT OF PSYCHOTROPIC PRESCRIPTIONS (2011).

<sup>38</sup> Melissa D. Carter, *Medicating Trauma: Improving Prescription Oversight of Children in Foster Care*, 46 CLEARINGHOUSE REV. 398, 399 (2013).

<sup>39</sup> *Id.*

<sup>40</sup> Leslie et al., *supra* note 19. Monopharmacy means the use of a single medication, as opposed to polypharmacy, which is the use of multiple medications. *Id.*

<sup>41</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 37.

<sup>42</sup> See CLOYES ET AL., *supra* note 19, at 7-8.

<sup>43</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 37.

<sup>44</sup> Norton, *supra* note 35, at 159; see also Citizens Comm’n on Human Rights Int’l, *supra* note 18.

<sup>45</sup> Norton, *supra* note 35, at 160.

increased risk of diabetes.<sup>46</sup> In 2004, a Columbia University review of the pediatric trials of commonly prescribed psychotropic medications found that young people who took them often experienced suicidal thoughts or actions.<sup>47</sup> And in 2006, results of an analysis of FDA data showed that at least forty-five children died between 2000 and 2004 from the side effects of psychotropic medications.<sup>48</sup>

Throughout various interviews of many foster children and youth involved in the juvenile justice system, children report anecdotally that they were heavily medicated while in state custody. These children have stated that psychotropic medications make them “feel like zombies.”<sup>49</sup> For example:

- Eleven-year-old Ke’onte from Texas indicated that he was on at least twelve different psychotropic medications while in foster care, up to four of them concomitantly.<sup>50</sup> The medications made him irritable and exhausted, caused a loss of appetite, and put him “in a lights-out mode fifteen minutes” after he had taken them.<sup>51</sup>
- Fourteen-year-old Westley stated that he was prescribed five psychotropic medications concomitantly.<sup>52</sup> He would resist the pills because he did not like the way they made him feel.<sup>53</sup>
- Mark, a former foster child from California, was also prescribed multiple psychotropic medications concomitantly.<sup>54</sup> He stated that he felt too “zoned out” to focus on high school and was so groggy that he was cut from his varsity basketball team.<sup>55</sup>
- Yolanda, a former foster child who was also involved in the California juvenile justice system, indicated that doctors prescribed her a series of powerful psychotropic medications in order to numb her pain from being physically and sexually abused and control her outbursts.<sup>56</sup> She was “so medicated with psychotropic medications that she literally lost her ability to speak.”<sup>57</sup>

Protocols for the administration of psychotropic medications to children in custody are absent. Psychotropic medication to foster children and youth involved in the juvenile justice system are prescribed and administered without the informed consent of the child, his/her parent,

<sup>46</sup> *Id.*; see also David M. Rubin, *Risk of Incident Diabetes Mellitus Following Initiation of Second-Generation Antipsychotics Among Medicaid-Enrolled Youths*, 169 JAMA PEDIATRICS (2015).

<sup>47</sup> Norton, *supra* note 35, at 160.

<sup>48</sup> Citizens Comm’n on Human Rights Int’l, *supra* note 18.

<sup>49</sup> See Freed, *supra* note 17.

<sup>50</sup> Abdelmalek et al., *supra* note 3.

<sup>51</sup> Jenny Gold, *Foster Kids Given Psychiatric Drugs at Higher Rates*, NPR.COM (Dec. 1, 2011), <http://www.npr.org/blogs/health/2011/12/01/143017520/foster-kids-even-infants-more-likely-to-be-given-psychotropic-drugs>.

<sup>52</sup> See Freed, *supra* note 5.

<sup>53</sup> *Id.*

<sup>54</sup> Karen De Sa, *Drugging our Kids: Bay Area News Group Investigation*, MERCURY NEWS (Aug. 24, 2014), <http://webspecial.mercurynews.com/druggedkids/?page=pt1>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

or court-appointed guardian.<sup>58</sup> In the majority of states, the state agency often provides consent on behalf of the child, although sound reasons, discussed below, recommend against this practice.<sup>59</sup> Second, psychotropic medications are prescribed without a full medical history and/or making any diagnostic assessment, without record keeping by the agency who has custody of the child, without protocols to monitor and review medication use on a short or long-term basis, and with inadequate court oversight.<sup>60</sup> Little documentation of the administration of psychotropic medications exists and periodic reviews of a medication plan are lacking.<sup>61</sup> Third, psychotropic medication are requested and prescribed to control behavior, in dosages exceeding the maximum recommendation, and for off-label use.<sup>62</sup> Foster children and youth involved in the juvenile justice system are prescribed these medications simply for the purpose of sedating the child – basically, maintaining control – a practice which has been widely condemned.<sup>63</sup> Last, psychotropic medications are prescribed without any previous or concurrent use of alternate therapies or psychosocial treatments.<sup>64</sup>

## **II. AACAP and NCJFCJ: Best Principles Guideline and Recommendations to Improve the Administration and Oversight of Psychotropic Medications**

As a result of the various problems foster children and youth involved in the juvenile justice system have faced, AACAP and NCJFCJ have instituted guidelines and recommendations to improve use of psychotropic medications for children in the child welfare and juvenile justice system.<sup>65</sup>

### **1. No psychotropic medication should be prescribed without informed consent by the child, his/her parent, guardian and/or licensed caretaker.**

As stated, in many states, the state agency often provides consent for the administration of psychotropic medications on behalf of the child-patient.<sup>66</sup> AACAP has recommended against this practice, particularly because a state agency should not be equated with a parent for the purpose of medicating a child since the state does not form an emotional attachment with the child.<sup>67</sup> While in state custody, the child interacts with a long series of social workers, clinic

<sup>58</sup> *Id.* at 380; see also Joseph V. Penn et al., *Practice Parameter for the Assessment and Treatment of Youth in Juvenile Detention and Correctional Facilities*, 44 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1085, 1094-95 (2005).

<sup>59</sup> See Camp, *supra* note 7, at 380; see also Leslie et al., *supra* note 19 (discussing that a state should not be equated with a parent for the purpose of medicating a child since the state does not form an emotional attachment with the child).

<sup>60</sup> See Leslie et al., *supra* note 19; see also Penn et al., *supra* note 57, at 1094-95.

<sup>61</sup> See Leslie et al., *supra* note 19; see also Penn et al., *supra* note 57, at 1094-95.

<sup>62</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 37; Leslie et al., *supra* note 19.

<sup>63</sup> See Leslie et al., *supra* note 19; see also Camp, *supra* note 7, at 373; Penn et al. *supra* note 58, at 1094.

<sup>64</sup> See Penn et al., *supra* note 58, at 1095-96.

<sup>65</sup> See AACAP, *supra* note 5 see also *Resolution*, and *supra* note 5.

<sup>66</sup> See Leslie et al., *supra* note 19; see also Michael W. Naylor et al., *Psychotropic Medication Management for Youth in State Care: Consent, Oversight and Policy Considerations*, 86 CHILD WELFARE 175, 182 (2007).

<sup>67</sup> See AACAP, *supra* note 5; see also Leslie et al., *supra* note 19; Bernard P. Perlmutter & Carolyn S. Salisbury, "Please Let Me Be Heard:" *The Right of a Florida Foster Child to Due Process Prior to Being Committed to a Long-Term, Locked Psychiatric Institution*, 25 NOVA L. REV. 725, 734 (2001).



doctors, caseworkers, and supervisors making it impossible for anyone in the agency to really know the child.<sup>68</sup> The state is less likely to make sound medical decisions for the child because it is unaware of the intricacies of the child's medical or behavioral history.<sup>69</sup>

According to the Best Principles Guideline, states should not permit a state agency to consent to the administration of psychotropic medications on behalf of a child.<sup>70</sup> AACAP recommends that states should identify the parties empowered to consent for treatment for youth in state custody in a timely fashion and establish a mechanism to obtain consent for psychotropic medication management from minors when possible.<sup>71</sup> Studies show that older youth possess the developmental capabilities necessary for providing informed consent to personal health and medical treatment, and so child development psychologists and AACAP recommend that children fourteen years of age or older provide informed consent on behalf of themselves.<sup>72</sup> For children under fourteen years of age, informed consent should be obtained by the parent, guardian, or licensed caregiver.<sup>73</sup>

States should obtain and distribute simply written psychoeducational materials and medication information sheets to facilitate the consent process.<sup>74</sup> Both AACAP and NCJFCJ have recommended that these materials consist of information about the proposed medication, and its risks and potential side effects, including adverse effects of sudden discontinuation of psychotropic medications.<sup>75</sup>

## **2. No psychotropic medication should be prescribed without appropriate administration, oversight, and regulation.**

AACAP makes several recommendations to improve the oversight and regulation of psychotropic medication use in foster children and children involved in the juvenile justice system.<sup>76</sup> The Best Practice Guidelines note that both a short-term and long-term monitoring plan is essential for assessing any developments or increases in suicidal ideation, initial side effects, and potential changes over time.<sup>77</sup> The guidelines recommend that states should require the prescriber to reassess the child frequently in order to monitor the response to the treatment

<sup>68</sup> Perlmutter & Salisbury, *supra* note 67, at 734.

<sup>69</sup> *Id.*; see also GARY B. MELTON, ET AL., NO PLACE TO GO: THE CIVIL COMMITMENT OF MINORS 157-58 (1998).

<sup>70</sup> AACAP, *supra* note 5; Resolution, *supra* note 5.

<sup>71</sup> AACAP, *supra* note 5; Resolution, *supra* note 5; Penn et al., *supra* note 57, at 1094-95.

<sup>72</sup> Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD. DEV. 1589, 1589 (1982); AACAP, *supra* note 9.

<sup>73</sup> AACAP, *supra* note 5.

<sup>74</sup> *Id.*

<sup>75</sup> AACAP, *supra* note 5; Resolution, *supra* note 5.

<sup>76</sup> Solchany, *supra* note 17; AACAP, *supra* note 5; Resolution, *supra* note 5.

<sup>77</sup> See Magellan Health, *Appropriate Use of Psychotropic Drugs in Children and Adolescents* Magellan Health (2013), available at

[http://www.magellanprovider.com/MHS/MGL/providing\\_care/clinical\\_guidelines/clin\\_monographs/psychotropicdrugsinkids.pdf](http://www.magellanprovider.com/MHS/MGL/providing_care/clinical_guidelines/clin_monographs/psychotropicdrugsinkids.pdf); see also Solchany, *supra* note 17; AACAP, *supra* note 5; Penn et al., *supra* note 57, at 1094.

and ensure the medication's effectiveness.<sup>78</sup> This includes, at a minimum, periodic review of the child every six months.<sup>79</sup>

Many states allow psychotropic medications to be prescribed without a full medical history and diagnostic assessment of children and youth.<sup>80</sup> The Best Practice guidelines recommend that each state require its agencies to maintain an ongoing record of diagnoses, height and weight, allergies, medical history, ongoing medical problem list, psychotropic medications, and adverse medication reactions that are easily available to treating clinicians 24 hours a day.<sup>81</sup>

**3. No psychotropic medication should be prescribed to a child in dosages that exceed recommended use, or for off-label or concomitant use, without secondary review.**

Many states prescribe psychotropic medications to foster children and children involved in the juvenile justice system concomitantly, or in combination.<sup>82</sup> Additionally, these states often prescribe psychotropic medications to manage – not treat – these children.<sup>83</sup> This is referred to using the medication as a “chemical restraint,” since the medication is being used without a therapeutic purpose, but for the sole purpose of sedating and immobilizing the child.<sup>84</sup> Concomitant use and chemical restraint of these children has been widely condemned by the AACAP and the Child Welfare League.<sup>85</sup>

Many states are prescribing psychotropic medications to these children at dosages exceeding current manufacturer, federal, professional and internal state maximum recommendations.<sup>86</sup> An increasing number of studies show that higher dosages increase the potential for adverse side effects, and that for some medications, a higher dose may actually be less effective than the more moderate recommended dose.<sup>87</sup> As a result, the Best Practice Guidelines recommend that psychotropic medications only be administered at therapeutic dosages and should not exceed recommended dosage levels.<sup>88</sup>

**4. Use of alternative therapies must precede or accompany use of psychotropic medications in children and youth in custody.**

In a 2006 report, the FDA approved only thirty-one percent of psychotropic medications for children<sup>89</sup>. Additionally, because pediatric trials of commonly prescribed psychotropic

<sup>78</sup> Magellan Health, *supra* note 77; Solchany, *supra* note 17; AACAP, *supra* note 5.

<sup>79</sup> Magellan Health, *supra* note 77.

<sup>80</sup> See Leslie et al., *supra* note 19.

<sup>81</sup> AACAP, *supra* note 5.

<sup>82</sup> Carter, *supra* note 29, at 399.

<sup>83</sup> Camp, *supra* note 7, at 378.

<sup>84</sup> See Burton, *supra* note 22, at 492.

<sup>85</sup> *Id.*

<sup>86</sup> Leslie et al., *supra* note 19.

<sup>87</sup> U.S. Gov't Accountability Office, *supra* note 37.

<sup>88</sup> U.S. Gov't Accountability Office, *supra* note 37; Solchany, *supra* note 17; Leslie et al., *supra* note 19.

<sup>89</sup> Cummings, *supra* note 24, at 360.

medications found that children who took them experienced suicidal thoughts or action, the FDA ordered pharmaceutical companies to add a “black box warning” to all commonly prescribed psychotropic medications due to the medications’ effect on children.<sup>90</sup> A “black box warning” appears on a prescription drug’s label and is designed to call attention to serious or life-threatening risks.<sup>91</sup> Despite these facts, states prescribe psychotropic medications before exploring alternative treatment options. The Best Practice Guidelines dictate that children should only take psychotropic medications when absolutely necessary and as a last resort.<sup>92</sup> The guidelines recommend that prior to prescribing psychotropic medications to children or youth, states should consider other methods to treat the child, such as intensive therapy or psychosocial treatments.<sup>93</sup>

### **III. States Must Provide Adequate Resources to Improve the Health and Wellbeing of Children and Youth in State Custody and Adopt Comprehensive Policies on Administration and Oversight of Psychotropic Medication**

Improved mental health for children and youth who are in foster care or in juvenile justice facilities, including residential care, group homes, residential treatment or secure detention, relies upon much more than decreased use of psychotropic medications. States must provide adequate resources so that care is trauma-informed, and so that timely assessments and treatments for emotional and behavioral disorders of children and youth in custody, including psychosocial and clinical interventions, recreational opportunities and supportive services that can reduce the need for prescribing psychotropic drugs.<sup>94</sup>

In addition, states and its administrative agencies that oversee child welfare cases and juvenile justice systems, must develop comprehensive policies to protect children in state custody from over-medication. Juvenile and dependency courts should implement administration and oversight protocols in order to manage and regulate psychotropic medication use among children in foster care and youth involved in the juvenile justice system.<sup>95</sup> Finally, attorneys and judges need to be better educated and assist in providing training to each other and to other stakeholders about the use of psychotropic medication in children.

<sup>90</sup> See Citizens Comm’n on Human Rights Int’l, *supra* note 18.

<sup>91</sup> U.S. Food & Drug Administration, *A Guide to Drug Safety Terms at the FDA*, FDA (Nov. 2012), <http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/ucm107976.pdf>.

<sup>92</sup> Leslie et al., *supra* note 19.

<sup>93</sup> Solchany, *supra* note 17; AACAP, *supra* note 5; *Resolution*, *supra* note 5.

<sup>94</sup> See, *Children’s Defense Fund Mental Health Fact Sheet* (March 2010), <http://www.childrensdefense.org/library/data/mental-health-factsheet.pdf>; Oregon Department of Human Services, *Tip Sheet Psychotropic Medications Guide for caseworkers and advocates of foster youth*, DHS 0130 (April, 2014); see AAP *supra* note 12.

<sup>95</sup> Congress’ power to require states to implement psychotropic drug administration and oversight protocols is originated from tying the requirements to federal funding. See The Am. Acad. of Pediatrics, *Health and the Fostering Connections Act of 2008*, FOSTERINGCONNECTIONS.ORG (Feb. 2013), *available at* <http://www.childrensdefense.org/child-research-data-publications/data/state-data-repository/perspectives-on-fostering.pdf>. If Congress tied this legislation to the health care provision of the Fostering Connections Act, states would be incentivized to immediately comply because they would receive federal funding for doing so. *Id.*; see also Camp, *supra* note 7, at 395.

Every state across the United States should follow AACAP and the National Council of Juvenile and Family Court Judges Best Practice Guidelines and recommendations in order to improve the administration and oversight of psychotropic medication use in their child welfare and juvenile justice systems. There are a number of states that have implemented some of the AACAP and the National Council of Juvenile and Family Court Judges Best Practice Guidelines and recommendations. According to the Tufts Institute's 2010 analysis of the policies and practices of forty-seven states and the District of Columbia, twenty-six states have some written policy or set of guidelines regarding psychotropic medication use in children in state custody.<sup>96</sup> Thirteen states are in the process of developing a guideline, and nine states have no policy or guideline regarding psychotropic medication use.<sup>97</sup>

Although half of the states have implemented some type of written guidelines regarding psychotropic medication use in state-involved children, these guidelines are seldom comprehensive in their scope.

The Tufts report indicates that, in the twenty-six states that have written policy or guideline regarding psychotropic medication use, only two states included the state-involved child in the informed decision making process.<sup>98</sup> These two states acknowledge that states' informed consent processes need to be strengthened in order to protect youth from being overmedicated.<sup>99</sup> Their solution includes the youth in the informed consent process and providing youth with information about the potential medication, its side effects and risks.<sup>100</sup> In the other twenty-two states, informed consent authority resides with the child welfare agency, despite the fact that the AACAP has strongly recommended against this practice.<sup>101</sup> If parents have not lost their rights to make health care decisions about a child, that parent should have informed consent; if that right is temporarily resting in the jurisdiction of a state agency, then a guardian should be appointed to give informed consent in the best interest of the child.

In thirteen states currently developing policy, all thirteen expressed interest in involving the child, when age-appropriate, in the decision-making process.<sup>102</sup> These states recognized the importance of a "child-centered perspective"<sup>103</sup> and are working to implement a comprehensive child welfare psychotropic medication oversight system.<sup>104</sup> Their system would obtain informed consent from the youth if psychotropic medication is recommended,<sup>105</sup> and actively involve the

<sup>96</sup> See Leslie et al., *supra* note 19. "States" refers to either child welfare agencies or state legislation. *Id.*

<sup>97</sup> See Leslie et al., *supra* note 19.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*; see also Naylor et al., *supra* note 66, at 182.

<sup>101</sup> Leslie et al., *supra* note 19; AACAP, *supra* note 5.

<sup>102</sup> Leslie et al., *supra* note 19 (finding that states wanted to involve youth, when age-appropriate, in decisions about the child and that the name of the medication, dosage, why it's being prescribed, side effects, and risks should be provided to the child all in language the child can understand).

<sup>103</sup> A "child-centered perspective" is all about focusing on a child's needs and best interests directly from the perspective of the child. See Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON FIGHTING POVERTY 313, 318 (1997).

<sup>104</sup> Leslie et al., *supra* note 19.

<sup>105</sup> *Id.*

youth in both initial and ongoing decision-making.<sup>106</sup> Finally, nine states have no written policy or guidelines regarding informed consent in the psychotropic medication administration process.

The Tufts report finds that all of the states with some policy identify “monitoring a youth’s response to psychotropic medication and its side effects” as a major challenge.<sup>107</sup> While these states recognize that this is an important aspect in medication oversight, they do not *require* periodic reporting and review of the benefits and side effects of medications.<sup>108</sup> Only North Carolina requires a physician to review the psychotropic medication regimen of a state-involved child at least every six months.<sup>109</sup> In the thirteen states that are developing guidelines, all thirteen expressed interest in ensuring that up-to-date oversight programs and records on each child-patient are in place.<sup>110</sup> Nine states had no written policy or guidelines regarding the oversight and regulation of the psychotropic medication administration process.<sup>111</sup>

Fourteen states in the Tufts report that children in custody are given psychotropic medications in dosages exceeding current maximum recommendations.<sup>112</sup> Eight states administer newer, non-FDA approved psychotropic medications over FDA-approved medications. Eighteen states administer three to five psychotropic medications to state-involved children simultaneously, despite the fact that GAO experts stated that they did not find *any* evidence supporting the use of five psychotropic medications in adults, let alone children.<sup>113</sup> And eight states allowed psychotropic medications to treat Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, or Adjustment Reaction Disorder to state-involved children who did not exhibit symptoms of any of those disorders.<sup>114</sup>

All forty-eight states in the study understand that psychotropic medication plays an important role in addressing mental health problems; however, all express concern that medications are being used to manage problems that might respond as well, or better, to psychosocial treatments.<sup>115</sup>

In the five years since the Tufts Institute report, several states are developing new legislation and policies to curb the overuse of psychotropic medication among these children. California enacted several new laws in October, 2015, after the San Jose Mercury News’

---

<sup>106</sup> *Id.*

<sup>107</sup> *See id.*

<sup>108</sup> *See id.*; see also Karen de Sa, *California Creates First Guidelines for Prescribing Psych Meds to Foster Youth*, BAYAREANEWS (Apr. 11, 2015), [http://www.insidebayarea.com/breaking-news/ci\\_27891659/california-creates-first-guidelines-prescribing-psych-meds-foster](http://www.insidebayarea.com/breaking-news/ci_27891659/california-creates-first-guidelines-prescribing-psych-meds-foster) (discussing the fact that although states must regularly report on medication use in order to ensure children are being prescribed safely, Washington, Wyoming, New Jersey and Illinois are moving in the right direction by requiring that children prescribed psychotropic medications receive second medical opinions).

<sup>109</sup> *See* Naylor et al., *supra* note 66, at 185.

<sup>110</sup> *See* Leslie et al., *supra* note 19.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*; U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 37.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

ongoing investigation, “Drugging Our Kids” found almost 1 in 4 foster teens in that state receive psychotropic medications.<sup>116</sup>

#### **IV. Data Should be collected in Both Systems to Demonstrate Appropriate Oversight, Monitoring, and Progress<sup>117</sup>**

Published national data on the rates of psychotropic medication use in either detained or incarcerated juvenile populations do not currently exist.<sup>118</sup> In the child welfare system, the Administration of Children and Families reports that “research on psychotropic medication use has relied primarily on Medicaid data, which does not permit examination of medication use in relationship to mental health needs and typically does not distinguish children in foster care by type of foster care placement. Children eligible for Medicaid living in foster care may be living formally with kin caregivers, in group homes or residential placements, or in more traditional nonrelative, foster parent homes. These various types of foster care placements may be associated with different rates of psychotropic medication use or various levels of mental health need. Prior research also does not provide estimates of psychotropic medication use among children who remain at home with at least one biological parent after reports of maltreatment, or children living in informal kin caregiver arrangements.”<sup>119</sup>

The GAO report recommends states improve documentation on the implementation of psychotropic medication policies and practices in the child welfare system, especially to confirm the use of alternative evidence-based therapies.<sup>120</sup> In addition, the Annie E. Casey Foundation, in a partnership with the Center for Health Care Strategies, specifically urges that, in order to limit overuse of psychotropic medication for children in foster care, data should be aggregated across systems for a comprehensive picture of use. Data, which often resides in disparate agencies, are needed for several purposes: to determine baseline rates of psychotropic medication use and expense; to identify outlier prescribing patterns; understand the types, number, and quantity of psychotropic medications prescribed; and track quality and cost outcomes. According to CSCG, New Jersey is examining child welfare, Medicaid, and

<sup>116</sup> Karen De Sa, *California Foster Care: New Laws Signed to Restrict Psychiatric Drugs*, San Jose MercuryNews (Oct. 6, 2015).

<sup>117</sup> Congress’ role as administrator of the child welfare system has been in place since 1980. The federal government sets policy, issues regulations, provides financial assistance to the states, and monitors programs. Federal financing of the foster care system is provided by titles IV-B and IV-E of the Social Security Act. In addition, each State spends a portion of its title XX funds for foster care. Foster care children qualifying for coverage under title IV-E also qualify for Medicaid benefits. Congress regularly receives reports on child welfare outcomes based on data that states submit in order to receive funding. In contrast, the federal government’s role in collecting data on juvenile justice indicators is more limited. See, Peter J. Pecora and Mark A. Pecora, *Challenges and Opportunities in Foster Care* (2008), [http://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/fostercare.html](http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/fostercare.html); *Federal- and State-level Data* (2015), <http://youth.gov/youth-topics/juvenile-justice/federal-and-state-level-data>

<sup>118</sup> See Lyons et al., *supra* note 7, at 59. Children and youth in juvenile justice facilities have a variety of treatment providers – some may be treated by the state, some by Medicaid, and others by county or private insurers.

<sup>119</sup> *Psychotropic Medication Use by Children in Child Welfare*, 17 NAT’L SURVEY OF CHILD & ADOLESCENT WELL-BEING 1 (2012).

<sup>120</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 37.

children's behavioral health data to develop a clear picture of both psychotropic medication use and that of psychosocial interventions. The state is also enhancing its child welfare data information system to capture data on psychotropic medication use.<sup>121</sup> All data, regardless of its source, must be de-identified to protect the privacy rights of children and youth under federal and state law, and in accordance with best practices.

Collection of data on the use of psychotropic medication and psychosocial treatments and therapies in the juvenile justice system in every state, territorial and tribal government is essential to understanding the areas of improvement that must be addressed. Likewise, uniform and consistent monitoring of data in the child welfare system is necessary in order to create better oversight and implementation of policies to benefit the health and wellbeing of the children in their care.<sup>122</sup>

## **V. Attorneys and Judges Need More Education on Psychotropic Medications**

A highly-functioning legal system is vitally important for children and youth in state custody. Courts give children protection, ensure due process and ultimately make every decision affecting their lives. State agencies are charged with the duty to act in the best interest of the child. Lawyers who represent children have the specific responsibility to advocate either in the child's best interest or for the child's express interest on each and every issue that impacts the child in child welfare and juvenile justice cases. Neither courts nor attorneys in the juvenile system can properly serve children and youth when they do not understand or properly address children's trauma and their mental health needs.

Judge William G. Jones summarized the role of the courts. "Juvenile courts operate like other courts when deciding whether a child was abused or neglected or committed a delinquent act or a status offense. What is unique about juvenile courts is that they also make extensive use of experts, including CPS caseworkers, juvenile probation officers, psychologists, mental health professionals, physicians, domestic violence specialists, educators, child development specialists, foster parents, relative caretakers, and others. The court utilizes the expertise of these individuals to understand children and their families better, why events occurred that necessitated court intervention, and how to prevent recurrence. Juvenile courts attempt to look beyond individual and family deficits to understand the family and child as a whole. They aim to make well-informed decisions to address needs for housing, childcare, in-home services, domestic violence advocacy, mental health or substance abuse treatment, paternity establishment, child support, educational services, or employment. Also unique to the juvenile court, particularly in CPS

---

<sup>121</sup> Kamala Allen, *Reducing Inappropriate Psychotropic Prescribing For Children And Youth In Foster Care*, HEALTH AFFAIR BLOG (Apr. 17, 2015), <http://healthaffairs.org/blog/2015/04/17/reducing-inappropriate-psychotropic-prescribing-for-children-and-youth-in-foster-care/>

<sup>122</sup> Marian Wright Edelman, *Child Watch Column: Overmedicating Children in Foster Care*, CHILDREN'S DEFENSE FUND (May 22, 2015), <http://www.childrensdefense.org/newsroom/child-watch-columns/child-watch-documents/OvermedicatingChildrenInFosterCare.html> (bringing attention to the Administration's current budget proposal that requests \$250 million to reduce the over-reliance on drugs and increase the use of appropriate screening, assessment, and interventions, including better data collection and information sharing by child welfare agencies, Medicaid, and behavioral health services).

cases, are the frequent review of parents and the assessment of agency performance.”<sup>123</sup> Judge Jones also emphasized that the court should also take an active role in educating policymakers and the public about issues affecting the needs of these children and youth.<sup>124</sup> The attorneys who function in the juvenile court likewise must develop competence to navigate this system of experts, to assist the court’s understanding of why events occurred, and advocate for the right decisions to be made on behalf of the child. They too are involved in the process of informing policymakers and the public when the issues around child protection and delinquency necessitate change in order to improve outcomes for children and youth.

Attorneys and judges in both the child welfare and juvenile justice systems have long accepted medications and the amount of medication for the children and youth in their cases as normal, expected, and medically necessary. However, the overuse of psychotropic medication among children and youth in state custody demands that lawyers for children and the courts ask many questions about the child’s diagnosis, recommended treatment and alternatives, and the qualifications of the medical professionals prescribing and administering psychotropic medication. Lawyers for children and youth, as well as the courts that have jurisdiction over the cases, should ask, at a minimum, “Why is this prescribed? Why is this amount necessary? Where can I learn more about this medication and its side effects? What are the possible long term consequences of use of this medication?”<sup>125</sup> Moreover, to ensure continued competence and adherence to best practice standards and the rules of professional responsibility, attorneys and judges should be educated and develop technical knowledge on legal issues relating to psychotropic medications and on the appropriate use of psychotropic medication for children.<sup>126</sup>

## Conclusion

Children in foster care and youth involved in the juvenile justice system are overmedicated with psychotropic medications and under-treated for mental and behavioral health conditions as a result of the absence of meaningful, comprehensive state policies. Children, their parents, guardians or caregivers are not given informed consent before these powerful medications are prescribed. Prescriptions are written without the benefit of a complete medical

---

<sup>123</sup> William G. Jones, *Working with the Courts in Child Protection*, U.S. Dept. of Health & Human Services (2006), at 8, <https://www.childwelfare.gov/pubPDFs/courts.pdf>

<sup>124</sup> Jones, *id.*, at 77.

<sup>125</sup> Solchany, *supra* note 17, 27-28.

<sup>126</sup> *NACC Recommendations for Representation of Children in Abuse and Neglect Cases*, NAT’L ASSOC. OF COUNSEL FOR CHILDREN, <http://swrtc.nmsu.edu/files/2014/12/NACC-Standards-and-Recommendations.pdf> (last visited May 27, 2015) (stating that competence is the foundation of all legal representation. For attorneys who represent children and youth, competence includes knowledge of child development, and of trauma and mental health conditions, and treatment and services available to the child. An attorney must have sufficient knowledge to advocate for all of a child’s needs, including their medical and mental health needs, and the court has an ongoing role to ensure that lawyers are continually trained); see also MODEL CODE OF PROF’L CONDUCT 1.1, 1.14(a) (1983); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1, EC 7-12, DR 6-10 (1980); AMERICAN BAR ASSOCIATION (1996); STANDARDS FOR PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES §§ A-1, B-1, C-1 (1996); STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES §§ 1.7, 4.3, 6.4, 9.2, 10.1 (1996); STANDARDS FOR PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES §§ C-2, D-2 (2004).



history and a diagnostic assessment. Protocols do not exist to monitor the side effects of these medications and to adjust medications on an ongoing basis. Off-label use is widespread, often by medical professionals without sufficient training, dosages often exceed manufacturer recommendations, and concomitant use of multiple psychotropic medications is the norm. There is little oversight in the legal system by the courts or by the advocates who are appointed to represent the best interest of children, and children and youth are rarely given the opportunity to give their opinions about their health care and the medications they are taking. It is easier to prescribe psychotropic medications in lieu of alternate treatments or therapies, when the latter should always be used first or as a concurrent treatment with medication.<sup>127</sup> All states should develop policies incorporating the recommendations set forth in this resolution so that foster children and youth involved in the juvenile justice system have the best opportunity for meaningful, appropriate and comprehensive mental health treatment.

Respectfully submitted,  
Vanessa Peterson Williams, Chair  
Commission on Youth at Risk  
February 2016

---

<sup>127</sup> See Leslie et al., *supra* note 19; see also CLOYES ET AL., *supra* note 19 at 63-68.

**GENERAL INFORMATION FORM**

Submitting Entity: Commission on Youth at Risk

Submitted By: Vanessa Peterson Williams, Chair, Commission on Youth at Risk

1. Summary of Resolution(s). The resolution urges state child welfare and juvenile justice agencies to develop comprehensive policies and state courts to improve oversight for the administration of psychotropic medications for children in state custody – those children who are in the child welfare and/or juvenile justice systems. The resolution also recommends that attorney and judges become better educated on this subject, and that Congress enact legislation to require data collection from states to learn progress that is made on this subject.
2. Approval by Submitting Entity. This resolution was first approved by the Commission on Youth at Risk by electronic vote on April 30, 2015, and then approved again at its fall meeting on October 23, 2015.
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?

These policies are relevant: MODEL CODE OF PROF'L CONDUCT 1.1, 1.14(a) (1983); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1, EC 7-12, DR 6-10 (1980); AMERICAN BAR ASSOCIATION (1996); STANDARDS FOR PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES §§ A-1, B-1, C-1 (1996); STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES §§ 1.7, 4.3, 6.4, 9.2, 10.1 (1996); STANDARDS FOR PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES §§ C-2, D-2 (2004). None of the policies would be adversely affected; rather, the resolution urges conformance with these policies.

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 child welfare and juvenile justice organizations, as well as to state and local bar association sections or committees on children. The policy will also be featured on the Commission on Youth at Risk website, in ABA publications, and in websites and materials of the co-sponsoring and supporting ABA entities.
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.

Co-Sponsors:

Commission on Homelessness and Poverty  
 Health Law Section  
 Section of Science and Technology

Supported by:

Criminal Justice Section  
 Commission on Disability Rights

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

Linda Britton  
 Director, Commission on Youth at Risk  
 American Bar Association  
 1050 Connecticut Ave. NW, Suite 400  
 Washington, DC 20036  
 Phone: 202-662-1730 (office); 972-743-7743 (cell)  
 Email: Linda.Britton@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.)

Vanessa Peterson Williams, Chair, Commission on Youth at Risk  
 R.L. Polk & Co.  
 26533 Evergreen Road  
 Southfield, MI 48076  
 Phone: (248) 728-7250 (office); (248) 794-7276 (cell)  
 Email: Vanessa.Williams@ihs.com

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The resolution urges state child welfare and juvenile justice agencies to develop comprehensive policies and state courts to improve oversight for the administration of psychotropic medications for children in state custody – those in the child welfare and/or the juvenile justice systems. The resolution also recommends that attorney and judges become better educated on this subject, and that Congress enact legislation to collect unidentified data from states to learn whether progress that is made on this subject.

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

Children in foster care and youth in the juvenile justice system are a vulnerable population with significant unmet healthcare needs. Across the country, they are being prescribed anti-psychotic medications in percentages exceeding children and youth in the general population, often with insufficient medical justification. These medications are prescribed without medical histories or diagnostic assessments, in dosages exceeding manufacturer recommendations, often in combination with other psychotropic medications, and for off-label use. Little is done to monitor these medications, and no state insures these children or youth, or their parents or caretakers, informed consent. These medications are most often prescribed before any alternate therapies or psychosocial treatments are utilized and to control behavior, not in response to a mental health or behavioral health condition. Many concerns are raised by medical professionals about the short-term side effects of these medications, and little is known about long-term effects of these medications on children and youth.

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

The sponsor, co-sponsors and supporters hope that this resolution will assist states, courts, attorneys and judges, and the federal government to improve the adequacy and range of treatment for mental health conditions of children who are in state custody so that psychotropic medications are utilized only when medically appropriate. Some states are developing comprehensive policies on this issue, some have developed policies that are piecemeal and incomplete, and others have ignored this issue altogether. Court systems and the attorneys who represent children, youth and parents in these cases are beginning to recognize the importance of improving supervision over this subject, and this proposed policy position is consistent with the resolution passed in July, 2013, by the National Council of Juvenile and Family Court Judges, and with the Position Statement on the Oversight of Psychotropic Medication Use for Children in State Custody: A Best Principles Guideline by the American Academy of Child and Adolescent Psychiatrists. This policy resolution also encourages Congress to enact legislation requiring states to report on the use of psychotropic medications in youth in the juvenile justice system, which is currently absent, and to develop better data on this subject for children in foster care.

### 4. Summary of Minority Views

None are known.

**AMERICAN BAR ASSOCIATION**

**SECTION OF FAMILY LAW**

**SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW**

**SECTION OF SCIENCE AND TECHNOLOGY LAW**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association adopts the ABA Model Act Governing  
2 Assisted Reproductive Technology Agencies dated February 2016 and recommends  
3 consideration and adoption of the Model Act by appropriate governmental agencies and  
4 legislatures.



**AMERICAN BAR ASSOCIATION MODEL ACT  
GOVERNING ASSISTED REPRODUCTIVE  
TECHNOLOGY AGENCIES  
(February 2016)**

1	ARTICLE 1. DEFINITIONS
2	SECTION 101. SHORT TITLE
3	SECTION 102. DEFINITIONS
4	
5	ARTICLE 2. LICENSING
6	SECTION 201. APPLICATION FOR LICENSE
7	SECTION 202. DISCIPLINARY ACTION
8	SECTION 203. FAILURE TO COMPLY
9	
10	ARTICLE 3. RESPONSIBILITIES OF ART AGENCIES
11	SECTION 301. LICENSING REQUIRED
12	SECTION 302. AFFIRMATIVE DUTIES AND OBLIGATIONS
13	SECTION 303. SERVICE AGREEMENTS
14	SECTION 304. PREREQUISITES FOR CYCLE COMMENCEMENT
15	SECTION 305. RECORDKEEPING
16	SECTION 306. CONTINUING EDUCATION
17	SECTION 307. MANAGEMENT AND DISBURSEMENT OF FUNDS
18	SECTION 308. PROFESSIONAL LIABILITY INSURANCE
19	
20	ARTICLE 4. MISCONDUCT
21	SECTION 401. UNLICENSED OPERATION
22	SECTION 402. AUTHORIZATION OF CIVIL ACTION
23	SECTION 403. CANDOR WITH THE COURT
24	SECTION 404. PAYMENT FOR GAMETES
25	SECTION 405. REMEDIES NOT EXCLUSIVE
26	
27	ARTICLE 5. MISCELLANEOUS PROVISIONS
28	SECTION 501. AUDITS
29	SECTION 502. RULEMAKING
30	
31	ARTICLE 6. PUBLIC INFORMATION
32	SECTION 601. DISSEMINATION OF INFORMATION
33	

# 112A

## ARTICLE 1. DEFINITIONS

### SECTION 101. SHORT TITLE

This Act is entitled a Model Act Governing ART Agencies.

### SECTION 102. DEFINITIONS

1. "Assisted Reproductive Technology" or "ART" means a variety of clinical treatments and laboratory procedures, which include the handling of human oocytes, sperm, or Embryos, with the intent of establishing a pregnancy. This includes, but is not limited to, in vitro fertilization (IVF), Gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), Embryo biopsy, preimplantation genetic diagnosis (PGD), Embryo cryopreservation, oocyte or Embryo donation, and gestational surrogacy. This definition, for purposes of this Act, does not include artificial insemination, the process by which a man's fresh or frozen sperm sample is introduced into a woman's vagina, other than by sexual intercourse.

2. "Assisted Reproductive Technology Agency" or "ART Agency" means any Person that facilitates Collaborative Reproduction by:

- (a) Planning or arranging the details of agency services with the Intended Parent(s);
- (b) Setting the timeline for the services; establishing the type of services to be rendered; acquiring or coordinating the services of third party licensed professionals;
- (c) Recruiting and/or obtaining personal information regarding Donors, Gametes or Surrogates;
- (d) Making, negotiating, or completing the financial arrangements;
- (e) Directing, having real or apparent authority over, or supervising, directly or indirectly, the matching process between the Intended Parent(s) and Donors, Gametes or Surrogates;
- (f) Directing, being in charge or apparent charge of, or supervising, directly or indirectly, the services to be provided by another licensed Person;
- (g) Using in connection with one's name or employment the words or terms "Agency," "agency owner," or any other word, term, title, or picture, or combination of any of the above, that when considered in the context in which used would imply that such Person is engaged in the practice of agency ownership or that such Person is holding herself or himself out to the public as being engaged in the practice of providing services related to matching egg Donors or Surrogates; provided, however, that nothing in this paragraph shall prevent using the name of any Owner, department, or corporate director of an agency, who is not a licensee, in connection with the name of the agency with which such individual is affiliated, so long as such individual's affiliation is properly specified; or
- (h) Managing or supervising the operation of an agency, except for administrative matters such as budgeting, accounting and personnel,



80 maintenance of buildings, equipment and grounds, and routine clerical and  
81 recordkeeping functions.

82 (i) A Person who facilitates Collaborative Reproduction shall not be  
83 considered an ART Agency under this Act, so long as that Person is not also  
84 performing actions detailed above in (a)-(h).

85 (j) A Person who facilitates Collaborative Reproduction shall not provide  
86 medical, legal, insurance or psychological services unless they are themselves  
87 licensed within such profession.

88  
89 3. “Client” means Intended Parent(s) working with an ART Agency.  
90

91 4. “Collaborative Reproduction” means any ART in which an individual other than the  
92 Intended Parent(s) provides genetic material or agrees to act as a Surrogate. It can  
93 include, but is not limited to: (1) attempts by Intended Parent(s) to create a child through  
94 means of a Surrogacy agreement, with or without the involvement of Donors; and (2)  
95 assisted reproduction involving Donors where a Surrogate is not used.  
96

97 5. “Conflict of Interest” means a situation where a Provider has financial interests that  
98 could potentially influence the services rendered a Participant in Collaborative  
99 Reproduction.  
100

101 ***Legislative Note:*** *States will insert conflict of interest standards as reflected by statute*  
102 *and case law.*  
103

104 6. “Cycle” means an attempt to establish pregnancy, with the assistance of a Donor or  
105 Surrogate, through the use of medical techniques or therapies including but not limited to  
106 ART through IVF or artificial insemination.  
107

108 7. “Department” means a division or department of the State government charged by  
109 statute with authority to oversee the licensing, regulation and/or administration of  
110 professionals in that State.  
111

112 ***Legislative Note:*** *States should determine the department under the State's own*  
113 *organizational scheme that is best suited to oversee ART Agencies.*  
114

115 8. “Donor” means an individual who produces eggs or sperm used for ART, whether or  
116 not for consideration. The term does not include: (a) an Intended Parent who provides  
117 Gametes, to be used for assisted reproduction; (b) a woman who gives birth to a child by  
118 means of assisted reproduction; or (c) an Intended Parent. An “Embryo Donor” means  
119 an individual or individuals with dispositional control of an Embryo who provide(s) it to  
120 another for gestation and relinquish(es) all present and future parental and inheritance  
121 rights and obligations to a resulting individual or individuals.  
122

123 9. “Embryo” means a cell or group of cells containing a diploid complement of  
124 chromosomes or group of such cells (not a Gamete or Gametes) that has the potential to

# 112A

develop into a live born human being if transferred into the body of a woman under conditions in which gestation may be reasonably expected to occur.

10. “Escrow Account” means an independent, insured, bonded escrow depository maintained by a licensed, independent, bonded escrow company; or an insured and bonded trust account maintained by an attorney.

(a) For purposes of this section, a non-attorney ART Agency may not have a financial interest in any escrow company holding client funds. A non-attorney ART Agency and any of its officers, managers, owners of more than 5% ownership interest, directors or employees shall not be an agent of any escrow company holding client funds; and

(b) Client funds may only be disbursed by the attorney or Escrow Agent as set forth in the assisted reproduction agreement and the fund management agreement between the Intended Parent(s) and the Escrow Account holder.

11. “Escrow Agent” means the trustee for an Escrow Account.

12. “Gamete” means a cell containing a haploid complement of DNA that has the potential to form an Embryo when combined with another Gamete. Sperm and eggs are Gametes. A Gamete may consist of nuclear DNA from one human being combined with the cytoplasm, including cytoplasmic DNA, of another human being.

13. “Intended Parent” means an individual, married or unmarried, who manifests the intent as provided in this Act to be legally bound as the parent of a child resulting from assisted or Collaborative Reproduction.

**Legislative Note:** *This definition is for guidance only and is not intended to change the standard of care for the delivery of professional services or shift the burden of proof otherwise required within the jurisdiction.*

14. “Owner” means any and all Persons who, directly or acting by or through one or more Persons, owns more than a 5% interest in an ART Agency.

15. “Participant” means any Intended Parent, Donor or Surrogate, whether or not a written contractual relationship exists with the ART Agency.

16. “Person” means any and all persons, associations, businesses, corporations, partnerships, institutions, agencies, medical centers, and other organizations.

17. “Record” means information inscribed in a tangible medium or stored in an electronic or other medium that is retrievable in perceivable form.

18. “Service Agreement” means an agreement between an ART Agency and Intended Parent(s) describing the services to be performed.

19. “Surrogate” means an adult woman, not an Intended Parent, who enters into a surrogacy agreement to bear a child, whether or not she has any genetic relationship to the resulting child. Both a traditional surrogate (a woman who undergoes insemination and fertilization of her own eggs *in vivo*) and a gestational surrogate (a woman into whom an Embryo formed using eggs other than her own is transferred) are surrogates.

20. “Surrogacy” means an arrangement between Intended Parent(s) and a Surrogate.

## ARTICLE 2. LICENSING

### SECTION 201. IN-STATE APPLICATION FOR LICENSE

1. Every applicant for a license as an ART Agency must submit a written application for a license to the Department, in such form as prescribed by the Department.

2. The Department’s application, shall, at a minimum, require the following information to be provided in a sworn statement:

(a) The business name, each business address, tax ID number, and date of incorporation if applicable, or the true full legal name of the primary agent for the business, date of birth, driver’s license number, social security number, and each place of business address;

(b) The true name, date of birth, driver’s license number, social security number, and home address of all Owners;

(c) Degrees and certifications and licenses or other professional designation of primary agent for the business and for all Owners;

(d) Each business or occupation engaged in by all Owners during the five (5) years immediately preceding the date of the application, including place of employment and the location thereof;

(e) The previous experience of all Owners as it relates to the field of ART;

(f) A description of formal and informal education in the field of ART completed preceding the application date by all Owners;

(g) Proof of applicable professional liability insurance, if available;

(h) The applicant’s Conflict of Interest Policy (disclosure procedure/waiver procedure);

(i) Statement of whether the applicant or any Owner:

(i) has been charged with or indicted for a felony. If so, provide an explanation of the nature of the crime and a certified copy of the relevant court records;(ii) regardless of adjudication, has been convicted of, entered an admission of guilt or a plea of nolo contendere to a felony and a certified copy of the relevant court records; and/or

(ii) regardless of adjudication, has previously been convicted of, has entered an admission of guilt or nolo contendere to racketeering or any offense involving fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property and a

217

certified copy of the relevant court records.

218

(j) Whether there has ever been a judicial or administrative finding that the applicant or any Owner has previously acted as an ART Agency without a license, or whether such a license has previously been refused, revoked, or suspended in any jurisdiction. If so, provide a detailed explanation.

219

220

221

222

223

224

225

226

227

228

229

230

(k) Whether the applicant or any Owner has worked for, or provided consulting services to, a company that has had entered against it an injunction, a temporary restraining order, or a final judgment or order, including a stipulated judgment or order, an assurance of voluntary compliance, or any similar document, in any civil or administrative action involving racketeering, fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property or the use of any untrue, deceptive, or misleading representation or the use of any unfair, unlawful, or deceptive trade practice. If so, provide a detailed explanation;

231

232

233

234

235

236

237

238

(l) Whether the applicant or any Owner has had entered against him/her/it an injunction, a temporary restraining order, or a final judgment or order, including a stipulated judgment or order, an assurance of voluntary compliance, or any similar document, in any civil or administrative action involving racketeering, fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property or the use of any untrue, deceptive, or misleading representation or the use of any unfair, unlawful, or deceptive trade practice. If so, provide a detailed explanation;

239

240

241

(m) Whether the applicant or any Owner has had any convictions for child abuse, child neglect or sexual misconduct as such is defined by the criminal code of his/her State of residence;

242

243

244

245

(n) A statement from each Owner specifying that he/she is not currently using any drugs in a manner which violates the laws of his/her State of residence, and is able to fulfill the duties of his/her job description;

246

247

248

(o) A statement of affirmative duties as further described under Section 302 of this Act;

249

250

251

252

(p) A statement of intent to comply with Department's audit and review policy;

253

254

(q) Whether there have been any judicial or administrative findings that applicant or any Owner has been previously denied a license in the area of providing legal, medical, adoption, child-care, assisted reproductive services or counseling services; and

255

(r) Any material change in business following date of initial or renewal of licensure (as specified below).

256

257

258

3. The Department shall determine the minimum education and experience required for the issuance of licenses.

259

260

261

4. The Department shall implement procedures to obtain the following information regarding each Owner:

- 262 (a) State and federal criminal records;  
263 (b) Child abuse and neglect check for all states of residency from the age of  
264 eighteen (18); and  
265 (c) Sex offender registry check for all states of residency from the age of  
266 eighteen (18) as well as the federal database.  
267
- 268 5. Upon the filing of an application for a license and payment of all applicable fees,  
269 unless the application is to renew or reactivate an existing license, the Department shall,  
270 in addition to reviewing the application:  
271
- 272 (a) Review applicant's policy for client file structure and management;  
273 (b) Review applicant's written pro forma Service Agreement for clients to  
274 ensure compliance with this Act;  
275 (c) Review applicant's accounting process;
- 276 (d) Review the applicant's system for protection of Participant funds in  
277 accordance with this Act; and  
278 (e) Review applicant's Record retention policy.  
279
- 280 6. The Department shall issue the license unless the application is incomplete, or grounds  
281 for denial of the license exist. Grounds for denial shall include, but is not limited to, a  
282 previous felony conviction, previous license revocation or failure to demonstrate  
283 sufficient experience or education within the field of ART. Any denial, and reversal of  
284 same, shall be governed by applicable State or federal law.  
285
- 286 7. The Department may implement any application fees or other fees necessary or  
287 convenient to carry out the provisions of this section.  
288
- 289 8. The Department may permit applicants to operate on an interim basis while license  
290 applications are pending. Interim licensure shall be permitted only if applicant is licensed  
291 within another State, all unearned or undisbursed funds of its Intended Parent Clients are  
292 deposited in an Escrow Account, and the applicant is covered by professional liability  
293 insurance if such is available.  
294
- 295 9. Each licensee shall report, on a form prescribed the Department, any change to the  
296 information contained in any initial application form or any amendment to such  
297 application not later than thirty (30) days after the change is effective.  
298
- 299 10. Each licensee shall report any changes in the Owners, partners, departments,  
300 members, joint venturers or directors of any licensee, or changes in the form of business  
301 organization, by written amendment in such form and at such time as the Department  
302 specifies by rule.
- 303 (a) When such change causes a new Person to acquire greater than 5%  
304 ownership, or be provided direct control over the activities of the licensee,  
305 such Person must submit an initial application for licensure before such  
306 purchase or acquisition at such time and in such form as the Department  
307 prescribes.

# 112A

11. Licenses are not transferable or assignable.

12. A licensee may invalidate any license by delivering it to the Department with a written notice of the delivery, but such delivery does not affect any civil or criminal liability or the authority to enforce this chapter for acts committed in violation thereof.

13. A licensee who is the subject of a voluntary or involuntary bankruptcy filing must report such filing to the Department within seven (7) business days after the filing date.

14. A licensee that has been convicted or found guilty of a felony or has had entered against her or him an injunction, a temporary restraining order, or a final judgment or order, including a stipulated judgment or order, an assurance of voluntary compliance, or any similar document, in any civil or administrative action involving racketeering, fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property or the use of any untrue, deceptive, or misleading representation or the use of any unfair, unlawful, or deceptive trade practice must immediately report such filing to the Department, together with a full explanation.

15. The Department shall implement procedures for the renewal of licenses.

## 16. Streamlined License Procedure

(a) Any Owner who is a professional subject to regulation under other departments may opt for streamlined licensure requirements under this Act.

(b) The Department shall determine categories of professionals that qualify for streamlined licensure. Such professionals shall include, but not be limited to, physicians, attorneys, registered nurses, licensed psychologists and licensed social workers.

(c) An inactive, suspended or otherwise not active professional license shall not qualify for the streamlined licensure requirements.

(d) The streamlined licensure procedure shall be determined by the Department.

17. This Chapter does not prevent a licensee from providing services to residents of any part of this State or any other State or country.

## SECTION 202. OUT OF STATE APPLICATION FOR LICENSE

1. The Department shall establish a mechanism for recognition and licensure of a foreign ART Agency that desires to do business within its borders.

(a) A licensed, nonresident ART Agency that does not have a substantial nexus within the State shall transmit a copy of their current license to the Department and pay any applicable fees, as determined by the Department, prior to transacting business in the State.

349 (b) A licensed, nonresident ART Agency, that has a substantial nexus within  
350 the State shall transmit to this State's licensing body a copy of its current  
351 license, pay any applicable fees, as determined by the Department, and submit  
352 a completed application as required by the Department.

353 (c) An unlicensed, nonresident ART Agency shall satisfy all licensing  
354 requirements previously established for resident ART Agencies.

355 (d) If reciprocity of ART licensing exists between the State of residence of the  
356 licensed foreign Agency and this State, the Agency must transmit to the  
357 Department a copy of its current license, pay any applicable fees, as  
358 determined by the Department, and submit a completed application as  
359 required by the Department.

360 2. The Department shall, upon receipt of the required documents and fees, make an  
361 expedient determination for licensing.

362 (a) The Department can reject the application with direction for reapplying.

363 (b) The Department can accept the application and issue a license.

364 (c) The Department can accept the application and issue a provisional license,  
365 with a remedial program to run concurrent with the timeline of the provisional  
366 admission. The Department shall issue a full license upon completion of the  
367 remedial program.

## 368 SECTION 203. DISCIPLINARY ACTION

369 1. The following acts are violations of this chapter and constitute grounds for disciplinary  
370 action.

371 (a) A material misstatement of fact in an application for a license.

372 (b) The violation, either knowingly or without the exercise of due care, of any  
373 provision of this chapter, any rule or order adopted under this Act, or any  
374 written agreement entered into with the Department.

375 (c) Any act of fraud, misrepresentation, non-waived conflict of interest, or  
376 deceit, regardless of reliance by or damage to a client, or any illegal activity,  
377 where such acts are in connection with providing agency services under this  
378 chapter. Such acts include, but are not limited to:

379 (i) Willful imposition of charges in violation of this Act, or  
380 previously undisclosed charges, or charges in excess of 10% over  
381 the amount originally disclosed in the Service Agreement without  
382 reasonable cause;

383 (ii) Misrepresentation, circumvention, or concealment of any  
384 matter required to be stated or furnished to a third Person;

- 385 (iii) The use of false, deceptive, or misleading advertising; and
- 386 (iv) Failure to disclose material information in its possession to
- 387 Participants.
- 388 (d) Failure to maintain, preserve, and keep available for examination, all
- 389 books, accounts, or other documents required by this Act, by any rule or order
- 390 adopted under this Act, or by any agreement entered into with the Department.
- 391 (e) Refusal to permit inspection of books and Records in an investigation or
- 392 examination by the Department or refusal to comply with a validly issued
- 393 subpoena issued by the Department.
- 394 (f) Pleading nolo contendere to, or having been convicted or found guilty of, a
- 395 crime involving fraud, dishonest dealing, or any act of moral turpitude,
- 396 regardless of whether adjudication is withheld.
- 397 (g) Allowing any Person other than the licensee to use the licensee's business
- 398 name, address, or telephone number.
- 399 (h) Failure to pay any fee, charge, or fine imposed or assessed pursuant to this
- 400 chapter or any rule adopted under this chapter.
- 401 (i) Using the name or logo of another Person when marketing or soliciting
- 402 existing or prospective customers if such marketing materials are used without
- 403 the consent of that institution and in a manner that would lead a reasonable
- 404 individual to believe that the material or solicitation originated from, was
- 405 endorsed by, or is related to or the responsibility of that institution or its
- 406 affiliates or subsidiaries.
- 407 (j) Payment to the Department for a license or permit with a check or
- 408 electronic transmission of funds that is dishonored by the applicant's or
- 409 licensee's financial institution.
- 410 (k) Failure to maintain continuing education as otherwise set out in this
- 411 Statute. [**Legislative Note:** *Optional, depending on adoption of continuing*
- 412 *education requirements*]
- 413 (l) Failure to meet and/or maintain minimum standards as set forth above
- 414 constitute grounds for denial of an application.
- 415 2. Under this section, a licensee is responsible for acts of its Owners, members of the
- 416 partnership, any department or director of the corporation or association, or any Person
- 417 with power to direct the management or policies of the partnership, corporation, or
- 418 association.
- 419 3. Under this section, a licensee is responsible for the acts of its employee or agents if,
- 420 with knowledge or reckless disregard of such acts, the licensee retained profits, benefits,
- 421 or advantages accruing from such acts or ratified the conduct of the employee or agent as



422 a matter of law or fact.

423 4. Disciplinary action that may be imposed under this section includes:

424 (a) Denial of the issuance of a license or renewal of a license;

425 (b) Issuance of a probationary or conditional license;

426 (c) Fines up to \$25,000 per violation;

427 (d) Suspension of a license;

428 (e) Revocation of a license; and

429 (f) Ordering restitution to aggrieved Participant(s) to the full extent of their  
430 damages. Restitution includes, but is not limited to, all amounts paid by the  
431 aggrieved Participant(s) to the ART Agency as well as all other economic and  
432 non-economic losses incurred by the aggrieved Participant(s) as a result of the  
433 ART Agency's and/or Owner's misconduct.

434 5. The Department shall follow the State's administrative procedures act when exercising  
435 its duties under this Section, and all remedies available under the administrative  
436 procedures act shall be available to the Department and licensee or applicant.

437 6. In the event that the Department takes action under this Section, it shall arrange for the  
438 provision of ongoing services to the active Participants.

#### 439 SECTION 204. FAILURE TO COMPLY

440 1. The Failure of any ART Agency or any other Person to comply with any provision(s)  
441 of this Act shall not affect the validity and enforceability of any lawful direct  
442 agreement(s) among the Participants.

443 2. Action taken by the Department against any licensee shall not impair the obligation of  
444 any lawful agreement(s) between the licensee and Participant(s).

445

#### 446 ARTICLE 3. RESPONSIBILITIES OF ART AGENCIES

##### 447 SECTION 301. LICENSING REQUIRED

448

449 1. ART Agencies must be licensed by the Department to operate in this State.

450

##### 451 SECTION 302. AFFIRMATIVE DUTIES AND OBLIGATIONS

452

453 1. An ART Agency shall provide services to its Participants in a non-discriminatory  
454 manner. Nothing herein shall inhibit the ART Agency's ability to accept or decline  
455 prospective Participants based on its own policies and screening procedures.

456

# 112A

2. An ART Agency shall respect the autonomy of Participants by not engaging in coercion, fraud, misrepresentation, or unethical behavior.

3. An ART Agency shall not provide legal, medical, psychological, insurance or other advice that it is not licensed or otherwise qualified to give.

4. An ART Agency shall respect Participant confidences by first obtaining the appropriate HIPAA releases, attorney-client privilege waivers, or other such written consent from the Participant prior to conversation with other relevant ART professionals on behalf of the Participant.

5. An ART Agency shall not present a Surrogate or Donor for matching to Intended Parent(s), that they reasonably know or should know has not or will not pass medical and/or psychological testing or is otherwise unavailable.

## SECTION 303. SERVICE AGREEMENTS

1. Prior to entering into a Service Agreement, an ART Agency shall provide the following items to the Intended Parent:

- (a) A detailed description of the services to be provided by the ART Agency;
- (b) The estimated costs of the services to be provided by the ART Agency;
- (c) An explanation of refund and cancellation policies; and
- (d) The estimated timing for the services to be provided by the ART Agency, as well as a statement that the projected time frame may be subject to variables outside of the control of the ART Agency.

2. All Service Agreements must be in writing and include the following provisions:

- (a) The information required by Article 3, Section 303 of this Act;
- (b) The name and address, phone number and email of Agency, the corporate identity if any, the main contact person of the agency, and the license number, if one has been provided by the Department;
- (c) The full legal names, addresses, phone numbers and emails for the Intended Parent(s);
- (d) A detailed description of the services to be provided by the ART Agency;
- (e) A detailed description of the estimated costs of the services to be provided by the ART Agency;
- (f) A description of other known fees and expenses that may be incurred, including, but not limited to, legal fees and medical costs;
- (g) A timetable for the payment of known costs, fees and expenses;
- (h) The name and address, phone number and email of the Escrow Agent;
- (i) The estimated time for completion of the services to be provided, as well as a statement that the projected time frame may be subject to variables outside of the control of the ART Agency;
- (j) Notification of the right, and an opportunity, to have the Service Agreement reviewed by independent legal counsel, and right to separate counsel for applicable agreements with third parties for each Participant involved;

- (k) An explanation of recordkeeping procedures for Records required to be kept under Section 305 of this Act;
- (l) An explanation of the ART Agency's policies regarding future contact between the Participants following the completion of the direct agreement between the Participants or a statement that the ART Agency does not provide such services;
- (m) Disclosure of any and all relationships, activities, financial or other interests of the Owners of the ART Agency that may constitute an actual or potential conflict of interest as such is defined within the State and to offer the Participant an ability to waive said conflict if such is permitted within the jurisdiction; and
- (n) The name of the ART Agency's professional liability insurance carrier(s) or a statement that the ART Agency does not carry professional liability insurance where none is applicable.

#### SECTION 304. PREREQUISITES FOR CYCLE COMMENCEMENT

1. No ART Agency shall permit, encourage or facilitate an egg Donor or Surrogate to begin a Cycle until the following tasks have been completed:
  - (a) A Service Agreement has been signed by the Intended Parent(s);
  - (b) All Participants have each had an opportunity to consult with a licensed attorney of their own choosing;
  - (c) A direct agreement between the Participants has been executed (i.e., a direct agreement between Intended Parents and a Donor, or a direct agreement between Intended Parents and a Surrogate);
  - (d) The Intended Parent(s) have made the deposit to the Escrow Account, in accordance with the direct agreement(s) between the Participants.
  - (e) The Participants are informed to seek advice regarding their life insurance and health insurance/benefits policies and the respective coverage of the fertility treatment, complications, and obstetric costs and fees;
  - (f) The Participants are informed to seek advice from medical, psychological, legal, and any other relevant third party professionals to discuss the potential risks and outcomes of the process; and
  - (g) The Participants are informed to seek advice regarding their guardianship and estate planning options.

#### SECTION 305. RECORDKEEPING

1. The ART Agency shall create and maintain reasonable and ordinary business Records.
2. The ART Agency shall maintain copies of direct agreements between Participants, unless the Participants decline to share their direct agreement with the ART Agency.
3. All Records required to be kept under this section shall be maintained for a minimum of eighteen (18) years following the completion of the Service Agreement.

# 112A

4. The ART Agency shall have and follow a written policy that covers the following:

- (a) The protocol for creating, storing, backing up, accessing, transferring and disposing Records under the ART Agency's control; and
- (b) The policy for transfer of such Records in the event that the ART Agency ceases to exist or is otherwise unable to continue to maintain the Records for the required time period.

5. Such Records shall be held in strict confidence by the ART Agency and only released upon the written permission of the Participant(s) addressed by the information stored in such Records. This provision applies even when the information is identified and used in a database, for archival research, education, advertising, or for any other purpose. If the Participant is defined in the Record as a couple, both persons shall provide permission prior to release of information.

6. Such Records shall be confidential and the Records and their contents shall not be disclosed nor shall disclosure be compelled except as follows:

- (a) For the ART Agency Owner to carry out any and all duties under a Service Agreement;
- (b) With the consent of the Participant(s) whose information is contained in the Record to be disclosed; or
- (c) Pursuant to a valid court order or subpoena.

## SECTION 306. CONTINUING EDUCATION

**Legislative Note:** States can choose to implement alternative educational requirements in lieu of yearly continuing education.

1. Owners of ART Agencies must complete \_\_\_\_\_ hours of continuing education each calendar year.

2. Such continuing education may consist of such topics as ethics, communicable diseases, FDA screening, financial responsibility, psycho-social aspects of assisted reproduction, reproductive medicine/biology and reproductive law or other relevant topics. To the extent that the subject matter is identical, licensees that hold other professional licenses may satisfy these requirements through continuing education approved by their respective licensing authority.

## SECTION 307. MANAGEMENT AND DISBURSEMENT OF FUNDS

1. All unearned or undisbursed funds of Intended Parent(s) must be held in an Escrow Account established pursuant to this Act. Trust accounting rules of the jurisdiction of the Escrow Account shall control the disbursement of funds as further reflected in the fund management agreement between Intended Parent and Escrow Agent as well as within the direct agreement between Intended Parent and Surrogate or Donor.

590 2. An ART Agency must provide proof of insurance and bonding as required pursuant to  
591 this Act, as may be required by the Department.

## 592 SECTION 308. PROFESSIONAL LIABILITY INSURANCE

593

594 1. An ART Agency must carry professional liability insurance coverage, if available.  
595

## 596 ARTICLE 4. MISCONDUCT

597 *Legislative Note: States should customize this article to comport with the State's*  
598 *criminal code.*

599

## 600 SECTION 401. UNLICENSED OPERATION

601

602 1. No ART Agency shall operate without a license issued in accordance with this Act.

603 Violation of this paragraph shall be punishable by a civil penalty.  
604

605 2. No Person shall knowingly operate or permit the operation in this State of an ART  
606 Agency that is not licensed in accordance with this Act. Violation of this paragraph shall  
607 be punishable by a civil penalty.

608

609 *Legislative Note: States should incorporate the existing statutory scheme for civil*  
610 *penalties for unlicensed activities.*

611

## 612 SECTION 402. AUTHORIZATION OF CIVIL ACTION

613

614 1. An aggrieved Person may bring a civil action against an ART Agency or Owner in the  
615 event of negligent conduct or misappropriation of funds.

616

617 2. An aggrieved Person may bring a civil action against an ART Agency or Owner for a  
618 breaching the Service Agreement or violating the terms of this ACT.

619

620 3. In the event of knowing or purposeful misconduct, an award of punitive damages is  
621 authorized.

622

623 4. In the event of a civil action against an ART Agency or Owner, attorney's fees and  
624 costs shall be paid by the unsuccessful litigant.

625

## 626 SECTION 403. CANDOR WITH THE COURT

627 1. No ART Agency or Operator shall provide, attempt to provide, or solicit another to  
628 provide false or misleading information to an administrative agency or court during the  
629 parental establishment of a child. Violation of this section shall be a felony and  
630 punishable accordingly.

631 2. Destruction of ART Agency records during or in anticipation of a civil action shall be  
632 spoliation of evidence for which the court may shift the burden of proof to the ART

# 112A

633 Agency to prove non-liability or lack of damages.

## 634 SECTION 404. PAYMENT FOR GAMETES

635 1. No program of an ART Agency or Owner shall compensate or provide that a Donor, as  
636 defined in Section 102.8, be compensated, based on the number or quality of Gametes or  
637 Embryos donated. Violation of this section shall be a misdemeanor and punishable  
638 accordingly.

## 639 SECTION 405. REMEDIES NOT EXCLUSIVE

640 1. This Article is not intended to limit the rights of any Person or government entity to  
641 bring an action against the ART Agency or Owner under any other provision of law or  
642 equity.

## 643 ARTICLE 5. MISCELLANEOUS PROVISIONS

### 644 SECTION 501. AUDITS

645 1. The Department may audit the ART Agency to ensure compliance with any and all  
646 provisions of this Act and the ART Agency shall fully cooperate in any such audit.

### 647 SECTION 502. RULEMAKING

648 1. The Department shall, adopt rules to implement the Department's responsibilities  
649 under this Act, in accordance with the State administrative procedures act, if any.

## 650 ARTICLE 6. PUBLIC INFORMATION

### 651 SECTION 601. DISSEMINATION OF INFORMATION

652

653 1. The Department shall publish a list of all ART Agencies licensed within the State.

654

655 2. The Department shall publish a list of all ART Agencies subject to its sanctions and  
656 the sanction levied.

657

658 3. Such lists shall be updated and published as otherwise required of the Department by  
659 its administrative regulations.

## **REPORT**

### **Introduction & Summary**

Assisted Reproductive Technologies (ART) is the collaboration of various professions all synchronized to resolve infertility visited upon an Intended Parent. Certain aspects of infertility are respectively addressed by licensed professionals including psychologists, physicians, and attorneys. Each of these professions is guided and regulated to some extent by the substantive and ethical rules of its various professional organizations and its licensing requirements.

The ABA Model Act Governing Assisted Reproduction Technologies was adopted by the ABA House of Delegates in 2008. Resolution 107, adopted by the House of Delegates in February 2008, was cosponsored by the following Sections: Individual Rights and Responsibilities; Real Property, Trust and Estate Law; Science and Technology Law; Young Lawyers Division; and the Health Law. The ABA Model Act governing Assisted Reproduction Technologies established for intended parents and licensed professionals a single baseline legal standard from which to foster predictability within the Intended Parent-Licensed Professional relationship. This is especially important given the tendency in ART for intended parents to seek professional support beyond the geographic boundaries typically seen in medical, psychological and legal sub-specialties.

When ART requires collaboration with persons outside of the intended parent – professional relationship, this is referred to as third party ART. Third party ART (gamete or embryo donation and surrogacy) is impacted by the services provided by certain recruiting and matching agencies. These agencies receive and manage prospective intended parents' funds for the purpose of matching them with desirable donors/surrogates as well as administering various aspects of their ongoing fertility program. Agencies can be owned and operated by anyone without professional training or affiliation. There are documented cases in which the owners of such agencies have misappropriated and absconded with client funds and otherwise inadequately or negligently administered their programs to the detriment of their clients and their donors/surrogates.

The lack of oversight with regard to ART agencies puts the Intended Parents, donors and surrogates at risk of legal and financial harm. Regarding such agencies, there is a significant gap in the licensing and regulation that governs most other aspects of the ART process. Such licensing and regulation should be proposed and adopted. To this end, this Resolution is designed to reduce the possibility of harm and abuse by providing the Intended Parents and other ART participants a basis upon which to predict performance of an ART agency, by promoting professionalism and best practices for ART agencies through licensing. Through this Resolution, Intended Parents and other ART participants can become better-informed consumers as a result of the implementation of objective standards required for the licensure of an ART agency.

This Resolution proposes the ABA Model Act Governing ART Agencies for jurisdictions seeking to develop their own legislation governing ART agencies. By adopting

# 112A

this Resolution, the legal community will be providing a model licensing structure to help states ensure that agencies providing support to the third party reproduction process are doing so with accountability and to help establish ethical and best practices for ART agencies, for the benefit of all ART participants.

## Background

Infertility, the inability to conceive, may be physiological or anatomical in origin. A problem may arise in the production, delivery or viability of gametes (sperm, eggs or embryos). A problem may arise in the implantation or retention of the embryo or fetus. Within the entire spectrum of infertility, one-third of all infertility is attributed to females, one-third to males and one-third to a combination of problems in both partners or to unexplained causes. ([www.asrm.org](http://www.asrm.org)).

Assisted reproductive technology (ART) procedures are increasingly used as a method of family formation and to overcome various forms of infertility.

Infertility was defined as a disease in 2009, by the World Health Organization. The Supreme Court considers the inability to reproduce as a disability, stating that reproduction is a “major life activity,” and “conditions that interfere with reproduction should be regarded as disabilities” as per the Americans with Disabilities Act of 1991. (*Bragdon v Abbott*, 524 US 624, 629; 118 S Ct 2196. 1998). Under such a rubric, we are dealing with persons who are intellectually compromised, through stress associated with the underlying infertility, and physically. As such, these persons are subject to exploitation.

This Resolution will provide states a model licensing structure which will promote predictability and accountability for the benefit of Intended Parents and all ART participants with respect to the services provided by currently unlicensed third party ART agencies. Such a licensing structure will also help to minimize exploitation of the ART participants, foster professionalism and provide a mechanism for dispute resolution.

## Infertility Statistics

A survey of the statistics is instructive to appreciate how infertility impacts society. A couple aged 29-33 years with a normal functioning reproductive system has a 20-25% chance of conceiving in any given month (National Women’s Health Resource Center, 2015). After six months of trying, 60% of couples will conceive without medical assistance; 90% after one-year. (*Id*). The remaining couples are diagnosed as infertile.

The 2011 statistics show that of 2,670,545 births in the US, at least 38,496 (1.44%) of the children were born from ART. (See generally, Thoma ME, Boulet S, Martin JA, Kissin D. *Births resulting from assisted reproductive technology: Comparing birth certificate and National ART Surveillance System data, 2011*. National Center for Health Statistics. 2014). The 2013 census noted there were 3,957,577 births in the U.S. (Hamilton BE, Martin JA, Osterman MJK, Curtin SC. *Births: Preliminary data for 2013. National vital statistics*



reports. National Center for Health Statistics. 2014), suggesting approximately 56,989 births from ART in 2013, and demonstrating an increasing reliance upon ART for family building.

### The Psychosocial Costs of Infertility

Infertility is a non-discriminatory offender, and it carries with it a psychosocial overlay. Parenthood is a major aspect of adult life for women and men. The stress associated with infertility is associated with anger, depression, anxiety, marital issues and feelings of worthlessness. Intended Parents experience stigma, sense of loss, and diminished self-esteem as a result of their infertility. (Nachtigall RD, Becker G, Wozny M. *The Effects of gender-specific diagnosis on men's and women's response to infertility*. Fertil Steril 1992). Intended Parents will permit others to provide for results, treatment and fulfillment. "Normal Emotion Responses to Infertility and Coping Strategies." Access Australia, 23 Jan. 2010. Web. Intended Parents exposed to the stress of infertility are predisposed to making decisions without sufficient information and by accepting an unreasonable paradigm of risk.

### The Financial Costs of Infertility

Medical fees and costs associated with ART treatment can be characterized as 'direct' or 'indirect'. The direct costs are primarily attributed to medical treatment addressing the infertility and include consultations, medications and hormone treatments, laboratory services, testing, gamete (egg and/or sperm) retrieval and embryo transfer, as well as associated administrative and overhead charges. (See generally, Connolly MP, Hoorens S, Chambers GM. *The Costs and Consequences of Assisted Reproductive Technology*. Hum. Reprod., Update 2010).

On the microeconomic side of infertility, patients expect to pay \$50,000 - \$100,000 for gestational surrogacy, \$15,000 - \$20,000 for donor eggs, \$12,000 for IVF, and \$3,000 - \$5,000 for medications. (Rosata D, *How High-Tech Baby Making Fuels the Infertility Market Boon*. Money, July 9, 2014). Sober thought requires factoring success rates into the true cost of treatment - as the national IVF success rate for a live birth ranges from 40 to 50% depending upon the source of the eggs. (SART.org, *Clinic Summary Report*, 2013). Thus, there is a very real possibility that a second cycle, and another round of costs, may be required. On a macroeconomic level, the infertility marketplace is expanding. As of 2013, the fertility market was independently valued at a recession proof, \$3.5 billion with a 3.6% annual growth. (*U.S. Fertility Clinics & Infertility Services: An Industry Analysis*, October, 2013).

Clearly, costs of fertility treatment are high, and such treatment is voluntary and risky. Within the United States, fifteen states have either an insurance mandate to offer, or an insurance mandate to cover, some level of infertility treatment. Eight of those states have an insurance mandate that requires qualified employers to include IVF coverage in their plans offered to their employees. "Insurance Coverage in Your State." RESOLVE, n.d. Web. 10 Dec., 2015.

# 112A

With a partial or complete absence of financial risk protection, the majority of infertility health care costs are paid with out-of-pocket payments [OoPP] by consumers. "...The high price of IVF cycles (\$12,000 for each cycle, and frequently multiple cycles), plus drugs, exams and tests deters many. The total price tag can top \$50,000 or more ..." (Marketdata Enterprises, Inc., Research Director, John LaRosa, 2013). While OoPP may be seen as a severe infringement to a right to reproductive health, OoPP absolutely impacts the current and future wellbeing of the Intended Parent(s) as a financial stressor.

## Third Party Reproduction Services

As stated above, ART is collaboration of various licensed professionals, including psychologists, physicians, and attorneys. Each is guided and regulated by the rules of their professional organization and their licensing requirements.

When we speak of resolving infertility through "third party" reproduction, we expand the collaboration to include unlicensed persons, as well as ART agencies that help to match Intended Parents with the necessary third parties (gamete donor or gestational carrier) to resolve their infertility. The third party is never licensed, rather, she or he only operate through the authority of the medical consent forms signed at a fertility clinic and/or contracts entered into with the intended parents.

Commonly, ART agencies will provide fee-based services to match their intended parents with gamete donors and/or surrogates recruited by the ART agency. The fees are typically nonrefundable and range from \$4,000 for a gamete donor to \$20,000 for a gestational carrier. Yet, ART agencies can be owned and operated by anyone without professional training or affiliation. While many ART agency owners were themselves infertile, provided eggs or acted as gestational carrier, most do not have any form of education addressing medicine, ethics or law related to ART.

## ART Regulation in the United States

There are few laws which address commercialization within third party reproduction; two states outlaw ART agencies; one state requires the use of escrow accounts. There are no Federal code sections on the provision of ART through Agencies.

The two largest professional medical organizations for reproductive medicine, American Society for Reproductive Medicine ("ASRM") and the Society for Assisted Reproductive Technology ("SART"), have issued practice and ethical guidelines for their members. However, membership in the organizations is voluntary and the guidelines are self-regulated.

Thus, there is no national regulation of surrogacy and the states provide a mere patchwork quilt of policies and laws. This lack of law or regulation of third party reproduction is cast against a backdrop of rising reliance on such medical services. This lack of law and regulation has permitted ART agencies to take advantage of their clients to the extent of delayed or lost reproductive cycles, and, in some of the most egregious cases where

fraud is involved, theft of millions of dollars. To be fair, there is not an epidemic of abuse by ART agencies. However, the impact of abuse within any family building scenario is very devastating and infects all aspects of the aggrieved Intended Parents' lives.

Thus, we see the event horizon for abuse of an Intended Parent operating under an intellectual disability arising from an infertility diagnosis. First, the Intended Parent is under psychosocial stress resulting from his or her reproductive failures. Second, the Intended Parent is under financial stress because of expensive OoPPs, most often without insurance support. Third, the Intended Parent is under stress because of an inability to predict a positive outcome. Certainly, licensed professionals can provide the client security through their personal skill sets and licensure. The unlicensed ART agency, however, can offer nothing more than their most recent endorsement.

If an ART cycle fails because of an unlicensed or unregulated ART agency, everyone is harmed. The Intended Parent is harmed; e.g., loss of money and opportunity. The donor or carrier is harmed; e.g., unnecessary medical treatment. The institute of family is harmed; e.g., disincentive toward unique ways to address infertility. In addition, the moral fabric of society is harmed; e.g., no ability to rectify the injury to the Parties participating in the ART cycle in a productive manner. Lewin, Tamar. "The Surrogacy Agency that Delivered Heartache." *New York Times*. 25 Jul. 2014. Web.; Press Release. "Surrogacy Scam." FBI. 13 Sept. 2011. Web.

To this end, this Resolution, is designed to reduce the possibility of harm and abuse by providing the Intended Parents and other ART participants a basis upon which to predict performance of an ART agency, by promoting professionalism and best practices for ART agencies through licensing. Through this Resolution, Intended Parents and other ART participants can become better-informed consumers as a result of the implementation of objective standards required for the licensure of an ART agency.

### Licensure of ART Agencies

Under the Resolution, ART agencies shall be required to apply for licensure within the jurisdiction it resides or expects to do business. Licensure, first of all, is the mark of a professional. The licensure process is intensive and demands an extra showing of competence and dedication. This reflects a general view that licensed professionals are more dedicated, with enhanced education, leadership and management skills.

Licensure is an indicator of dedication to integrity, hard work, and creativity, and an assurance that the ART agency has competence, even if at a minimal level. This Resolution proscribes an application process that requires detailed information and a demonstration of competency to be eligible for licensure within the relevant jurisdiction. Requested information includes, but is not limited to, a lack of a criminal background, a description of all ART related education in which the Agency has participated, and a minimum ongoing education requirement to maintain such license. The Resolution also addresses the consequences of failure of ART agencies to maintain minimum competency such as discipline, loss of license, and sanctions including fines by the licensing body.

# 112A

Licensure becomes a basis upon which to predict competence. The Resolution describes certain affirmative duties due to an ART agency's clients. Such duties include freedom from coercion and refraining from providing medical and/or legal advice. The Resolution also requires ART agencies to provide their clients clear, written documentation describing the duties to be performed by the agency, the fees charged for such services and conditions for rebating fees paid.

Through the Resolution, licensure is also recognized as a starting point for professional growth and development of ART agencies, and participation in professional activities such as education programs is part of the ongoing activities of a true professional service entity.

Finally, the Resolution supports the concept that through licensure ART agencies must meet certain ethical and financial responsibility standards, including requirements for holding client funds in an escrow account with appropriate bonding and insurances.

## **Conclusion**

Through the adoption of this Resolution, the ABA voices its support and understanding of: 1) the vulnerability of Intended Parents who rely upon third party reproduction to treat their infertility; and 2) the importance of creating and fostering a licensing structure for third party reproduction ART agencies that match gamete donors and surrogates with Intended Parents who must rely on them to help build their families through assisted reproduction.

An ART agency licensing structure will provide assurances to the infertile population that ART agencies are providing professional support in a fashion that is predictable and accountable. Through the adoption of this Resolution, the ABA will provide a model licensing structure from which a jurisdiction can establish its own licensing paradigm and will help establish ethical and best practices for ART agencies, for the benefit of all ART participants.

Respectfully submitted,

Greg J. Ortiz, Chair  
Section of Family Law  
February 2016

**GENERAL INFORMATION FORM**

Submitting Entity: Section of Family Law

Submitted By: Greg J. Ortiz, Chair, Section of Family Law

1. Summary of Resolution(s). The Resolution recommends consideration and adoption of the Model Act Governing ART Agencies by appropriate governmental agencies and legislatures.
2. Approval by Submitting Entity. The ABA Section of Family Law approved submission of this Resolution on November 9, 2015.
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 Model Act Governing Assisted Reproduction Technologies was adopted by the ABA House of Delegates in 2008 (“Resolution 107”). Resolution 107, adopted by the House of Delegates in February 2008, established for intended parents and licensed professionals a single baseline legal standard from which to foster predictability within the Intended Parent-Licensed Professional relationship. This is especially important given the tendency in ART for intended parents to seek professional support beyond the geographic boundaries typically seen in medical, psychological and legal sub-specialties. Resolution 107, adopted in 2008, did not address regulation or licensing of assisted reproduction agencies. The Model Act Governing ART Agencies will supplement Resolution 107 and will act to provide further predictability and accountability for Intended Parents and all ART participants with respect to the services provided by currently unlicensed third party ART agencies.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? This is not a late report, but some urgency exists in that third party ART agencies are currently unregulated and the reliance upon and use of assisted reproduction as a method of family formation continues to increase every year. This lack of law and regulation increases the potential for exploitation of vulnerable intended parents, surrogates and gamete donors as more unlicensed and unregulated third party ART agencies enter the industry and provide third party ART services. Acting now demonstrates the ABA’s leadership in protecting the participants in third party reproduction and fostering a licensing structure for third party ART agencies.
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. Submission to the states for adoption.

# 112A

8. Cost to the Association. (Both direct and indirect costs). None
9. Disclosure of Interest. (If applicable). Not Applicable.
10. Referrals. The Section of Family Law circulated the substantive draft documents in 2013 and 2014 to the following entities, who were also invited to take part in a Working Group session on May 9, 2015: Business Law; Health Law; Individual Rights and Responsibilities; International Law; Litigation; Real Property, Trust and Estate Law; Science and Technology Law; Young Lawyers Division. A second Working Group session was held on August 2, 2015, and the following entities were invited to participate: Business Law; Health Law; Individual Rights and Responsibilities; International Law; Litigation; Real Property, Trust and Estate Law; Science and Technology Law; Young Lawyers Division; Solo, Small Firm & General Practice Law; Tort Trial & Insurance Practice Law. The Section of Health Law has provided substantive comments, resulting in revisions to the underlying documents which are the subject of this Resolution. The Section of Science and Technology and the Section of Real Property, Trusts and Estates have also provided substantive input and have actively participated in the drafting of the documents which are the subject of this Resolution.
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address).

Anita M. Ventrelli, Esq.  
Schiller, DuCanto & Fleck LLP  
200 N. LaSalle Street, 30th Floor  
Chicago, IL 60601-1019  
312-609-5506  
AVentrelli@sdfllaw.com

Marshall J. Wolf, Esq.  
Wolf & Akers  
2200 One Cleveland Center  
1375 E. 9th Street  
Cleveland, OH 44114-1739  
216-623-9999  
MW@wolfakers.com

Richard B. Vaughn, Esq.  
International Fertility Law Group Inc.  
5757 Wilshire Blvd., Suite 645  
Los Angeles, CA 90036  
323-904-4728  
Rich@IFLG.net

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.)

Anita M. Ventrelli, Esq.  
Schiller, DuCanto & Fleck LLP  
200 N. LaSalle Street, 30th Floor  
Chicago, IL 60601-1019  
312-609-5506  
AVentrelli@sdflaw.com

Marshall J. Wolf, Esq.  
Wolf & Akers  
2200 One Cleveland Center  
1375 E. 9th Street  
Cleveland, OH 44114-1739  
216-623-9999  
MW@wolfakers.com

Richard B. Vaughn, Esq.  
International Fertility Law Group Inc.  
5757 Wilshire Blvd., Suite 645  
Los Angeles, CA 90036  
323-904-4728  
Rich@IFLG.net

## EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution recommends consideration and adoption by appropriate governmental agencies and legislatures of the Model Act Governing ART Agencies, which provides model licensing legislation governing ART agencies.

2. Summary of the Issue that the Resolution Addresses

Assisted Reproductive Technologies (ART) is the intersection of various professions all synchronized to resolve infertility visited upon an Intended Parent. Certain aspects of infertility are respectively addressed by licensed professionals including psychologists, physicians, and attorneys. Each of these professions is guided and regulated to some extent by the substantive and ethical rules of their various professional organizations and their licensing requirements.

When assisted reproduction requires collaboration with persons outside of the intended parent – professional relationship, this is referred to as third party ART. Third party ART (gamete or embryo donation and surrogacy) is impacted by the services provided by certain recruiting and matching agencies (“ART agencies”). ART agencies receive and manage prospective intended parents’ funds for the purpose of matching them with desirable donors/surrogates as well as administering various aspects of their ongoing fertility program. ART agencies can be owned and operated by anyone without the professional training, licensing or regulation that governs most other aspects of the ART process.

The reliance upon and use of assisted reproduction as a method of family formation continues to increase every year. The lack of law and regulation of third party ART agencies increases the potential for exploitation of vulnerable intended parents, surrogates and gamete donors as more unlicensed and unregulated third party ART agencies enter the industry and provide third party ART services.

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

The Model Act Governing Assisted Reproductive Technology Agencies will provide states a model licensing structure which will promote predictability and accountability for the benefit of Intended Parents and all ART participants with respect to the services provided by currently unlicensed third party ART agencies. Such a licensing structure will also help to minimize exploitation of the ART participants, foster professionalism and provide a mechanism for dispute resolution.

4. Summary of Minority Views

At the time of the writing of this Resolution with Report and summary, we are not aware of any formal reported direct opposition to the approval of the Model Act Governing ART Agencies.



## AMERICAN BAR ASSOCIATION

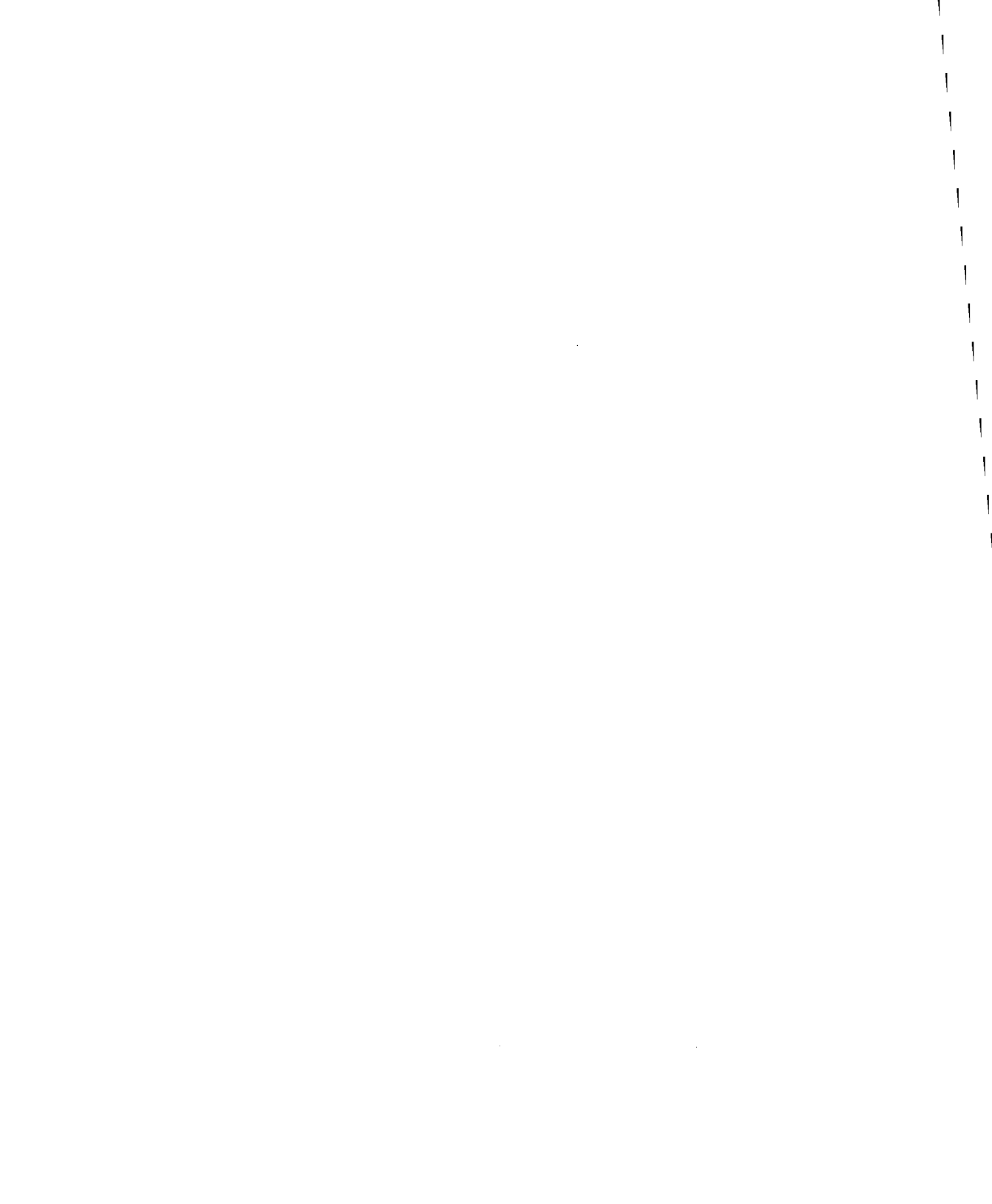
SECTION OF FAMILY LAW  
SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW  
SECTION OF SCIENCE AND TECHNOLOGY LAW

## REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges the United States Department of  
2 State to seek the following in negotiations concerning a possible Hague Convention on  
3 private international law concerning children, including international surrogacy  
4 arrangements:

- 5  
6 a. That any Convention should focus on the conflict of laws and comity  
7 problems inherent in international citizenship and parentage proceedings  
8 and that any such collective international approach should allow for cross-  
9 border recognition of parentage judgments so that the parental relationship  
10 and citizenship status of all children, no matter the circumstance of their  
11 birth, will be certain; and  
12
- 13 b. That any such collective international approach allows individual member  
14 countries to regulate surrogacy within their own borders as deemed  
15 appropriate by that country without imposing new international  
16 restrictions on surrogacy arrangements; and  
17
- 18 c. That a Central Authority model to regulate surrogacy arrangements is not  
19 an appropriate model for any collective international approach regarding  
20 surrogacy; and  
21
- 22 d. That any Convention should recognize the clear distinctions between  
23 adoption and surrogacy; and  
24
- 25 e. That the Hague Convention on the Protection of Children and Co-  
26 Operation In Respect of Intercountry Adoption (1993) is not an  
27 appropriate model for any Convention regarding surrogacy; and  
28
- 29 f. That rather than requiring a genetic link, an intent-based parentage  
30 analysis is the most appropriate parentage doctrine for surrogacy; and  
31
- 32 g. That human rights abuses are not necessarily inherent in or exclusive to  
33 surrogacy arrangement; and, therefore should be addressed separately.



## REPORT

### Introduction & Summary

Recent advancements in medical technology have enabled the global expansion of assisted reproductive technology (“ART”) and third party assisted reproduction for infertile and same-sex couples as well as single individuals. Surrogacy is one of the forms of third-party assisted reproduction. When surrogacy arrangements involve individuals from more than one nation, the legal status of the individuals and that of the resulting child may be uncertain. Situations where “stateless” children were born through International Surrogacy Arrangements (ISAs) have prompted a discussion about whether a Hague Convention on International Surrogacy is needed.

The Hague Conference on Private International Law (HCCH) is engaged in research on this issue. The US Department of State (DOS) has expressed opposition to a new Convention on international surrogacy, and has requested that the ABA provide a professional opinion that reflects the knowledge and expertise of the organization. By adopting this Resolution, the ABA will be providing its expertise and assistance to the US Department of State for its use in negotiations concerning a possible Hague Convention on private international law concerning children, including surrogacy arrangements.

### Background

The Council on General Affairs and Policy of the HCCH has published a report finding that it is both desirable and feasible to continue work on the project of exploring options to address the issues that can be seen in, but are not exclusive to, ISAs.<sup>1</sup> The HCCH report provided a summary of the HCCH's findings from surveys completed by member states, lawyers who practice in the field of ART, and surrogacy agencies. The recommendation of the HCCH is to continue work on the project, but with a broad focus to address the legal status of children no matter the circumstances of their birth. The HCCH has taken the view in its report that the legal challenges that can sometimes occur with ISAs are not exclusive to ISAs, and will only become more frequent in the future with advances in technology and evolution of society. With this view of the key issues in ISAs, the HCCH's reasoning is in alignment with the core of this Resolution.

A companion report by the HCCH provides a closer analysis of international private law, cooperation, and rules involved with ISAs.<sup>2</sup> Key points from the study include:

---

<sup>1</sup> Hague Conference on Private International Law, THE DESIRABILITY AND FEASIBILITY OF FURTHER WORK ON THE PARENTAGE/SURROGACY PROJECT, Preliminary Document No. 3 B of March 2014 for the Attention of the Council of April 2014 on General Affairs and Policy of the Conference, available at: [http://www.hcch.net/upload/wop/gap2015pd03b\\_en.pdf](http://www.hcch.net/upload/wop/gap2015pd03b_en.pdf).

<sup>2</sup> Hague Conference on Private International Law, A STUDY OF LEGAL PARENTAGE AND THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS, Preliminary Document No. 3 C of March 2014 for the Attention of the Council of April 2014 on General Affairs and Policy of the Conference, available at: [http://www.hcch.net/upload/wop/gap2015pd03c\\_en.pdf](http://www.hcch.net/upload/wop/gap2015pd03c_en.pdf).

- The conflicts of law regarding the legal status of children and intending parents involved in ISAs may result in lengthy, complex, financially and emotionally draining processes to get home and establish the child's legal parentage and nationality.
- Whilst a different context from adoption may require a different approach, some basic, minimum standards are required in order to protect children from harm and to comply with basic human rights standards.

The findings from the study are largely consistent with this Resolution on ISAs, and several members of the Sponsors are quoted (unattributed) in both the study and the summary report on the desirability and feasibility of further work.

The ABA Model Act Governing Assisted Reproductive Technology (2008) ("Resolution 107") was developed, in part, to provide individual states with a framework to address issues with assisted reproduction at a local level. The Sponsors believe that local governance of issues with assisted reproduction is appropriate in order to account for local culture and concerns over this area of law. At the international level, however, the Sponsors believe that it is inappropriate to implement a uniform set of rules governing surrogacy arrangements between private parties which would usurp the local cultures and concerns involved. Adoption of this Resolution would provide further support for self-governance of the surrogacy process within the United States and the principles established by the ABA Model Act Governing Assisted Reproduction Technologies as well as self-governance of the surrogacy process within each country.

### **Sponsors' Position**

While the Sponsors generally supports the notion of an international Convention concerning children, including international surrogacy arrangements, the Sponsors feel that the appropriate focus of such a Convention should be on the conflict of law and comity issues that arise in international surrogacy rather than on regulating the industry itself and individual surrogacy arrangements between private parties.<sup>3</sup>

Any Convention concerning ISAs should recognize the clear distinctions between adoption and surrogacy rather than reflexively applying the existing Hague Convention on Adoption to an inapposite set of legal circumstances. The Hague Conference itself has acknowledged that the existing adoption Convention may not be suitable to address

---

<sup>3</sup>In one of the first published articles addressing the issues that sometimes result from international surrogacy arrangements, Dr. Katarina Trimmings and Prof. Paul Beaumont of the University of Aberdeen School of Law, through a grant by the Nuffield Foundation, have developed a framework for a Hague Convention on International Surrogacy, largely modelled on the Hague Convention on Adoption. The framework proposed by Trimmings and Beaumont calls for national and international regulation of international surrogacy arrangements.

the issues raised by international surrogacy.<sup>4</sup> It would be preferable to have no Convention at all than to create an instrument that applies an adoption model to surrogacy. Rather, the Sponsors believe that a collective international comity approach allowing recognition and registration of parentage judgments issued by foreign countries should be the cornerstone of any such international instrument.

**The following key points are central to this position:**

**1. Surrogacy is a form of procreation through the use of assisted reproduction.**

The Sponsors recognize that individuals in all countries procreate naturally without excessive regulatory interference. Surrogacy is a form of procreation through the use of assisted reproduction typically involving "a contract between intended parents and a gestational carrier intended to result in a live birth."<sup>5</sup> The legal position of intended parents creating their own child through a surrogacy arrangement should be viewed as distinct from the legal position of adoptive parents seeking to raise someone else's existing child as their own.

**2. Surrogacy and adoption are different processes and should not be conflated.**

The Sponsors recognize that surrogacy and adoption are separate and distinct ways for people to achieve parenthood. Surrogacy is a medical solution to infertility, whether the infertility is physiological or social (based on relationship status), and is, therefore, a method of reproduction. Adoption is the transfer of legal responsibility over an existing child from one party (or the state) to another. Most, if not all societies permit adoption in some form, while many jurisdictions ban gestational surrogacy in one way or another. Regulating these two processes in similar fashion is inappropriate.

**3. Different processes ought to be regulated differently.**

The Sponsors are concerned that an approach to regulating surrogacy that is substantially equivalent to the Hague Convention on Intercountry Adoptions will frustrate and create barriers to intended parents' right to reproduce. The state appropriately exercises great care in the adoption process, as this process concerns an existing citizen child. The state does not, however, have a role in regulating so-called "natural" reproduction, as this would be an offence to the right to reproduce. The state concern in the surrogacy process is to ensure that the rights of the parties involved are upheld, particularly the right of the child to have a swift determination of parentage. Any regulation of ISAs should be viewed in this context.

---

<sup>4</sup>Hague Conference on Private International Law, PRIVATE INTERNATIONAL LAW ISSUES SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS, Preliminary Document No. 11 of March 2011 for the Attention of the Council of April 2011 on General Affairs and Policy of the Conference, p. 21, Para. 40(e) (Mar. 2011), available at: <http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>.

<sup>5</sup>ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 102 (15) (2008)

**4. Establishing Central Authorities to oversee surrogacy arrangements is opposed.**

The Sponsors are concerned that a model which would establish Central Authorities to regulate ISAs is likely to lead to:

- Increased interference with the ability of intended parents to reproduce;
- Increased risk of discrimination in the surrogacy process;
- Decreased flexibility/freedom to contract for all parties (surrogates and intended parents);
- Increased cost for intended parents;
- Increased delay for intended parents;
- Increased risk that parties will act 'outside' the system;
- Decreased transparency and certainty in the process; and
- Increased burdens upon taxpayers

Further, the Sponsors feel that establishing Central Authorities would not significantly increase protection for surrogates or for children. Such protection is more effectively managed on a scale broader than one that is limited to the context of surrogacy arrangements.

**5. Discriminatory screening of potential intended parents should not be allowed.**

It is a matter of concern that, in the adoption process, many countries currently discriminate against intended parents who are single, older, disabled, or homosexual. In the context of surrogacy, the Sponsors support the general principle of screening prospective intended parents for the narrow purpose of suitability to receive assisted reproduction services from service providers. However, the Sponsors are concerned that extensive screening requirements will be used by some countries to deny their citizens the ability to seek to become intended parents because of their sexual orientation, marital status, or other inappropriate characteristics. Again, the Sponsors re-iterate the position that surrogacy is more akin to procreation (where there is no screening of prospective parents) than it is like adoption (where the interests of an existing child need to be considered because the child is being moved from one family, and perhaps country, to another). Therefore, the Sponsors disapprove of the creation of international standards dictating who can - and cannot - access ISAs.

**6. Bilateral treaties to regulate international surrogacy arrangements should be discouraged.**

The Sponsors do not believe that, instead of or in addition to the proposed Convention, countries on a case-by-case basis should enter into bilateral treaties as to commercial surrogacy. The Sponsors are very concerned that this:

- Will lead to a plethora of disparate treaties;
- which will take many years to negotiate;

- which will be very hard to dismantle if and when a comprehensive multilateral solution is reached; and
- which will, in turn, unnecessarily complicate matters and severely reduce the legitimate reproductive options currently available.

In sum, the Sponsors are concerned that these treaties may cause further cost, delay, and heartache to intended parents who choose to pursue surrogacy.

**7. The HCCH project should focus on encouraging comity and reducing conflicts of laws affecting intended parents and children born through international surrogacy.**

To the extent that the HCCH may facilitate a new Convention concerning children, including international surrogacy arrangements, the position of the Sponsors is that the most effective role for the HCCH is to assist in developing a framework among participating nations which allows them to navigate the conflict of laws and comity problems that sometimes result from ISAs and, thereby, to avoid the problems of stateless children, conflicting parentage determination processes, and the lack of recognition of those children in the intended parents' home country.

**8. To require a genetic link between intended parent and child in order to become a legal parent will create a barrier to reproductive choice.<sup>6</sup>**

The journey for intended parents who choose to pursue surrogacy is often the journey of last resort. In general, most intended parents pursuing surrogacy seek a child who is their genetic offspring. Sometimes, due to the cruel tricks of biology and reproduction, intended parents may not be able to have a genetic connection with their child. For example, after many years of IVF, a couple may find that the female partner is unable to carry a baby safely to term. The couple may also find that their own gametes are insufficient to conceive after the many delays associated with this process, leading them to turn to donated genetic material. If there is a requirement that this couple must have a genetic link to their child born through surrogacy, they will be denied the ability to reproduce - even if they use genetic material from siblings or other family members. It is only in the use of a surrogate that this hypothetical differs from the cases where children, born to a woman in the context of a marriage, are deemed to be children of the marriage even when donor gametes are used. As long as the parties involved consent to the use of donor gametes, the law in many jurisdictions has long recognized the legal parentage of the intended parents. This recognition should be maintained even in the case where the child is born via surrogacy.

Further, a requirement for a genetic link to a child born through surrogacy forecloses the possibility of using donated genetic material, including embryos, in the process. Many unused embryos remain stored in cryopreservation; these embryos are an existing source of potential genetic material that could be used in surrogacy arrangements rather than being destroyed.

---

<sup>6</sup> Article 7, Alternative A, of the ABA Model Act Governing Assisted Reproductive Technology (2008).

In taking this position, the Sponsors are in alignment with the position of the 2008 ABA Model Act Governing Assisted Reproduction as well as the position of the American Society of Reproductive Medicine (ASRM), which states that donated embryos are an important option for those who need assistance in the reproductive process.<sup>7</sup>

**9. The rights of expatriate intended parents must be respected.**

It is not unusual that intended parents who are non-resident citizens of country A and living in country B engage in surrogacy in country C. These intended parents must navigate a minefield of regulation to ensure that the resulting child can be a citizen of country A (like her parents), and reside in country B (with her parents). The Sponsors feel that a Convention that focuses on the conflict of laws and comity problems inherent in international citizenship and parentage proceedings (which are generally required in surrogacy matters) would serve the needs of all expatriate intended parents as well as intended parents who pursue surrogacy across national borders and of the children resulting from these arrangements.

**10. Any international instrument is unlikely to be successful without the accession of both the United States and India, and international regulation of ISAs does not take into account the differing systems in these two countries.**

The United States and India have the largest surrogacy industries. The Indian industry has grown exponentially in the last few years. The Indian surrogacy industry is now estimated to be worth over \$2 billion/year. The concerns raised at the HCCH stem, in part, from unstated concerns about the rise of surrogacy in India and other under-regulated surrogacy destinations, but these concerns also extend to encompass issues of the status of children globally. The issue of under-regulated destination countries is best dealt with not by a Convention that would apply to all countries but by the passage of appropriate laws in those under-regulated countries – laws based on the culture and political system of that country. It is noted that, since 2008, bills to regulate Assisted Reproductive Technology (ART) have, in one form or another, been drafted in India. The various forms of proposed legislation, and the uneven enforcement of existing regulations over the years, have resulted in widespread confusion over the legal aspects of surrogacy in India. Therefore, India and other burgeoning international destinations where intended parents pursue surrogacy should be encouraged to regulate their respective ART industries in a transparent manner so that the current uncertainties may be mitigated. Appropriate laws should allow for the protection of children, surrogates, and intended parents so as to maximize standards and informed consent and minimize exploitation.

By contrast, the United States' surrogacy industry is regulated at the state level. There is a wide range of approaches to surrogacy in the United States, from prohibitions (including criminalization) to statutorily defined processes for surrogacy. Further, the

---

<sup>7</sup>Ethics Committee of the American Society for Reproductive Medicine, DEFINING EMBRYO DONATION: A COMMITTEE OPINION, 99 Fertility and Sterility, No. 7, 1846 (June 2013), available at : [https://www.asrm.org/uploadedFiles/ASRM\\_Content/News\\_and\\_Publications/Ethics\\_Committee\\_Reports\\_and\\_Statements/Defining%20embryo%20donation2013.pdf](https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/Defining%20embryo%20donation2013.pdf)



professionals (lawyers, doctors, and others) are subject to standards, ethical guidelines, and codes of conduct. Given the various interests at stake (states and professional groups), accession of the United States to a Convention that would regulate the particulars of surrogacy arrangements seems unlikely.

Therefore, a Convention focused on conflict of laws and comity problems would likely be more successful.

**11. Human rights abuses are not necessarily inherent in or exclusive to ISAs, and, therefore, should be addressed separately from ISAs.**

The Sponsors understand that concern over human rights abuses is part of the impetus for the focus on ISAs at the HCCH. Exploitation of women, trafficking of women and children, and other abuses are often cited by critics of surrogacy as byproducts of the process. The Sponsors are deeply concerned about human rights abuses.

While it is, unfortunately, true that human rights violations have occurred within the context of surrogacy, violations of human rights do not occur only within the context of surrogacy. Human rights abuses must be addressed on a broad scale internationally and locally; e.g., if a woman is trafficked, the human rights violation must be addressed whether the trafficking is for the purpose of surrogacy, sex, forced labor, or any other reason. Regulation of the surrogacy industry for the purpose of reducing human rights violations has the potential to distract from the greater problems of trafficking and exploitation and to unnecessarily and inappropriately stigmatize surrogacy arrangements (and the children born through them). Moreover, regulation of ISAs themselves could actually exacerbate human rights issues if those wishing to reproduce begin to operate outside of the international regulatory framework in order to avoid the burdens that the process would entail. Therefore, the Sponsors would prefer to address human rights issues on a broader, more holistic scale than to try to solve a subset of problems in the limited context of ISAs.

**12. The fundamental rights, interests, and status of children, for both parentage and citizenship, are an important concern in all contexts, including surrogacy.**

The Sponsors believe that protecting the interests and status of children is an important driver in this analysis; however, the Sponsors also believe that, in the overall analysis and implementation of surrogacy, it is not appropriate to focus solely on the interests of the children to be born. Before intended parents initiate the surrogacy process, the child does not. At this point in time, the only interest of the child is whether the child will exist or not. The Sponsors believe it is better to allow the intended parents to exercise their reproductive rights (in whatever form they may exist from country to country) while protecting the rights of children through other, already existing, Conventions and protections designed to prevent them from being trafficked or otherwise harmed or abused.

The Sponsors do not believe parents procreating through assisted reproduction should be subject to fundamentally different regulation, governmental authority, or discrimination

because of their choice of a legal method of procreation. Once a child is born of the surrogacy process, the rights and interests of that child are then equally important, but that child's best interests will almost universally be served by establishing the child's legal relationship with the intended parents (who have gone through considerable effort, emotional stress, and expense to have their own child) and recognizing the child as a citizen of the intended parents' home country. The alternative is to place the child with the state or other parents through the adoption process and, possibly, to leave the child stateless. This is clearly not in any child's best interest.

## **Discussion**

### **A. INTRODUCTION**

Recent advancements in medical technology have enabled the expansion of third-party assisted reproduction (surrogacy) for infertile and same-sex couples as well as single individuals. When surrogacy arrangements involve individuals from more than one nation, the legal status of the individuals and of the resulting child may be uncertain. Situations where "stateless" children were born through international surrogacy arrangements have prompted a discussion about whether some form of international regulation, such as a Hague Convention on International Surrogacy, is needed.

The Council on General Affairs and Policy of the Hague Conference on Private International Law (HCCH) is currently engaged in research to determine how to effectively address the issues posed by International Surrogacy Arrangements (ISAs).<sup>8</sup> Of greatest concern are situations where the legal parentage, nationality, and immigration status of the child born through international surrogacy are unclear due to conflicting national laws governing these matters. Of additional concern is the potential for exploitation of individuals in the international surrogacy process, particularly the exploitation of the resulting children and women who act as gestational carriers.

The question, therefore, is how to establish a regulatory framework to help avoid stateless children, child trafficking and the exploitation of women. One approach would be to regulate the international surrogacy industry itself. This industry regulation could take the form of a Convention on Surrogacy that establishes rules specifically for surrogacy arrangements involving participants from more than one country. Another approach would be to regulate the acceptance of parentage documents between states. This approach could potentially be accomplished with existing international agreements or through the implementation of new international agreements that are not necessarily specific to international surrogacy arrangements.

Surrogacy itself may not be the real issue. Rather, the uncertainty with these arrangements is a symptom of a more general problem of irreconcilable family and citizenship laws at the international level. It is important to note that these legal issues may

---

<sup>8</sup> Hague Conference on Private International Law, PRIVATE INTERNATIONAL LAW ISSUES SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS, Preliminary Document No. 11 of March 2011 for the Attention of the Council of April 2011 on General Affairs and Policy of the Conference, p. 21, Para. 40(c) (Mar. 2011), available at: <http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>.

arise in cases that do not involve surrogacy.<sup>9</sup> Thus, international regulation focused solely on surrogacy arrangements may be under-inclusive. Rather than focus on the regulation of the international surrogacy market itself, international agreement on the status of children and on the assignment of parentage and citizenship to them would be more helpful in mitigating the issues in this market.

## B. OVERVIEW OF THE MARKET

Before examining potential options for a solution to the problems that sometimes occur in the context of international surrogacy arrangements, it may be helpful to examine the parameters of the international surrogacy market.<sup>10</sup> It is undeniable that the commissioning of children through surrogacy – for money – represents a market.<sup>11</sup> Any solution to problems posed by international surrogacy arrangements must take into consideration the underlying market forces at work in these arrangements.

Although not universally accepted by all countries, the choice to reproduce is perceived as a fundamental human right in some countries,<sup>12</sup> and, without reference to which view a particular country may take on this issue, the desire to reproduce is a powerful force in this market. Modern gestational surrogacy can be seen as a legitimate fertility treatment option for the infertile who wish to reproduce. There are many ways in which people can choose to reproduce, including surrogacy. While surrogacy is often conflated with adoption, the markets for the two are distinct. People who choose to pursue surrogacy do not always do so as an alternative to adoption.

Surrogacy has existed in various forms throughout history.<sup>13</sup> When fertility treatment advanced to separate the component parts of conception and gestation, market forces drove the growth of international surrogacy.<sup>14</sup> The international surrogacy market exists for two reasons: barriers to domestic surrogacy or other assisted reproductive options (evidenced by the pursuit of surrogacy in the US by European and other international intended parents), and cost savings (evidenced by the growth of surrogacy in lower cost nations).<sup>15</sup> The overall value of the market is unknown, but a report in 2010 estimated that the value of the surrogacy industry in India alone would reach \$2.3

<sup>9</sup> See examples described by the Hague Conference on Private International Law in A STUDY OF LEGAL PARENTAGE AND THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS, PREL. DOC. NO 3 C OF MARCH 2014, p. 51, available at: [http://www.hcch.net/upload/wop/gap2015pd03c\\_en.pdf](http://www.hcch.net/upload/wop/gap2015pd03c_en.pdf).

<sup>10</sup> “Market” and related terms are used here deliberately, despite the risk that discussing surrogacy in market terms may conjure up images of human commodification, a frequent criticism of modern surrogacy arrangements. This discussion addresses the market forces that react to regulation, and therefore relies on market terms for clarity.

<sup>11</sup> Kimberly D. Krawiec, *Price and Pretense in the Baby Market*, in BABY MARKETS, 41 (Michele Bratcher Goodwin, ed., Cambridge University Press 2010).

<sup>12</sup> Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV), ¶ 4, (11 Dec., 1969). Available at: <http://www2.ohchr.org/english/law/pdf/progress.pdf>; *Meyer v. Nebraska*, 262 U.S. 390 (1923) (finding the 14<sup>th</sup> Amendment includes right to “bring up children”); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (declaring compulsory sterilization a violation of fundamental right to procreate).

<sup>13</sup> We can trace certain practices of surrogacy back into biblical times. Genesis 16 and 30 both tell stories of women bearing children for others.

<sup>14</sup> Deborah L. Spar, *THE BABY BUSINESS*, 85-88 (Harvard Business School Press, 2006).

<sup>15</sup> Richard F. Storrow, *QUESTS FOR CONCEPTION: FERTILITY TOURISTS, GLOBALIZATION AND FEMINIST LEGAL THEORY*, 57 *Hastings L.J.* 295, 301 (2005).

billion by 2012.<sup>16</sup> In order to maximize profits, international surrogacy brokers will operate in the countries with the lowest regulatory restrictions.<sup>17</sup> Price is not everything in this market, however, as the intended parents will have their own personal criteria for deciding in which country to pursue surrogacy.<sup>18</sup>

Comparisons between the surrogacy market and the adoption market are frequent, but adoption and surrogacy are not “*so similar that analysis of one can suggest solutions for the other*” as suggested by one scholar.<sup>19</sup> Nor are adoption and surrogacy interchangeable substitutes for all prospective parents – persons seeking parenthood do not always move smoothly and seamlessly between the two options.<sup>20</sup> Adoption affords the adoptive parents the legal right to “parent” someone else’s child over whom they would otherwise not possess legal authority; surrogacy affords the intended parents their sole opportunity to “reproduce,” thereby creating their own child using, in the vast majority of cases, at least some of their own genetic material. “Parenting” and “reproducing” are two distinct and inherently different processes. Some intended parents will accept solutions to their infertility through either option, but many will be firmly committed to only one or the other. The similarity between surrogacy and adoption rests solely in the fact that a woman other than one of the intended parents gestates the child. Any similarity quickly ends there.

Adoption is a process to transfer parental rights and responsibilities over a living child from one or more parties to another party or parties. In adoption, the state responsibility toward the existing child is paramount, particularly where the child is in state custody.

Surrogacy, on the other hand, is a therapeutic option for the infertile, specifically those for whom being pregnant is physically impossible or medically contra-indicated. Surrogacy is a reproductive process where a child is created directly as a result of the actions of the intended parents. Of course, modern surrogacy<sup>21</sup> is achieved through medical intervention.

It is also important to remember that adoption is a generally accepted mechanism to deal with the issue of raising children who (for any number of reasons) have no legal

<sup>16</sup> Jason Burke, INDIA’S SURROGATE MOTHERS FACE NEW RULES TO RESTRICT ‘POT OF GOLD’, The Guardian (30 July 2010), <http://www.guardian.co.uk/world/2010/jul/30/india-surrogate-mothers-law> (last accessed 17 July 2012).

<sup>17</sup> Angie Godwin McEwen, SO YOU’RE HAVING ANOTHER WOMAN’S BABY: ECONOMICS AND EXPLOITATION IN GESTATIONAL SURROGACY, 32 Vand. J. of Transnat’l L., no. 1 (Jan. 1999). See also Iris Lebowitz-Dori, WOMB FOR RENT: THE FUTURE OF INTERNATIONAL TRADE IN SURROGACY, 6 Minn. J. Global Trade 329, 334 (1997).

<sup>18</sup> As an example, there remains a strong domestic market for surrogacy in the US despite the potential cost savings for intended parents to pursue surrogacy internationally. Potential explanations for this include the desire of intended parents to participate more fully in the process, and the desire of intended parents to avoid legal complexity and mitigate legal risk. In addition, some intended parents may choose a higher-cost market for surrogacy over a lower-cost market in order to mitigate the very ethical and human rights concerns cited by the HCCH.

<sup>19</sup> Iris Lebowitz-Dori, WOMB FOR RENT: THE FUTURE OF INTERNATIONAL TRADE IN SURROGACY, 6 Minnesota Journal of Global Trade 329, 338, (1997).

<sup>20</sup> Kimberly D. Krawiec, *Price and Pretense in the Baby Market*, in BABY MARKETS, 44-45 (Michele Bratcher Goodwin, ed., Cambridge University Press 2010).

<sup>21</sup> Specifically, gestational surrogacy, where the woman who gives birth to the child has no genetic connection to the child.

or *de facto* parents, while commercial surrogacy remains a sometimes controversial process that is permitted in certain jurisdictions and banned - or rising to the level of a criminal offense - in others.<sup>22</sup>

Certainly, adoption and surrogacy may be seen as alternate processes to achieve *parenthood*. However, surrogacy may be pursued as a logical extension of fertility treatment that may start when a heterosexual couple fails to conceive “naturally”. Beyond achieving *parenthood*, surrogacy achieves *reproduction*. Likewise, those unable to conceive without assisted reproduction (such as a same-sex couple or a single individual) may have no realistic choice but to pursue surrogacy (including reproduction for one or both of the partners) in order to have children. For the simple reason, therefore, that prospective parents have certain barriers and choices in how to achieve parenthood, the surrogacy market and the adoption markets must be seen as separate, but overlapping, ones.

Market-based mechanisms have allowed international surrogacy to operate efficiently, with the result that this reproductive option can often happen as quickly and as cost effectively as humanly possible. For intended parents who have often waited many years to fulfill the lifelong dream of having children, the availability of surrogacy as a choice is extremely beneficial. It is not unusual for there to be extraordinary delays in being able to adopt a child internationally. In addition to the delays in meeting the eligibility processes set out by adoption authorities (including the Central Authority in the adoptive parents’ country), once approved to adopt from the overseas country, delays of three to five years are not uncommon, and those delays are increasing.<sup>23</sup> In Australia, for example, delays have been described as “glacial” and have been up to 8 years from beginning to end.<sup>24</sup> If an adoption-based model of regulation were extended to international surrogacy, the effect on the right of the intended parents to reproduce would be disastrous. Consider the case of a married couple where the woman has just had a hysterectomy. This couple may choose to pursue surrogacy in order to have a child, but will need to move quickly in order to use the woman's eggs in the process. A lengthy application and vetting process could prevent the couple from having a child who is genetically related to both of them.

Market forces are central to the consideration of international regulatory schemes for international surrogacy arrangements. With the concomitant shift to lower-cost areas, the market, while price-sensitive, is not completely elastic. The desire to reproduce and the timing issues inherent in human reproduction are powerful influences in the decision-making of the intended parents. Significant barriers to international surrogacy arrangements will, by necessity, force some market participants to other means of achieving parenthood - means which carry, perhaps, more risk and less legitimacy. If we

<sup>22</sup> Compare : Family Code, CA STAT, Div 12, Part 7, §§ 7960-7962 (2012) (allowing surrogacy) and EMBRYONENSCHUTZGESETZ (ESchG) (The Embryo Protection Act), Dec 13, 1990, Federal Law Gazette, Part I, No. 69, issued in Bonn, 19th December 1990, page 2746 (Ger.) (with criminal penalties for creating a surrogate pregnancy).

<sup>23</sup> Australian Institute of Health and Welfare, ADOPTIONS AUSTRALIA 2010-2011, p.5; accessed at [www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737420773](http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737420773) (last accessed on 17 July 2012).

<sup>24</sup> Malcolm Farr, *Deborra-Lee Furness' calls for adoption help that ministers never returned*, NEWS.COM.AU, (November 09, 2011 4:14AM), <http://www.news.com.au/national-news/deborra-lee-furness-calls-for-adoption-help-that-ministers-never-returned/comments-e6frfk9-1226190335342>.

lose sight of these market forces that underlie international surrogacy, attempts to regulate this market may lead to unwanted consequences that defeat the purposes of regulation and shift the issues elsewhere.

## C. IS SURROGACY THE REAL ISSUE?

The real issue with surrogacy arrangements, and with ART in general, is that they challenge societal notions of identity and of the family structure in relation to the public and private spheres.<sup>25</sup> This challenge creates the false notion that ISAs themselves are the problem, rather than the inconsistent manner in which nations assign parentage and nationality. When the problems are viewed as inherent to ISA, inappropriate conclusions about how to mitigate the negative effects of the market may result.

There are conflicting views and opinions of the efficacy of the application of an adoption model to the complex issues that surrogacy raises, and some scholars have suggested that ISAs should be regulated like international adoptions.<sup>26</sup> The Sponsors do not share this perspective, and the purpose of this paper is to offer another, more applicable and appropriate alternative viewpoint and recommendation.

The Sponsors agree that “highly complex legal problems arise from international surrogacy arrangements. Among these problems, the most prevalent are the questions of legal parenthood and of the nationality of the child.”<sup>27</sup> There are many examples of international surrogacy arrangements that have resulted in “stateless” children.<sup>28</sup> These situations are the result of the conflicting legal regimes for determining parentage and citizenship - ***these are not situations where the intended parents and the surrogate contest the parentage of the child.*** Avoiding these situations is crucial to the overall status of children globally.

It is essential to understand that the problems of “stateless” children are essentially disputes between States, not between private citizens. The real problem is that there are potentially conflicting legal regimes for determining parentage and citizenship among the nations involved in an international surrogacy arrangement. These are not typically situations where the intended parents and the surrogate contest the parentage of the child. Rather, the children are deemed “stateless” precisely when, pursuant to their cooperative and intact agreement with the gestational carrier, the intended parents attempt to take the children back to their country of residence. The direct conflict between the

---

<sup>25</sup> Susan Markes, *SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION*, 176, (University of California Press, 2007).

<sup>26</sup> Dr. Katarina Trimmings and Professor Paul Beaumont were awarded a grant of more than £112,000 by the Nuffield Foundation in July 2010. The purpose of the grant was to study private international law aspects of international surrogacy arrangements, ways to regulate the international surrogacy market, and to prepare a document that could help shape a future Convention on international surrogacy. Their article favors an adoption model based largely on the 1993 Hague Intercountry Adoption Convention. *See* University of Aberdeen School of Law, *INTERNATIONAL SURROGACY ARRANGEMENTS: AN URGENT NEED FOR A LEGAL REGULATION AT THE INTERNATIONAL LEVEL*, accessed at <http://www.abdn.ac.uk/law/surrogacy/> (last accessed 17 July 2012).

<sup>27</sup> Katarina Trimmings and Paul Beaumont, *INTERNATIONAL SURROGACY ARRANGEMENTS: AN URGENT NEED FOR REGULATION AT THE INTERNATIONAL LEVEL*, 7 J. Private Int'l L. 627, 630, (2011).

<sup>28</sup> *E.g., X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (U.K.) (where twin children were delivered by a Ukrainian gestational surrogate for British intended parents, and both states denied citizenship to the children while claiming that the children were citizens of the other state.)

private contract between the parties and the national laws of their respective home countries creates the issue of “statelessness.”

The question is whether an international regulatory scheme specific to surrogacy will sufficiently address such problems. *“Even if all means of artificial reproduction were outlawed..., courts will still be called upon to decide who the lawful parents really are and who...is obligated to provide maintenance and support for the child. These cases will not go away.”*<sup>29</sup> ISAs bring issues with conflicting national laws to the fore; regulation of international surrogacy as a proxy for addressing these conflict of law issues could lead to an exacerbation of the problems it seeks to solve.

In fact, the legal complexity surrounding international surrogacy arrangements may actually be *helpful* in the absence of a broader regulatory scheme. Because of the legal pitfalls involved, the intended parents who pursue international surrogacy arrangements must do so with extreme care and planning. The daunting complexities and potentially disastrous pitfalls serve as a deterrent to intended parents and as an incentive for legal practitioners to exercise a high degree of caution in these arrangements.<sup>30</sup> In contrast, those intended parents who choose to pursue international surrogacy without regard to the legal complexities will also likely not be dissuaded by a new Convention. This is a fundamental challenge facing regulation of international surrogacy: some individuals will pursue international surrogacy without regard to law or Convention. Surrogacy-specific regulation will, therefore, be ineffective in resolving the difficult problems posed by these cases.

It is not that there is no existing regulation for international surrogacy; rather, the issue is that each state manages the legal infrastructure underpinning these arrangements differently. It is precisely this legal infrastructure that structures the arrangements.<sup>31</sup> The problem is that the legal infrastructure in one country may not be compatible with that in another country. What is needed, therefore, is a framework of cooperation to resolve issues as they arise from incompatible laws. In fact, the notable cases where the legal complexities were improperly navigated forced nations to work together to solve the problems created by the conflicts of law.<sup>32</sup>

The danger with a comprehensive regulatory scheme focused on ISAs is that it will be too restrictive, pushing legitimate participants out of the market and into the ‘grey’ or ‘black’ market.<sup>33</sup> An example of the effect of over-regulation can be seen in

<sup>29</sup> *Buzzanca v. Buzzanca*, 61 Cal. App. 4<sup>th</sup> 1410 (1998).

<sup>30</sup> Kimberly D. Krawiec, *Price and Pretense in the Baby Market*, in *BABY MARKETS*, 48-49 (Michele Bratcher Goodwin, ed., Cambridge University Press 2010).

<sup>31</sup> For a discussion of the legal infrastructure that supports surrogacy arrangements, see John A. Robertson, *Commerce and Regulation in the Assisted Reproduction Industry*, in *BABY MARKETS*, 195-196 (Michele Bratcher Goodwin, ed., Cambridge University Press 2010).

<sup>32</sup> For example, the recent case where Germany and India disagreed about the citizenship status of twins born to an Indian surrogate for intended parents resident in Germany was only resolved when the countries granted exceptions to the children. A summary of the conclusion can be found at: [http://articles.economictimes.indiatimes.com/2010-05-27/news/27577615\\_1\\_surrogate-twins-german-couple-inter-country-adoption](http://articles.economictimes.indiatimes.com/2010-05-27/news/27577615_1_surrogate-twins-german-couple-inter-country-adoption) (last accessed 29 July 2013).

<sup>33</sup> Lee, Ruby L., *NEW TRENDS IN GLOBAL OUTSOURCING OF COMMERCIAL SURROGACY: A CALL FOR REGULATION*, *Hastings Women's Law Journal*, Vol. 20, p. 275, 285 (2009). (Attributing the increase of ‘reproduction tourists’ from certain countries to those countries’ heavy regulation of the fertility industry.)

Italy. The heavy regulation of ART, including surrogacy, has contributed to the growth of international solutions for Italian citizens.<sup>34</sup> Faced with laws prohibiting domestic surrogacy, Italian intended parents must avail themselves of surrogacy in the international market if they choose to pursue this reproductive option. Similarly, if a new Convention were to be too restrictive, some intended parents in Convention nations might choose to pursue surrogacy in non-Convention nations or in less legitimate markets.

It has been suggested that an international regulatory scheme would “promote the exchange of information...reduce ‘limping’ or unrecognized surrogacy arrangements...[and] help to combat trafficking in women and children.”<sup>35</sup> While the exchange of information would undoubtedly improve, the other two effects are not so certain. Specifically, increased regulation will result in the exclusion of people from the market. Some of these people will seek surrogacy outside of the regulatory scheme – in the ‘grey’ and ‘black’ markets. As regulation pushes people out of the market, the risk of trafficking and exploitation in the grey and black markets may actually increase.

## **D. CONSIDERATION OF VARIOUS REGULATORY MISPERCEPTIONS**

To the extent that efforts continue to define an international regulatory scheme that is focused on ISAs, the adoption framework warrants closer examination. This discussion is necessary because the key points of such a model are ideas that appear regularly in the discussion of ways to regulate the international surrogacy market.

Numerous recommendations for a regulatory scheme regarding ISAs have been made. One describes a flexible framework in which countries maintain an open dialogue regarding issues surrounding international surrogacy. This approach would leave a great deal of autonomy to individual countries to apply the framework within the context of their own laws or to negotiate bilateral agreements with other countries. This is a sensible starting point, given that every country will have its own body of law, particularly family law, where any changes would have far-reaching effects throughout their societies. Great care must be taken to respect the public policies of every country participating in such a regulatory scheme. The most important aspects of this legislative approach are the underlying recognition that international surrogacy arrangements exist and that nations need to cooperate when conflicts of law surrounding these arrangements arise.

However, two major flaws can be seen in recommendations for a regulatory scheme. First, any focus on regulating the international surrogacy market itself is misguided. The legal issues that arise in ISAs are, in reality, conflict of law and comity problems that can arise in non-surrogacy contexts and are, therefore, more effectively addressed within a broader context than that of surrogacy.

Second, to the extent that international surrogacy is to be regulated, using international adoption as a template leads to inappropriate proposals for regulatory solutions. Ultimately, if such regulation were implemented, the indirect abuses that are feared (such as human trafficking and exploitation) may, instead be exacerbated. As a

---

<sup>34</sup> Richard F. Storrow, QUESTS FOR CONCEPTION: FERTILITY TOURISTS, GLOBALIZATION AND FEMINIST LEGAL THEORY, 57 Hastings L.J. 295, 306-307 (2005).

<sup>35</sup> Trimmings and Beaumont, at 636.



starting point, some look to the regulatory scheme in the 1993 Hague Intercountry Adoption Convention. This foundation for a surrogacy convention misconceives the market and reinforces unhelpful biases against international surrogacy. Any Convention on International Surrogacy should be developed with an eye to navigating the conflict of laws and comity problems in ISAs.

### **1. The 1993 Hague Intercountry Adoption Convention is an inappropriate model for a surrogacy convention.**

The HCCH has already recognized that the 1993 Hague Intercountry Adoption Convention (Adoption Convention) is not appropriate as a model for a convention on international surrogacy.<sup>36</sup> Nevertheless, some still suggest the Adoption Convention can be a template for a convention on surrogacy. This suggestion is based on two key elements of the Adoption Convention: its perceived political success and flexible approach.

However, underlying any proposal that the Adoption Convention be used as a template for a surrogacy convention is the mistaken idea that adoption and surrogacy are more alike than not. Even though many recognize that there are fundamental differences between surrogacy and adoption, they nevertheless conflate the two.

Even some proponents of the application of the Adoption Convention recognize the existence and the effect of surrogacy arrangements and recommend that nations uphold the enforceability of surrogacy arrangements even if the arrangements are not made pursuant to the local law.<sup>37</sup> Agreement among nations to recognize the citizenship and parentage decisions made by other nations pursuant to the principle of comity would go a long way to solving the majority of issues with international surrogacy in particular and ART in general. This is, however, perhaps the most politically sensitive recommendation; it implicates the internal law and sovereignty of nations in terms of their determination of who is a citizen and how families are structured in relation to the society. In fact, the questions of local family and immigration law are the controlling factors at the very core of the issues we see in ISAs.

### **2. A framework based on the Adoption Convention would lead to the consideration of several provisions that are inappropriate in the context of surrogacy.**

Important principles in adoption contexts are overly exclusionary as central principles for surrogacy. These include “best interests of the child”, a mandatory genetic connection between the child born of international surrogacy and one or more of the intended parents,<sup>38</sup> and an evaluation of the “parental fitness” of the intended parents, among others.

---

<sup>36</sup> Hague Conference on Private International Law, PRIVATE INTERNATIONAL LAW ISSUES SURROUNDING STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS (PRELIMINARY DOCUMENT No 11 FOR THE ATTENTION OF THE COUNCIL OF APRIL 2011 ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE), p. 21 (Mar. 2011), available at: <http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>.

<sup>37</sup> Trimmings and Beaumont, at 645.

<sup>38</sup> Trimmings and Beaumont, at 640.

(a) *The “Best Interests” doctrine is not the best doctrine for surrogacy*

The “best interests of the child” doctrine is inadequate to deal with the complexities of surrogacy, particularly in the international context. In surrogacy, parentage determinations can sometimes be made before the birth of the child. However, the “best interests” doctrine was developed to address the needs of a child who has already been born. Before a child is born, there is limited (or no) basis from his or her experience to attribute a “best interest,” and a best-interests analysis could simply become a pre-determination of whether the child's best interests is in being born at all. This is a philosophical and existential conundrum that courts will not entertain. Consequently, a court will, out of necessity, need to determine “best interests” based on the characteristics of all of the parties involved – raising issues of socio-economic status, class, race, and culture along the way. Ultimately, the “best interests” doctrine is unnecessary when all parties agree on the expectations for parentage and citizenship of the child in advance.

In the case of *Baby M*, a contested surrogacy, the best interests of the child was presumably the basis on which custody was determined.<sup>39</sup> However, the “best interests” evaluation of *Baby M* took into account the father’s economic status and the actions of the surrogate during the custody proceedings.<sup>40</sup> Ultimately, the analysis has little to do with the infant’s “best interests” and more to do with the societal conceptions of the parents’ fitness. In the international context, the question of “best interests” becomes even more complicated, as it inevitably will weigh the relative wealth of the parties involved, the ethnic background of the child, and the various societies in which the parties live. The analysis could quickly become fraught with cross-cultural judgment.

Furthermore, referencing the child’s best interests would simply bring legal uncertainty into the otherwise certain and reliable establishment of parentage and citizenship intended cooperatively by all the parties involved. Given the fact that in virtually all but a very few, exceptional, and extremely rare cases, the parties involved remain in complete accord - the surrogate and her spouse, if any, do NOT want custody of or parental rights to the resulting child while the intended parents DO want to be the child’s legal parents for all purposes - it simply cannot be successfully argued that analyzing the child’s best interests and, potentially, forcing the unwilling surrogate to accept custody of or rights to the child is in the child’s best interests.

Finally, we know that the best interests of any infant—even one not yet born—require certainty of parentage from the moment of birth, as well as not being left stateless. This principle was expressed as a right of identity for the child in the *Mennesson v. France* decision from the European Court of Human Rights in 2014.<sup>41</sup> Thus, any consideration of the best interests of a child born via surrogacy must come at this issue from the viewpoint of granting the child legal certainty on these two issues from the moment of birth (if not before).

<sup>39</sup> *In re Matter of Baby M.*, 537 A.2d 1227, 1256 (N.J. 1988).

<sup>40</sup> *Id.*, 1257-1259.

<sup>41</sup> *Mennesson v. France*, European Court of Human Rights 65192/11, 26 June 2014, paragraphs 96-101.

*(b) Genetic Link*

A proposal for a mandatory biological connection between the intended parents and children born through surrogacy comes from the misguided conflation of the adoption and surrogacy markets. It is an attempt to address the problems seen in one market (adoption) with a manipulation of the regulatory scheme in another market (surrogacy). Such a proposal is overbroad, and leads to undesirable conclusions about the regulation of both markets. It also flies in the face of the parties' intent since the intent of the intended parent(s) and the surrogate remains the same even if the embryo formed for transfer and gestation does not contain the genetic material of either of the intended parents.

This requirement, proposed by some,<sup>42</sup> that any child born through surrogacy must be genetically related to at least one of the intended parents is inappropriate and violative of the privacy of intended parents. On a practical level, a mandatory genetic link means that some intended parents will be denied the dream of parenthood. It is current practice that intended parents generally seek a child who is their genetic offspring. However, the journey for intended parents seeking surrogacy is often the journey of last resort. Sometimes, due to the cruel tricks of biology and reproduction, intended parents may not be able to have a genetic connection with their child. For example, a married couple may try fertility treatment and IVF for several years with no success. Upon further medical evaluation, they may find that the woman is unable to carry a child safely to term, and that the man's sperm is not of sufficient quality to conceive. By this time, the woman may have reached an age where her eggs are also not of sufficient quality to conceive. This couple will need to rely on a surrogate, an egg donor and a sperm donor to be able to achieve their dream of becoming parents. Another couple may discover that they both are carriers of a gene for a condition that would be incompatible with the ability of any genetic child of theirs to survive. Another couple who cannot use their own gametes to conceive may turn to their respective siblings for genetic material in order to maintain a family connection. To require a direct genetic link between these hypothetical intended parents and their children born through surrogacy would deny these individuals the fundamental right to reproduce and would interfere with their private medical decisions.<sup>43</sup> Situations where only one donor is needed could result in intended parents having an unequal position with regard to their rights toward the child if a genetic link is required. In addition, this requirement, by precluding the use of donor embryos in international surrogacy arrangements, eliminates a viable use of this valuable resource by willing individuals and encourages the destruction of such stored embryos.

*(c) Evaluation of parental fitness*

If the Adoption Convention is referenced as a model for regulating ISAs, it would be logical to have each state be responsible for the evaluation of intended parents' fitness to create a child.<sup>44</sup> This is again a conflation of the issues of adoption (transferring legal

---

<sup>42</sup> Trimmings and Beaumont, at 641.

<sup>43</sup> Although this paper focuses primarily on the reproductive rights of the parties involved, ART implicates privacy rights with regards to the medical treatment. The choice of how to source the gametes or embryos involved in the process should be left to the intended parents, and their relationship to the child born through the process should not be determined by this choice.

<sup>44</sup> Trimmings and Beaumont, at 642.

responsibility over another person's child after birth) and surrogacy (establishing legal authority over one's own child from the moment of birth). More importantly, it will serve to inappropriately restrict intended parents' ability to reproduce. "*Parents have the exclusive right to determine freely and responsibly the number and spacing of their children.*"<sup>45</sup> If we are to judge the parental fitness of those who would create a child through surrogacy, then there is no logical distinction to be made between judging the parental fitness of those who would pursue parenthood through any ART method. From there, it is not a difficult logical leap to require an evaluation of parental fitness for any parent who would create a child through any means – including "natural" coital reproduction.

Supporters of the parental fitness requirement often raise the specter of individuals creating a child through surrogacy for the express purpose of exploiting the child in some way, seemingly ignoring the reality that children born through a coital reproduction process are exploited with alarming regularity today. It is no more likely that someone will create a child through surrogacy for the express purpose of exploitation than via any other means. In fact, it seems less likely; if one is engaged in commodification of children to such an extreme, there are far more cost-effective ways of procuring them.

It is most disconcerting that an evaluation of parental fitness may be used as an excuse by countries to deny same sex couples or single intended parents the ability to reproduce through surrogacy. It may also be used as an invasive process of investigating a couple's sex life, finances, criminal history, and medical status.<sup>46</sup> A notorious example of an assessment of intended adoptive parents being deemed 'unsuitable' to adopt were actor Hugh Jackman and his wife Deborra-Lee Furness, who, following enormous difficulties in seeking to adopt in their home state of New South Wales, gave up and instead adopted their children in the United States.<sup>47</sup>

A more productive recommendation would be some form of social counseling for the intended parents focused on how they will explain the child's origins to him or her. In addition, a discussion of the various risks and outcomes that may be encountered throughout the process is important. Through this introspective exercise, the intended parents can determine if international surrogacy is the best option for them, or if another process to achieve parenthood is more appropriate for their circumstance. Rather than being an invasive and restrictive determination of their fitness to reproduce, this would be an appropriate analysis of the intended parents' understanding of, and suitability for, participating in surrogacy.

---

<sup>45</sup> Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV), ¶ 4, (11 Dec., 1969). Available at: <http://www2.ohchr.org/english/law/pdf/progress.pdf>.

<sup>46</sup> Lucie van den Berg, *Victorian adoption process likened to criminal investigation*, HERALD SUN, (10 November 2011, 8:14 AM), <http://www.heraldsun.com.au/news/victoria/victorian-adoption-process-likened-to-criminal-investigation/story-fn7x8mc2-1226190850588> (last accessed 17 July 2012).

<sup>47</sup> Kirstin Murray, *Celebrity campaign to reform adoption laws*, AUSTRALIAN BROADCASTING CORPORATION, (13 March, 2008), <http://www.abc.net.au/7.30/content/2007/s2188906.htm> (last accessed 17 July, 2012).

(d) *“Habitual residence” as determinative factor*

It is tempting to argue that the concept of *“habitual residence”* should be applied uniformly across member nations.<sup>48</sup> This proposition makes conceptual sense, and it applies beyond issues of surrogacy. Likewise, the provision that the child be presumed a citizen of the nation of the intended parents’ habitual residence could help resolve the citizenship and immigration issues that arise. However, there are often practical difficulties when the intended parents are citizens of one country, but resident in another, and they undertake surrogacy in a third. For these intended parents and their child, sorting out the residency and nationality issues cannot be easily solved by relying on a simple *“habitual residence”* construct. In order to determine the nationality and residency status of a child born through surrogacy, a more effective (and efficient) means would be to indulge in a legal fiction that a surrogate is not involved in the birth of the child; a legal fiction that the child was born to one of the intended parents. With this approach, nationality and residency are determined as simply as they are for a *“natural”* born child. The legal fiction approach would be consistent with the heart of the arrangement: that the intended parents are in fact the parents of the child. It would also be consistent with the intent of the parties and, ultimately, the interest of the child in not being stateless.

(e) *Administrative oversight*

Another proposal is that nations create a regulatory agency to approve international surrogacy arrangements (and, presumably domestic ones, as well) and to monitor compliance.<sup>49</sup> While this solution may work for some nations, others may prefer to rely on alternate institutions for regulation. For instance, medical standards of care and professional ethics for lawyers are critical elements of surrogacy arrangements, and regulation of these can be effectively achieved without a specific governmental agency. These non-governmental institutions form part of the *“market infrastructure”* that regulates surrogacy arrangements today.<sup>50</sup> Thus, nations should be able to choose how they structure the regulation in their society.

Central regulatory agencies specific to surrogacy would add unnecessary cost to the system. A new layer of administration could burden taxpayers and participants in the market. Further, such a layer of administration focused on ISAs risks being redundant and incomplete. Additional administrative oversight would run the risk of changing a relatively rapid process (surrogacy) to one of a glacial pace, with attendant increased costs and frustration for the intended parents. There is also the risk that by creating a new bureaucracy, the new bureaucracy becomes self-justifying and imposes unnecessary requirements that unduly burden the process. Governmental intervention of this sort in *“natural”* reproduction is offensive to modern notions of autonomy, privacy, and the freedom to reproduce; likewise, governmental intervention into individual reproductive choices must be very carefully considered. To the extent that the majority of the problems encountered by international surrogacy are really issues with existing legal and social structures, a central authority that seeks to resolve these issues only in the context

<sup>48</sup> Trimmings and Beaumont, at 639.

<sup>49</sup> Trimmings and Beaumont, at 641.

<sup>50</sup> John A. Robertson, *Commerce and Regulation in the Assisted Reproduction Industry*, in *BABY MARKETS*, 195-196 (Michele Bratcher Goodwin, ed., Cambridge University Press 2010).

of surrogacy misses the mark. Worse, overregulation could exacerbate the risks of exploitation. As the cost of the process increases, some market participants will seek less costly (and perhaps less legally sound) alternatives to parenthood.

## *(f) Licensing requirement*

It is proposed by some that all surrogacy arrangements not made with licensed agencies be outlawed.<sup>51</sup> While understandable at first blush, this proposal may be overbroad. Is there to be a license to practice international surrogacy? Alternatively, will state permission to practice law or medicine suffice? If an agency is required, does this add to the already prohibitive cost of the surrogacy process? What if the participants piece together the necessary elements of a surrogacy program with an overseas relative without the intervention of services of an agency? This last hypothetical raises an important point: regardless of the form of any international instrument, surrogacy will continue outside the boundaries of the "market." The individuals - and children - in the non-market arrangements deserve just as much protection as those in the market. Licensing of participating agencies is a sound idea, but requiring the use of a licensed agency limits freedom of choice and flexibility of the process.

Currently, participants in the international surrogacy market take enormous risk if they do not work with a competent practitioner. The inherent uncertainty in the current market gives people pause before they enter the market. In this sense, the complexity of the market is self-regulating, giving participants a strong incentive to act with caution and care. Using a competent broker is part of the calculation of the intended parents; those who choose not to work with one do so at their own peril.

This proposal also raises an important issue for any regulatory framework: the consequences of regulatory violations. If a subset of surrogacy arrangements is outlawed, then the expectation when such arrangements occur is that the parties involved will be punished, including the intended parents. A logical punishment for intended parents would be removal of the child. Short of removal of the child, fines or criminal sentences could be imagined for the intended parents. Whatever penalty is applied, it would ultimately serve to punish the people that the regulation purports to protect: the children born of surrogacy, as they will suffer for the punishment and the disruption to their family.

In addition, the requirement that all economic activity must pass through licensed agencies necessarily limits the availability of surrogacy agency services. In turn, supply of these services would be restricted, resulting in upward pressure on price. Such a result would increase risk of exploitation of the intended parents and surrogates alike as individuals move to the grey or black markets to seek lower costs and less oversight.

## *(g) Compensation for the gestational carrier and gamete donors*

Compensation for the gestational carrier is important, as it allows the market to function by balancing the rights of the carrier with the responsibilities of the intended parent(s). However, caps on compensation may increase the possibility of exploitation. *"Debate centers around two distinct issues: commercialization, or the fact that a surrogate is paid for her services, and exploitation, which is the idea that surrogates are*

---

<sup>51</sup> Trimmings and Beaumont, at 643.

*paid too little for their services.*"<sup>52</sup> ISAs heighten the concern of exploitation, as a main factor behind the existence of the international surrogacy market is price. On the one hand, lower costs for surrogacy arrangements give more people access to this reproductive option. On the other hand, higher compensation for gestational services may be seen as potential coercion for women in underdeveloped countries to become surrogates. Achieving a balance is a challenge, one best left to local regulatory expertise and market factors.

When approaching compensation for surrogates, many commentators assert that a maximum limit to compensation should be part of the regulation in order to avoid coercion.<sup>53</sup> The idea that overly coercive amounts of money will be offered to women in underdeveloped countries may be somewhat exaggerated. The market for international surrogacy is highly price-sensitive.<sup>54</sup> The surrogacy market has expanded to lower-cost areas precisely because those areas are lower-cost. As prices rise in a particular geographic market, the attractiveness of that market diminishes.

For gamete donors, the concerns may similarly be overstated. In the US, the egg donation market is rife with myths of eggs regularly sold for six-figure amounts. The reality is that the vast majority of egg donors in the US receive between five and ten thousand dollars per donation, conforming to the ASRM standards for egg donor compensation.<sup>55</sup> Here, again, the concerns of coercive exploitation of women through excessive sums of money are exaggerated.

Rather than income-based caps for compensation, a flexible approach to compensation is more appropriate. Nations and localities should be able to monitor and manage the delicate balance between market demand and market exploitation without conforming to a global formula, as the management of this balance will be based on each society's notion of fairness in this market. Nevertheless, care should be taken to avoid additional pressure for intended parents to move from the legitimate market to a less desirable means of achieving parenthood.

#### *(h) Access to Birth Records by Children Born Through Surrogacy*

There are also varying views as to the access of a child via surrogacy to his or her birth records.<sup>56</sup> While international law may highly value a child's rights to know his or her origins, especially within the adoption model, the applicability of this concept to children born of gestational surrogacy is uniquely problematic, particularly when donor gametes are not involved. Varying legal conceptions of the privacy of the family and medical information may warrant greater flexibility on this point. Ideally, each individual should have a clear view of his or her origins. However, children of "natural" birth are afforded no such guarantee, as parents are not obligated to disclose to their children any irregularities with their conception. Children born through surrogacy may

<sup>52</sup> Angie Godwin McEwen, SO YOU'RE HAVING ANOTHER WOMAN'S BABY: ECONOMICS AND EXPLOITATION IN GESTATIONAL SURROGACY, 32 Vand. J. of Transnat'l L., no. 1 (Jan. 1999).

<sup>53</sup> Trimmings and Beaumont, at 644.

<sup>54</sup> Deborah L. Spar, THE BABY BUSINESS, 30 (Harvard Business School Press, 2006) ("In this market, therefore, price acts harshly as a constraint on demand.").

<sup>55</sup> American Society for Reproductive Medicine, FINANCIAL COMPENSATION OF OOCYTE DONORS, 88 Fertility and Sterility, No. 2, 305 (Aug. 2007).

<sup>56</sup> Trimmings and Beaumont, at 646.

likewise need to rely on the disclosures or approvals of their parents for complete information, just as are children born through fertility treatment (including use of donor gametes) without surrogacy.

## E. INTENT-BASED PARENTAGE ANALYSIS SHOULD BE APPLIED TO SURROGACY

Some jurisdictions use an intent-based approach to parentage, relying on the concept that “*but for*” the actions of the intended parents, the child born through surrogacy would not exist.<sup>57</sup> This theory is certainly not universally accepted. Nevertheless, intent plays a significant role in the expectations that each party in a surrogacy arrangement has from the outset of the process and is typically expressed in any contractual instruments involved. Even without reducing surrogacy to the contractual sphere, however, the examination of the intention of all of the parties can be helpful in the analysis of legal issues that arise. The doctrine of intent offers a sound legal basis for recognizing those whose actions brought about the child as the legal parents of the child born through surrogacy.<sup>58</sup>

As further support for considering the doctrine of intent, the Adoption Convention does state, “*the policy of Contracting States regarding the nationality of the child should be guided by the overriding importance of avoiding a situation in which an adopted child is stateless.*”<sup>59</sup> When applied to surrogacy, the logical result is the determination of citizenship for the child based on the country of citizenship or habitual residence that all parties intended for the child. This is certainly in the best interests of the child and mirrors the intent-based parentage model.

Finally, it is important to remember the distinction between adoption and surrogacy when considering the doctrine of intent. Surrogacy is a process through which a child is conceived, gestated, and born based on the intended parents’ desire to procreate. The collective intent of both the parent(s) and the surrogate is established and documented in advance of any medical procedure or actual gestation. The actions of the intended parents exclusively set this process in motion. If the intended parents never chose to reproduce, the surrogate would never get pregnant, and the child born through surrogacy would not exist. Thus, the doctrine of intent can be useful to navigate issues that arise in the process.

## F. CONCLUSION

Regulation of ISAs as a proxy for other issues in the international private law sphere will have unintended consequences. It will almost certainly drive some people out of the market and into less desirable means of achieving parenthood. Further, regulation of the narrow issue of surrogacy will not address the structural challenges with international parentage decisions generally.

---

<sup>57</sup> *Johnson v. Calvert*, 5 Cal. 4th 84, 93(1993).

<sup>58</sup> Charles P. Kindregan, Jr. and Maureen McBrien, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE, (A.B.A., 2<sup>nd</sup> ed., 2012).

<sup>59</sup> Trimmings and Beaumont, at 646.



If we fear coercion and exploitation in the international surrogacy market, then each nation should consider developing an approach to protect all parties who participate in such arrangements. The definitions of ‘coercion’ and ‘exploitation’ vary from society to society; therefore, at the international level, a framework of cooperation to resolve conflicts of these society-dependent notions of coercion, exploitation, family, and citizenship may suffice to resolve the tensions in this market.

In reality, surrogacy is not the issue: the conflicts of family and immigration law are. In the end, the practical problems with ISAs are grounded in conflicts of laws and comity issues surrounding parentage, family structure, nationality, and immigration. Accordingly, any Convention should be limited to a framework for open dialogue between nations about the reconciliation of these conflicts, particularly when the issues are not contested by the parties involved.

While the Sponsors support the notion of an international Convention on private international law concerning children, including international surrogacy arrangements, the Sponsors recommend that conflict of laws and comity (i.e., cross-border recognition of parentage judgments) should be the cornerstone of any such collective international approach.

A Convention of this type should recognize the clear distinctions between adoption and surrogacy rather than reflexively applying legal frameworks created for adoptions, such as the existing Hague Convention on Adoption, to surrogacy arrangements. The Hague Conference itself has acknowledged that the existing adoption Convention may not be suited to address the issues raised by international surrogacy. The Sponsors’ position is that the Hague Convention on the Protection of Children and Co-Operation In Respect of Intercountry Adoption (1993) is not an appropriate model for any Convention regarding surrogacy.

The Sponsors strongly urge that any Convention allows individual member countries to regulate surrogacy as deemed appropriate by that country without imposing new international restrictions on surrogacy arrangements.

Most importantly, the Sponsors’ position is that rather than regulating the details and mechanics of surrogacy itself, what is most needed is an agreement among countries to recognize parentage judgments validly issued by participating countries so that the parental relationship and citizenship status of all children, no matter the circumstance of their birth, are not left to the uncertainties of the varied legal approaches of individual nations.

Respectfully submitted,

Greg Ortiz, Chair  
ABA Section of Family Law  
February 2016

## GENERAL INFORMATION FORM

Submitting Entity: ABA Section of Family Law

Submitted By: Greg Ortiz, Chair, ABA Section of Family Law

1. Summary of Resolution(s). Rather than regulating the details and mechanics of surrogacy itself, what is most needed is an agreement among countries to recognize parentage judgments validly issued by participating countries so that the parental relationship and citizenship status of all children, no matter the circumstance of their birth, are not left to the uncertainties of the varied legal approaches of individual nations.
2. Approval by Submitting Entity. The ABA Section of Family Law approved submission of this Resolution on November 9, 2015.
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 Model Act Governing Assisted Reproduction Technologies was unanimously ratified by the ABA House of Delegates in 2008. Resolution 107, adopted by the House of Delegates in February 2008, established for intended parents and licensed professionals a single baseline legal standard from which to foster predictability within the Intended Parent-Licensed Professional relationship in the United States.

The Sponsors believe that local governance of issues with assisted reproduction is appropriate in order to account for local culture and concerns over this area of law. At the international level, however, the Sponsors believe that it is inappropriate to implement a uniform set of rules governing surrogacy arrangements between private parties which would usurp the local cultures and concerns involved. Adoption of this Resolution would provide further support for self-governance within the United States and the principles established by the ABA Model Act Governing Assisted Reproduction Technologies.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? This is not a late report, but some urgency exists in that this is a very time-sensitive matter for the United States Department of State, which has requested the ABA to weigh in on the possibility of an international Convention and what it should or should not address. It is urgent that the ABA formulate a response as quickly as possible now that the Hague Conference has already begun convening its experts group for the formulation of policy proposals in 2016.
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. Submission to the United States Department of State for adoption.
8. Cost to the Association. (Both direct and indirect costs). None.
9. Disclosure of Interest. (If applicable). Not Applicable.
10. Referrals. The Section of Family Law circulated the substantive draft documents in 2013 and 2014 to the following entities, who were also invited to take part in a Working Group session on May 9, 2015: Business Law; Health Law; Individual Rights and Responsibilities; International Law; Litigation; Real Property, Trust and Estate Law; Science and Technology Law; Young Lawyers Division. A second Working Group session was held on August 2, 2015, and the following entities were invited to participate: Business Law; Health Law; Individual Rights and Responsibilities; International Law; Litigation; Real Property, Trust and Estate Law; Science and Technology Law; Young Lawyers Division; Solo, Small Firm & General Practice Law; Tort Trial & Insurance Practice Law. The Section of Health Law has provided substantive comments, resulting in revisions to the underlying documents which are the subject of this Resolution. The Section of Science and Technology and the Section of Real Property, Trusts and Estates have also provided substantive input and have actively participated in the drafting of the documents which are the subject of this Resolution.
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address).

Anita M. Ventrelli, Esq.  
Schiller, DuCanto & Fleck LLP  
200 N. LaSalle Street, 30th Floor  
Chicago, IL 60601-1019  
312-609-5506  
AVentrelli@sdflaw.com

Marshall J. Wolf, Esq.  
Wolf & Akers  
2200 One Cleveland Center  
1375 E. 9th Street  
Cleveland, OH 44114-1739  
216-623-9999  
MW@wolfakers.com

# 112B

Richard B. Vaughn, Esq.  
International Fertility Law Group Inc.  
5757 Wilshire Blvd., Suite 645  
Los Angeles, CA 90036  
323-904-4728  
Rich@IFLG.net

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.)

Anita M. Ventrelli, Esq.  
Schiller, DuCanto & Fleck LLP  
200 N. LaSalle Street, 30th Floor  
Chicago, IL 60601-1019  
312-609-5506  
AVentrelli@sdfllaw.com

Marshall J. Wolf, Esq.  
Wolf & Akers  
2200 One Cleveland Center  
1375 E. 9th Street  
Cleveland, OH 44114-1739  
216-623-9999  
MW@wolfakers.com

Richard B. Vaughn, Esq.  
International Fertility Law Group Inc.  
5757 Wilshire Blvd., Suite 645  
Los Angeles, CA 90036  
323-904-4728  
Rich@IFLG.net

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The Resolution urges the United States Department of State to seek, in negotiations concerning a possible Hague Convention on private international law concerning children, including international surrogacy arrangements, the following:

- a. That any Convention should focus on the conflict of laws and comity problems inherent in international citizenship and parentage proceedings and that any such collective international approach should allow for cross-border recognition of parentage judgments so that the parental relationship and citizenship status of all children, no matter the circumstance of their birth, will be certain; and
- b. That any such collective international approach allows individual member countries to regulate surrogacy within their own borders as deemed appropriate by that country without imposing new international restrictions on surrogacy arrangements,
- c. That any such Convention recognizes the clear distinctions between adoption and surrogacy and that The Hague Convention on the Protection of Children and Co-Operation In Respect of Intercountry Adoption (1993) is not an appropriate model for any Convention regarding surrogacy.

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

Recent advancements in medical technology have enabled the global expansion of third-party assisted reproduction (surrogacy) for both infertile couples and single individuals. When surrogacy arrangements involve individuals from more than one nation, the legal status of the individuals and that of the resulting children may be uncertain. Situations where “stateless” children were born through international surrogacy arrangements have prompted discussion about whether a Hague Convention on private international law concerning children, including international surrogacy arrangements is needed. Of additional concern are the potential for exploitation of individuals in the international surrogacy process, particularly the exploitation of women.

The United States Department of State has requested the ABA to weigh in on the possibility of an international Convention and what it should or should not address, and the Sponsors have prepared a position paper (the Report) on these issues. Additionally, it is the Sponsors’ view that international regulation of surrogacy arrangements could lead to other problems that will complicate the issues rather than resolve them.

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

While the Sponsors support the notion of an international Convention on private international law concerning children, including international surrogacy arrangements, conflict of laws and comity (i.e., cross-border recognition of parentage judgments) should be the cornerstone of any such collective international approach as opposed to regulation of the surrogacy industry itself. A Convention of this type should recognize the clear distinctions between adoption and surrogacy rather than reflexively applying legal frameworks created for adoptions, such as the existing Hague Convention on Adoption, to surrogacy arrangements. The Hague Conference itself has acknowledged that the existing adoption Convention may not be suited to address the issues raised by international surrogacy. The Sponsors' position is that the Hague Convention on the Protection of Children and Co-Operation In Respect of Intercountry Adoption (1993) is not an appropriate model for any Convention regarding surrogacy.

The Sponsors strongly urge that any Convention allows individual member countries to regulate surrogacy as deemed appropriate by that country without imposing new international restrictions on surrogacy arrangements.

Most importantly, the Sponsors' position is that rather than regulating the details and mechanics of surrogacy itself, what is most needed is an agreement among countries to recognize parentage judgments validly issued by participating countries so that the parental relationship and citizenship status of all children, no matter the circumstance of their birth, are not left to the uncertainties of the varied legal approaches of individual nations.

4. Summary of Minority Views

At the time of the writing of this Resolution with Report and summary, we are not aware of any formal reported direct opposition to the approval of this Resolution.

**AMERICAN BAR ASSOCIATION  
STANDING COMMITTEE ON LAWYER REFERRAL AND INFORMATION  
SERVICE  
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
AUSTIN BAR ASSOCIATION  
BROOKLYN BAR ASSOCIATION  
CINCINNATI BAR ASSOCIATION  
OREGON STATE BAR  
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE  
STANDING COMMITTEE ON DISASTER RESPONSE AND PREPAREDNESS  
STANDING COMMITTEE ON GROUP AND PREPAID LEGAL SERVICES  
LAW PRACTICE DIVISION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges federal, state, tribal, and territorial courts  
2 and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege for  
3 confidential communications between a client and a lawyer referral service, thereby ensuring that  
4 a client consulting a lawyer referral service for the purpose of retaining a lawyer or obtaining  
5 legal advice from a lawyer may refuse to disclose, and may prevent the lawyer referral service  
6 from disclosing, those confidential communications.

7  
8 FURTHER RESOLVED, That the American Bar Association urges federal, state, tribal, and  
9 territorial courts and legislative bodies to adopt rules or enact legislation protecting the  
10 confidentiality of information relating to a client's consultation with a lawyer referral service,  
11 including the identity of the client.





## **REPORT**

### **I. Introduction**

This resolution urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege for confidential communications between a client<sup>1</sup> and a lawyer referral service (“LRS”) for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. It generally facilitates and implements existing ABA policy that was adopted in August 1993, when the ABA adopted the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information Service Quality Assurance Act. Both Rule XIV of the Model Supreme Court Rules and the substance of and Section 6 of the Model Act both state that:

“A disclosure of information to a lawyer referral service for the purpose of seeking legal assistance shall be deemed a privileged lawyer-client communication.”

The new LRS-client privilege established by these rules or legislation should be similar to the privilege that currently exists for confidential communications between attorneys and their clients. Such a privilege should provide that a person who consults a LRS for the purpose of retaining a lawyer or obtaining legal advice may refuse to disclose the substance of that consultation and may prevent the lawyer referral service from disclosing that information as well. As with other privileges, the client contacting the LRS would have the authority to waive the LRS-client privilege. In addition, each jurisdiction may wish to apply to this new privilege certain recognized exceptions to the attorney-client privilege.

The resolution also urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation protecting the confidentiality of other information relating to the client’s consultation with the LRS, such as the identity of the client, which would be similar to the requirement of confidentiality outlined in ABA Model Rule 1.6. Each jurisdiction adopting or enacting such rules or legislation may wish to include certain reasonable exceptions that are similar to the recognized exceptions applicable to the attorney’s duty of confidentiality.

### **II. Background on Lawyer Referral Services**

Lawyer referral services help connect people seeking legal advice or representation with attorneys who are qualified to assist the individual client with their specific legal needs. In addition to providing an important service to the public, LRSs provide an important service for attorneys by helping them to get new clients and grow their practices.

---

<sup>1</sup> “Client” as used throughout the Resolution and Report means a client of the lawyer referral service, not a client of a lawyer who may later represent the person contacting the lawyer referral service.

LRSs are usually non-profit organizations affiliated with a local or state bar association. There are hundreds of these organizations nationwide, and they assist hundreds of thousands of clients every year. Some state governments and/or bar associations regulate and certify local LRSs, such as in California. In addition, the ABA offers its own accreditation to LRSs nationwide. While some LRSs are directed by attorneys, most of the staff who do “intake” (answering phone calls from clients, speaking with people who walk-in, or responding to electronically transmitted requests) are not attorneys and do not typically act under the direct supervision of attorneys.

The lawyer referral process begins when the client contacts the lawyer referral service, usually by phone or increasingly by email or over the Internet, to explain a problem, and ends when the LRS either provides the client with contact information for one or more attorneys whose expertise is appropriate to the problem or directs the client to a legal services program, government agency, or other potential solution. In the course of this interaction, confidential information regularly is provided by the client to the LRS. Indeed, to be directed to the appropriate lawyer or government or non-profit office, clients need to disclose the same or similar information to the LRS that they would typically provide in an initial meeting with a law firm or legal aid organization’s office personnel or a lawyer – the who, what, where, when, why and how of their legal situations.

Without detailed client information, LRSs cannot function properly. Inaccurate referrals are frustrating to clients. What makes LRSs valuable is their ability to triage clients' issues against the backdrop of knowledge of the government and nonprofit resources available, in addition to private lawyers in every area of law. LRSs are able to make appropriate referrals because they obtain detailed information needed to evaluate which is the appropriate resource for a given client. Lawyer referral services have been regularly questioned by clients about the issue of confidentiality of the information being provided, and most are unable to reassure clients that their communications are clearly privileged. This can hamper the kind of open communication required to make the right referral. Moreover, in recent years in a number of instances, litigants have sought discovery into such communications. In particular, the Bar Association of San Francisco was subpoenaed by a District Attorney concerning client communications. The issue was resolved without having to turn over any client communications. In 2015, the Akron Bar Association Lawyer Referral Service was forced to comply with a subpoena of its lawyer referral records concerning a referral to a panel attorney.

Without protection of the communications, clients would be forced to endure the frustrating experience of making multiple cold calls to different legal aid organizations or private lawyers, asking each time if his/her issue matches the organization’s limited mission or the lawyer's particular area of practice, and repeatedly being told no. Ineffective referrals will result in clients not connecting with the appropriate agency, legal aid society, or lawyer and decreases the use of LRSs. This would be particularly unfortunate because two-thirds to three-quarters of referrals are not to private lawyers. LRSs provide a significant public service – not only to the clients they serve, but to the multitude of government agencies and nonprofits that benefit from accurate referrals to them.

When speaking on the phone to LRS personnel, clients are often anxious, angry, and upset about their legal issues; wish to explain their situation in great detail without being prompted to do so; and express concerns about deadlines and a desire for immediate legal assistance. In fact, referral counselors have no control over clients' outbursts and as a result, clients often will provide potentially damaging or sensitive information immediately or soon after the referral counselor's greeting. Similarly, clients' seeking legal assistance on LRSs' websites often ignore or resist the LRSs' attempts to restrict the information clients provide. For example, while LRSs' websites typically ask specific questions and then limit the number of characters a client can type in response, clients often express a clear preference for providing a detailed, open narrative in a text box in response to a general instruction, such as: "Briefly explain your legal issue and what result you would like to see."

Although clients' open narratives frequently include information that could harm the client's criminal or civil case if revealed to adverse parties, LRSs' cautions about not providing too much information are unlikely to be effective. Clients either ignore the caution altogether, and provide potentially damaging information without prompting, or they take the caution very seriously and provide little to no information, thereby frustrating any ability to make an accurate referral to a lawyer, government agency, or nonprofit organization. On the other hand, the most common alternative utilized by many other LRSs—forms with a series of specific questions—have a high abandonment rate with fewer completed submissions than a simple form with a general instruction that permits a more open-ended answer.

### **III. Background on the Attorney-Client Privilege and the Lawyer's Duty to Protect Client Confidentiality**

The concepts of attorney-client privilege and lawyer confidentiality both concern information that the lawyer must keep private and are protective of the client's ability to confide freely in his or her lawyer, but the concepts are not synonymous.<sup>2</sup>

The attorney-client privilege protects any information communicated in a confidential conversation between a client and an attorney for the purpose of seeking or obtaining legal assistance, and it usually extends to communications between a *prospective client* and an attorney (even if the attorney is not ultimately retained). Originally established through the common law and now codified in many state rules of evidence, the attorney-client privilege allows the client and attorney to refuse to reveal such communications in a legal proceeding. The underlying purpose of the attorney-client privilege is to encourage clients to seek legal advice freely and to communicate candidly with lawyers, which, in turn, enables the clients to receive

---

<sup>2</sup> Michmerhuizen, Sue, ABA Center for Professional Responsibility, "Confidentiality, Privilege: A Basic Value in Two Different Applications, May 2007, available online at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/confidentiality\\_or\\_attorney\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney_authcheckdam.pdf)

the most competent legal advice from fully-informed counsel. The privilege belongs to the client, not to the lawyer, and so the client is always free to waive the privilege.

On the other hand, the principle of confidentiality is set out in the legal ethics rules adopted by each state and other jurisdictions and in ABA Model Rule of Professional Conduct 1.6.<sup>3</sup> These rules generally prohibit lawyers from revealing information relating to the representation of a client in the absence of the client's informed consent, implied authorization or under specific, limited exceptions permitted by the rule. Violations of the rules may lead to disciplinary sanctions.

Although these concepts are closely related, the scope of the lawyer's ethical duty of client confidentiality is somewhat broader than the scope of the attorney-client privilege. While the attorney-client privilege only protects confidential communications and information given for the purpose of obtaining legal representation or advice (*i.e.*, privileged communications and information), the duty of confidentiality protects both privileged information and other non-privileged, but confidential, information relating to the representation, including such things as the identity of the client (which is only privileged in a minority of states). However, despite these and other subtle differences, both the attorney-client privilege and the ethical duty of client confidentiality contribute to the trust that is the hallmark of the confidential lawyer-client relationship and encourage the client to seek legal assistance and to communicate fully and frankly with the lawyer.<sup>4</sup>

Both the attorney-client privilege and the duty of confidentiality are sometimes subject to exceptions, such as when disclosure may be necessary to prevent death, substantial bodily harm, or substantial injury to the financial interests or property of someone, or when the communication with the lawyer was for the purpose of committing a crime or defrauding others (the so-called "crime-fraud" exception). These exceptions vary somewhat from state to state and can also vary between the privilege and the duty of confidentiality within each state.

#### **IV. The Problem and the Solution**

If a client reveals confidential information to a LRS in an effort to obtain legal advice or counsel, it is unclear under existing case law whether any statutory or common law privilege would protect that communication (except in California, which passed a statute creating such a privilege in 2013). As noted above, most LRS staff are not attorneys, nor are most of these staff directly supervised by attorneys. Moreover, the LRS client typically seeks to obtain a referral to an attorney, not legal advice or representation from the LRS itself. Thus, some courts may conclude that neither the attorney-client privilege nor the broader ethical duty of client

---

<sup>3</sup> Id. See also ABA Model Rule of Professional Conduct 1.6 ("Confidentiality of Information"), 2015 Edition, and the related Comments, available online at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_6\\_confidentiality\\_of\\_information.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html)

<sup>4</sup> See ABA Model Rule 1.6, Comments 2 and 3.

confidentiality apply to communications between clients and LRSs (though it should be noted that we have found no published case where a court made a finding on this issue).

This is a problem for at least two reasons. First, it hampers communications between some clients and LRSs, making it difficult for the LRS to gather the information necessary to make a referral to the appropriate lawyer. Clients sometimes ask LRSs whether their communications are privileged, and in most states, the current answer is “we don’t know, but the communications may not be protected.” It is crucial that clients feel comfortable sharing as much information as possible with a LRS in order to facilitate a referral to the best possible attorney (or agency) for their particular legal issue. Second, with respect to the multitude of clients who are overly comfortable sharing damaging or sensitive information with LRS personnel without being prompted to do so, these clients are likely to be seriously harmed in the event of an opposing party’s successful discovery request. In a number of instances, litigants have sought discovery from a LRS with respect to confidential communications with a client, and it is likely this will continue to occur.

The lack of a clear privilege threatens the open communication necessary for LRSs to effectively triage the legal issues involved and match clients with appropriate lawyers, government agencies, non-profit programs or organizations, or other resources. Clients’ trust and confidence in LRSs might well quickly evaporate following publicized accounts of successful discovery requests to LRSs. Discouraging or impeding the free and candid communications between LRSs and clients will materially harm the ability of LRSs to help hundreds of thousands of people in need of legal assistance. Without open communication – including the exchange of information that might prompt LRS personnel to advise or warn a client about fast-approaching deadlines and other crucial aspects of the case – clients may prejudice their legal rights or suffer other serious harm.

This resolution urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation establishing a new evidentiary privilege for confidential communications between a client and a LRS in order to eliminate any uncertainty as to the privileged status of such communications from a client seeking legal counsel. It would enable LRSs to reassure clients and thereby maintain the kind of honest and open communication required to make a good referral. It would also eliminate the possibility that an opposing lawyer might attempt to subpoena documents and/or seek testimony from a LRS concerning its confidential communications with the other party. In addition, the resolution urges courts and legislative bodies to adopt rules or enact legislation requiring lawyer referral programs to keep other LRS client information, such as client identity, confidential.

The ABA previously expressed support for the goals and substance of this proposal in August 1993 when it adopted the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information Service Quality Assurance Act. Rule XIV of the Model Supreme Court Rules and Section 6 of the Model Act both state that:

“A disclosure of information to a lawyer referral service for the purpose of seeking legal assistance shall be deemed a privileged lawyer-client communication.”<sup>5</sup>

In addition, the Commentary to Rule XIV and Section 6 both state that “since a client discloses information to a lawyer referral service for the sole purpose of seeking the assistance of a lawyer, the client’s communication for that purpose should be protected by lawyer-client privilege.”

The ABA also adopted related policy in February 2001 stating that confidential client information held by legal aid and other similar programs should remain privileged and confidential and should not be provided to funding sources absent client consent. In particular, ABA Resolution 8A states in pertinent part that:

“...a funding source should not have access to records which contain information protected by the attorney-client privilege, or by ethical provisions prohibiting the disclosure of confidential information obtained by a client, or by statutory provisions prohibiting disclosure, unless the client has knowingly and voluntarily waived such protections specifically to allow the protected information to be released to the funding source.”<sup>6</sup>

Since the ABA Model Supreme Court Rules and the ABA Model Act urging that LRS-client communications be accorded privileged status were adopted in August 1993, however, only one state (California) has taken action on this issue. Therefore, it is time for the ABA to revise and aggressively implement the substance of its existing policy by adopting the proposed resolution urging courts and legislatures to adopt rules or enact legislation establishing a new evidentiary privilege for confidential communications between a client and a LRS and requiring lawyer referral services to keep other LRS client information confidential as well.

Respectfully Submitted,

C. Elisia Frazier, Chair  
Standing Committee on Lawyer Referral and Information Service  
February 2016

---

<sup>5</sup> See ABA Resolution 10D, adopted by the ABA House of Delegates in August 1993. Resolution 10D and the related background Report are available online at [http://www.americanbar.org/content/dam/aba/directories/policy/1993\\_am\\_10d.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/1993_am_10d.authcheckdam.pdf)

<sup>6</sup> See ABA Resolution 8A, Resolved Clause 3, adopted by the ABA House of Delegates in February 2001. Resolution 8A and the related background Report are available online at <http://www.americanbar.org/content/dam/aba/uncategorized/GAO/8A.authcheckdam.pdf>.

## GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Lawyer Referral and Information Service

Submitted By: C. Elisia Frazier, Chair

1. Summary of Resolution(s). This resolution urges federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new evidentiary privilege for confidential communications between a client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. The new LRS-client privilege established by these rules or legislation should be similar to the privilege that currently exists for confidential communications between attorneys and their clients. The resolution also urges courts and legislative bodies to adopt rules or enact legislation protecting the confidentiality of other information relating to the client's consultation with the LRS, such as the identity of the client.
2. Approval by Submitting Entity. Standing Committee on Lawyer Referral Services, by email on April 17, 2015
3. Has this or a similar resolution been submitted to the House or Board previously? An almost identical resolution (ABA Resolution 111) was submitted to the House prior to the 2015 Annual Meeting, but the resolution was voluntarily withdrawn to provide the sponsors an opportunity to further discuss the relevant issues with the ABA Standing Committee on Ethics and Professional Responsibility and add several minor clarifications and refinements to both the resolution and report. A similar principle was also incorporated into the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information Quality Assurance Act, previously adopted by the ABA House of Delegates as policy in August 1993 (See ABA Resolution 10D). However, while Resolution 10D urged state supreme courts and legislatures to apply the attorney-client privilege to confidential communications between clients and lawyer referral services, the proposed resolution would urge federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation establishing a new privilege for confidential communications between clients and lawyer referral services and requiring lawyer referral services to keep other LRS client information confidential as well.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This resolution is generally consistent with and would implement the substance of ABA Resolution 10D adopted in August 1993, which adopts Rule XIV of the ABA Model Supreme Court Rules Governing Lawyer Referral Services and Section 6 of the ABA Model Lawyer Referral and Information Service Quality Assurance Act. Both Rule XIV and Section 6 provide as follows:

“A disclosure of information to a lawyer referral service for the purpose of seeking legal assistance shall be deemed a privileged lawyer-client communication.

## Commentary

Since a client discloses information to a lawyer referral service for the sole purpose of seeking the assistance of a lawyer, the client's communication for that purpose should be protected by lawyer-client privilege.”

In addition, the proposed resolution is generally consistent with ABA Resolution 8A, adopted in February 2001, which urges that confidential client information held by legal aid and other similar programs should remain privileged and confidential and should not be provided to funding sources absent express client consent. ABA Resolution 8A states in pertinent part that:

“...a funding source should not have access to records which contain information protected by the attorney-client privilege, or by ethical provisions prohibiting the disclosure of confidential information obtained by a client, or by statutory provisions prohibiting disclosure, unless the client has knowingly and voluntarily waived such protections specifically to allow the protected information to be released to the funding source.

Furthermore, because the proposed resolution would call for the establishment of a new lawyer referral service-client privilege that is similar to the attorney-client privilege, the resolution is also generally consistent with ABA Resolution 111, adopted in August 2005, which supports the preservation of the attorney-client privilege as essential to maintaining the confidential relationship between client and lawyer required to encourage clients to discuss their legal matters fully and candidly with their counsel.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? This is not a late report, but there is urgency for House action nonetheless. Lawyer referral services get questions from clients about this issue on a regular basis, such as, “Before I tell you about my case, is this conversation privileged and confidential?” Lawyer referral services need the certainty of a specific codified or court-recognized privilege protecting confidential communications between a client and a lawyer referral service in order to reassure such clients and facilitate the kind of open communication required to make the right referral to the right lawyer. Without such a specific evidentiary privilege, litigants will continue to seek inappropriate discovery of these confidential communications between clients and lawyer referral services.
6. Status of Legislation. (If applicable) The California legislature codified a lawyer referral service-client privilege in 2013. *See* Cal. Evid. Code §§ 965-968. No other relevant legislation appears to be pending.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Lawyer referral services and their respective state and local bars around the country would hopefully urge their respective state supreme courts and legislatures to adopt rules or pass laws recognizing this evidentiary privilege. In addition, the ABA sponsoring



entities, in coordination with the ABA Governmental Affairs Office and the ABA Center for Professional Responsibility, would urge the federal courts and Congress to approve similar rules and legislation at the federal level.

8. Cost to the Association. (Both direct and indirect costs) None
9. Disclosure of Interest. (If applicable) None
10. Referrals. Business Law, Center for Professional Responsibility, Judicial Division, Litigation, National Conference of Bar Presidents, National Association of Bar Executives, Standing Committee on Client Protection, Standing Committee for Ethics and Professional Responsibility, Standing Committee on Professional Discipline
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)
 

C. Elisia Frazier  
114 Grand View Drive  
Pooler, GA 31322-4042  
[Cef1938@hargray.com](mailto:Cef1938@hargray.com)  
912-450-3695
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.

C. Elisia Frazier  
114 Grand View Drive  
Pooler, GA 31322-4042  
[Cef1938@hargray.com](mailto:Cef1938@hargray.com)  
912-450-3695

EXECUTIVE SUMMARY1. Summary of the Resolution

This resolution urges federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new evidentiary privilege for confidential communications between a client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. The new LRS-client privilege established by these rules or legislation should be similar to the privilege that currently exists for confidential communications between attorneys and their clients. The resolution also urges courts and legislative bodies to adopt rules or enact legislation protecting the confidentiality of other information relating to the client's consultation with the LRS, such as the identity of the client. .

2. Summary of the Issue that the Resolution Addresses

Lawyer referral services provide a public service in helping clients to find legal representation (and attorneys find clients). In order to provide this service, lawyer referral services must first obtain information from each client about their case or issue; to ensure that they are referred to the appropriate attorney or attorneys for their specific legal needs. In most states, it is unclear under existing statutory or case law whether any statutory or common law privilege would protect these confidential communications between a client and a lawyer referral service, meaning that they are potentially subject to compelled discovery and disclosure. Lawyer referral services have been regularly questioned by clients about this issue, and most are unable to reassure clients that their communications are clearly privileged. This can hamper the kind of open communication required to make the right referral. Moreover, in recent years in a number of instances, litigants have sought discovery into such communications.

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

This resolution would urge federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new evidentiary privilege for confidential communications between a client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. It would enable lawyer referral services to reassure their clients and thereby maintain the kind of open communications required to make a good referral. It would also eliminate, or at least minimize, the risk that an opposing lawyer might subpoena documents or seek testimony from a lawyer referral service concerning its confidential communications with the other party.

3. Summary of Minority Views

None as of this writing.

**AMERICAN BAR ASSOCIATION**  
**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE**  
**COMMISSION ON HOMELESSNESS AND POVERTY**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association urges Congress to enact legislation to
- 2 make permanent the tax deduction for donation of wholesome food inventory as
- 3 previously codified in Internal Revenue Code section 170(e)(3)(C).



## REPORT

This Resolution urges Congress to make permanent the IRC §170(e)(3)(C) charitable tax deduction for donation of wholesome food inventories from any trade or business, not just C corporations. Congress has renewed the deduction year by year until the end of 2014, when it did not. Specifically, early in 2015, HR 644, Section 2, the Fighting Hunger Incentives Act, was introduced in Congress as part of the America Gives More Act. After passing in the House, the bill was sent to the Senate, but the provisions were replaced by the Trade Facilitation and Enforcement Act of 2015. Thus, small businesses will not receive a tax deduction for food donations in 2015.

In general, an income tax deduction is permitted for charitable contributions, subject to certain limitations that depend on the type of taxpayer, the property contributed, and the recipient organization. IRC provisions pertaining to charitable contribution deductions for donation of food inventories are separate from provisions defining the cost basis of inventories used to determine taxable gain, although to use the enhanced deduction that would have been provided by Section 2 of H.R. 644 a taxpayer would need to establish that the fair market value of the donated item exceeds the cost basis.

Without further action by Congress to extend or make permanent the deduction for food inventories as envisioned in HR 644, Section 2, much food that could feed persons experiencing food insecurity in this country may simply be thrown out. The cost of properly saving, packaging, labelling, storing, and delivering this unused food to distribution centers, in many cases, is prohibitive for small businesses and sole proprietorships.<sup>1</sup> The enhanced tax deduction for donation of food inventories allows them to offset some of that expense, making more of this food available to charitable organizations.

Until December 31, 2014, IRC §170(e)(3)(C) provided:

Special Rule for Contributions of Food Inventory —

(i) General Rule.—In the case of a charitable contribution of food from any trade or business of the taxpayer, this paragraph shall be applied—

---

<sup>1</sup> According to the United Nations Environment Programme September 2015 Report, in the USA, organic waste is the second highest component of landfills, which are the largest source of methane emissions. In the USA, 30-40% of the food supply is wasted, equaling more than 20 pounds of food per person per month.

Although the numbers of businesses deterred from donating food inventories by the lack of a tax deduction is not precisely known, it can be inferred from data on waste. For example, Feeding America, an organization that supported the food donation tax deduction provisions in the America Gives Back Act before Congress, reports that, according to U.S. Environmental Protection Agency data, an estimated 25 – 40% of food grown, processed and transported in the US will never be consumed (website).

(I) without regard to whether the contribution is made by a C corporation, and

(II) only to food that is apparently wholesome food.

(ii) Limitation.—In the case of a taxpayer other than a C corporation, the aggregate amount of such contributions for any taxable year which may be taken into account under this section shall not exceed 10 percent of the taxpayer's aggregate net income for such taxable year from all trades or businesses from which such contributions were made for such year, computed without regard to this section.

(iii) Apparently Wholesome Food.—For purposes of this subparagraph, the term “apparently wholesome food” has the meaning given to such term by section 22(b)(2) of the Bill Emerson Good Samaritan Food Donation Act (42 U.S.C. 1791(b)(2)), as in effect on the date of the enactment of this subparagraph.

(iv) Termination.—This subparagraph shall not apply to contributions made after December 31, 2013.

The version of Section 2 of H.R. 644 that passed the House provided:

#### An Act

To amend the Internal Revenue Code of 1986 to permanently extend and expand the charitable deduction for contributions of food inventory.

#### Sec. 2. Extension and Expansion of Charitable Deduction for Contributions of Food Inventory.

(a) Permanent Extension- Section 170(e)(3)(C) of the Internal Revenue Code of 1986 is amended by striking clause (iv).

(b) Increase in Limitation – Section 170(e)(3)(C) of such Code, as amended by subsection (a), is amended by striking clause (ii), by redesignating clause (iii) as clause (iv), and by inserting after clause (i) the following new clauses:

(ii) Limitation – The aggregate amount of such contributions for any taxable year which may be taken into account under this section shall not exceed—

(I) in the case of any taxpayer other than a C corporation, 15 percent of the taxpayer's aggregate net income for such taxable year from all trades or businesses from which such contributions were made for such year, computed without regard to this section, and

(II) in the case of a C corporation, 15 percent of taxable income (as defined in subsection (b)(2)(D)).

(iii) Rules Related to Limitation –

(I) Carryover – If such aggregate amount exceeds the limitation imposed under clause (ii), such excess shall be treated (in a manner consistent with the rules of subsection (d)) as a charitable

contribution described in clause (i) in each of the 5 succeeding taxable years in order of time.

(II) Coordination With Overall Corporate Limitation – In the case of any charitable contribution allowable under clause (ii)(II), subsection (b)(2)(A) shall not apply to such contribution, but the limitation imposed by such subsection shall be reduced (but not below zero) by the aggregate amount of such contributions. For purposes of subsection (b)(2)(B), such contributions shall be treated as allowable under subsection (b)(2)(A).

(c) Determination of Basis for Certain Taxpayers – Section 170(e)(3)(C) of such Code, as amended by subsections (a) and (b), is amended by adding at the end the following new clause:

(v) Determination of Basis for Certain Taxpayers – If a taxpayer—

(I) does not account for inventories under section 471, and

(II) is not required to capitalize indirect costs under section 263A, the taxpayer may elect, solely for purposes of subparagraph (B), to treat the basis of any apparently wholesome food as being equal to 25 percent of the fair market value of such food.

(d) Determination of Fair Market Value – Section 170(e)(3)(C) of such Code, as amended by subsections (a), (b), and (c), is amended by adding at the end the following new clause:

(vi) Determination of Fair Market Value – In the case of any such contribution of apparently wholesome food which cannot or will not be sold solely by reason of internal standards of the taxpayer, lack of market, or similar circumstances, or by reason of being produced by the taxpayer exclusively for the purposes of transferring the food to an organization described in subparagraph (A), the fair market value of such contribution shall be determined—

(I) without regard to such internal standards, such lack of market, such circumstances, or such exclusive purpose, and

(II) by taking into account the price at which the same or substantially the same food items (as to both type and quality) are sold by the taxpayer at the time of the contribution (or, if not so sold at such time, in the recent past).

(e) Effective Date –

(1) In General – Except as otherwise provided in this subsection, the amendments made by this section shall apply to contributions made after the date of the enactment of this Act, in taxable years ending after such date.

(2) Limitation; Applicability to C Corporations – The amendments made by subsection (b) shall apply to contributions made in taxable years ending after the date of the enactment of this Act.

While Congress's failure to pass HR 644, Section 2 resulted in the unavailability of the deduction for 2015, Congress's past practice of annually terminating and renewing the deduction in IRC §170(e)(3)(C) was also problematic, as it served as a deterrent to food inventory donations because of the uncertainty that the deduction would be renewed and available for a particular tax year. Consequently, it is important that Congress remove the sunset provision and make the deduction a permanent tax incentive to encourage better utilization of our resources in addressing one of the primary manifestations of food insecurity, a lack of wholesome food.

In 2014, the ABA House of Delegates adopted Resolution 107 urging the United States government to make the realization of a human right to adequate food a principal objective of U.S. domestic policy. As the Report in support of that Resolution stated, 17.6 million households have difficulty feeding their families, and 7 million of those families suffer from "very low food security," affecting some 49 million people. Making permanent the tax deduction for donation of food inventories will provide one tool to address this need.

The Section of Civil Rights and Social Justice asks the House of Delegates to adopt this Resolution to urge Congress to enact legislation making the tax incentive for donation of wholesome food inventories a permanent part of the Internal Revenue Code.

Respectfully Submitted,

Lauren Stiller Rikleen, Chair  
ABA Section of Civil Rights and Social Justice  
February 2016



**GENERAL INFORMATION FORM**

Submitting Entity: SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE (CRSJ)

Submitted By: Lauren Stiller Rikleen, Chair, ABA Section of Civil Rights and Social Justice

1. Summary of Resolution(s). The American Bar Association urges Congress to enact legislation to make permanent the tax deduction for donation of wholesome food inventory as previously codified in Internal Revenue Code section 170(e)(3)(C).
2. Approval by Submitting Entity. The Executive Committee of the Section of Civil Rights and Social Justice approved the filing of this resolution on Wednesday, Nov. 18, 2015.  
  
The Commission on Homelessness and Poverty approved co-sponsorship of this resolution on Thursday, Dec. 3, 2015.
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? In August 2014, the House of Delegates passed a resolution urging the United States government to make the realization of a human right to adequate food a principal objective of U.S. domestic policy. ABA Resolution 107 (Aug. 2014).
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) Early in 2015, HR 644, Section 2, the Fighting Hunger Incentives Act, was introduced in Congress as part of the America Gives More Act. After passing in the House, the bill was sent to the Senate, but the provisions were replaced by the Trade Facilitation and Enforcement Act of 2015.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If passed, the Section would work with the ABA Governmental Affairs Office to make Congress aware of this policy and urge the enactment of legislation.
8. Cost to the Association. (Both direct and indirect costs).

Adoption of this Resolution would result only in minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members' overall

substantive responsibilities, and the costs of updating documents which list the Association's goals.

9. Disclosure of Interest. (If applicable). There are no known conflicts of interest.
10. Referrals. The Section has worked with the Section of Taxation and the Commission on Homelessness and Poverty on this Resolution and Report.

By copy of this form, the Resolution also will be referred to the following entities:

Section of Business Law  
Section of State and Local Government Law  
Government and Public Sector Lawyers 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. Please include name, address, telephone number and e-mail address)

**Lauren Stiller Rikleen, Chair**

ABA Section of Civil Rights and Social Justice  
Rikleen Institute for Strategic Leadership  
87 Sears Rd  
Wayland, MA 01778-1706  
Tel.: 508/259-3500 (cell)  
Tel: 508/358-6115 (home)  
E-mail: [laurenr@bc.edu](mailto:laurenr@bc.edu)

**Tanya N. Terrell, Section Director**

ABA Section of Civil Rights and Social Justice  
1050 Connecticut Avenue, NW  
Suite 400  
Washington, DC 20036  
Tel: 202/662-1593  
Cell: 703/888-8022  
E-mail: [tanya.terrell@americanbar.org](mailto:tanya.terrell@americanbar.org)

**Marilyn Harbur, Vice Chair, CRSJ Committee on Economic Justice**

Department of Justice  
1162 Court St NE, Salem, OR 97301  
Tel: 503-947-4485  
Email: [marilyn.harbur@state.or.us](mailto:marilyn.harbur@state.or.us)

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.)

**Estelle H Rogers, Delegate**

ABA Section of Individual Rights and Responsibilities

111 Marigold Ln

Forestville, CA 95436-9321

Tel: 202/337-3332

Cell: 202/337-3332

E-mail: [lestellerogers@gmail.com](mailto:lestellerogers@gmail.com)

**EXECUTIVE SUMMARY**1. Summary of the Resolution

This Resolution urges Congress to enact legislation to make permanent the tax deduction for donation of wholesome food inventory as previously codified in Internal Revenue Code section 170(e)(3)(C).

2. Summary of the Issue that the Resolution Addresses

Small businesses and sole proprietorships throw away unsold inventories of wholesome food that could be donated to the nation's food pantries if the costs of storage, packaging and delivery were not prohibitive. Making permanent the federal income tax deduction for donation of food inventories would offset these costs and eliminate the uncertainty of the previous annual sunset provision in the law.

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

This Resolution would allow the ABA Governmental Affairs Office to lobby Congress for legislation, such as that passed by the U.S. House of Representatives earlier this year, making permanent the tax deduction for charitable donation of food inventories.

4. Summary of Minority Views

No minority views or opposition have been identified at this time.

**AMERICAN BAR ASSOCIATION  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association approves the Revised Uniform Athlete
- 2 Agents Act, promulgated by the National Conference of Commissioners on Uniform
- 3 State Laws, as an appropriate Act for those states desiring to adopt the specific
- 4 substantive law suggested therein.



**REPORT****REVISED UNIFORM ATHLETE AGENTS ACT***Summary*

With the immense amount of money at stake for a wide variety of professional athletes and those who represent them, the commercial marketplace in which athlete agents operate is extremely competitive. While seeking to best position one's clients and to maximize their potential income is both legal and good business practice, the recruitment of a student athlete while he or she is still enrolled in an educational institution can and will cause substantial eligibility problems for both the student athlete and the educational institution, which in turn lead to severe economic sanctions and loss of scholarships for the institution. The problem becomes worse where an unethical agent misleads a student, especially where the athlete is not aware of the possible effect of signing the agency agreement or where agency is established without notice to the athletic director of the institution. In an effort to address these problems, the Uniform Law Commission drafted the Uniform Athlete Agents Act (UAAA), which was approved in 2000.

The UAAA provided for the uniform registration, certification, and a mandated criminal history disclosure of sports agents who sought to represent student athletes who were or may have been eligible to participate in intercollegiate sports, imposed specified contract terms on these agreements, and provided educational institutions with a right to notice along with a civil cause of action for damages resulting from a breach of specified duties.

The UAAA required agents to disclose their training, experience, and education, whether they or an associate had been convicted of a felony or crime of moral turpitude, had been administratively or judicially determined to have made false or deceptive representations, had their agent's license denied, suspended, or revoked in any state, or had been the subject or cause of any sanction, suspension, or declaration of ineligibility. Agents were required to maintain executed contracts and other specified records for a period of five years. Agents who were issued a valid certificate of registration or licensure in one state are able to cross-file that application (or a renewal thereof) in all other states that have adopted the Act.

In addition, the UAAA required athlete agency contracts to disclose the amount and method of calculating an agent's compensation, the name of any unregistered person receiving compensation because the athlete signed the agreement, a description of reimbursable expenses and services to be provided, as well as warnings disclosing the notice requirements imposed under the Act.

The UAAA was revised in 2015 and is now known as the Revised Uniform Athlete Agents Act (RUAAA). The purposes of the RUAAA includes providing enhanced protection for student athletes and educational institutions, create a uniform body of agent registration information for use by state agencies, and simplify the regulatory environment faced by legitimate athlete agents.

# 115A

“Athlete agent” is further defined to include an individual who, for compensation or the anticipation of compensation, serves the athlete in an advisory capacity on a matter related to finances, business pursuits, or career management decisions; or manages the business affairs of the athlete by providing assistance with bills, payments, contracts, or taxes. The revised Act revises the definition of “athlete agent” to include individuals who give something of value to a student athlete or another person in anticipation of representing the athlete for a purpose related to the athlete’s participation in athletics.

The revised Act contains two alternatives for athlete agent registration. Alternative A includes a true reciprocal registration requirement in that if an individual is issued a certificate of registration by one state, the registration is in good standing and no disciplinary proceedings are pending against the registration, and the law in that state is the same or more restrictive as the law in another state, the other state would be required to register the individual. Alternative B would adopt an interstate compact when the Act is enacted by at least five states. The compact would create the Commission on Interstate Regulation of Athlete Agents to provide a single registration site where an individual could register to act as an athlete agent in the states that are members of the compact.

The revised Act adds additional requirements to the signing of an agency contract. The contract must now contain a statement that the athlete agent is registered in the state in which the contract is signed and list any other state in which the agent is registered. The contract must also be accompanied by a separate record signed by the student athlete acknowledging that signing the contract may result in the loss of eligibility to participate in the athlete’s sport.

Under the revised Act, an agent is required to notify the educational institution at which a student athlete is enrolled before contacting a student athlete. A violation of this notice requirement is subject to civil penalties. The revised Act also contains a provision that requires an athlete agent with a preexisting relationship with a student athlete who enrolls at an educational institution and receives an athletic scholarship to notify the institution of the relationship if the agent knows or should have known of the enrollment and the relationship was motivated by the intention of the agent to recruit or solicit the athlete to enter an agency contract or the agent actually recruited or solicited the student athlete to enter a contract.

The revised Act adds criminal penalties for athlete agents who encourage another individual to take on behalf of the agent an action the agent is prohibited from taking. Furthermore, the revised Act contains provisions for actual damages, treble damages, punitive damages, and attorney’s fees as options for a state to enact. Student athletes are also given a right of action against an athlete agent in violation of the Act.

The work of the Drafting Committee is available at [www.uniformlaws.org](http://www.uniformlaws.org), the website of the Conference. A direct link to the Revised Uniform Athlete Agents Act is available [here](http://www.uniformlaws.org/shared/docs/athlete_agents/2015_RUAAA_Final%20Act.pdf) ([http://www.uniformlaws.org/shared/docs/athlete\\_agents/2015\\_RUAAA\\_Final%20Act.pdf](http://www.uniformlaws.org/shared/docs/athlete_agents/2015_RUAAA_Final%20Act.pdf)).



Respectfully submitted,

Richard T. Cassidy, President  
National Conference of Commissioners  
On Uniform State Laws  
February 2016

## GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Revised Uniform Athlete Agents 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 2015 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 previously approved a resolution to support the 2000 version of the Uniform Athlete Agents 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 Revised Uniform Athlete Agents Act has not yet been enacted in any state legislature.

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 [here](http://www.uniformlaws.org/Committee.aspx?title=Athlete%20Agents%20Act) (<http://www.uniformlaws.org/Committee.aspx?title=Athlete%20Agents%20Act>).

The ABA Advisor for the Revised Uniform Athlete Agents Act was Michael P. Barnes.

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

Liza Karsai, NCCUSL Executive Director  
111 North Wabash Ave., Suite 1010  
Chicago, IL 60602  
(312) 450-6604 (office)  
(678) 446-0305 (cell)  
[lkarsai@uniformlaws.org](mailto:lkarsai@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.)

Richard T. Cassidy, NCCUSL President  
Hoff Curtis PC  
100 Main St.  
P.O. Box 1124  
Burlington, VT 05402  
(802) 864-6400 (office)  
(802) 238-2809 (cell)  
[rcassidy@uniformlaws.org](mailto:rcassidy@uniformlaws.org)

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

That the American Bar Association approves the Revised Uniform Athlete Agents Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2015 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

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

The Revised Uniform Athlete Agents Act (2015) is an update of the Uniform Athlete Agents Act of 2000, which has been enacted in 42 states. The 2000 Act governs relations among student athletes, athlete agents, and educational institutions, protecting the interests of student athletes and academic institutions by regulating the activities of athlete agents. The Revised Act makes numerous changes to the original act, including expanding the definition of “athlete agent” and “student athlete;” providing for reciprocal registration between states; adding new requirements to the signing of an agency contract; and expanding notification requirements

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

Approval of the Revised Uniform Athlete Agents 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.

### 4. Summary of Minority Views

None known.

**AMERICAN BAR ASSOCIATION  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association approves the Revised Uniform
- 2 Residential Landlord and Tenant Act, promulgated by the National Conference of
- 3 Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to
- 4 adopt the specific substantive law suggested therein.



**REPORT****THE REVISED UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT***Summary*

The Uniform Residential Landlord and Tenant Act (URLTA) was first approved in 1972 and enacted in 21 states to provide rules governing residential lease arrangements. Over the years, many of those states have enacted nonuniform amendments to the act to address newly arising issues.

In 2011 the ULC appointed a drafting committee to revise and update the URLTA. The committee added provisions on the following topics that had not been addressed in the original version:

- Tenant abandonment or death, and the disposition of tenant's personal property;
- Lease modification or termination in case of domestic violence, stalking, or sexual assault; and
- Handling security deposits and unearned rent.

The drafting committee also updated many other provisions of the act and clarified the rights, duties, and remedies of both landlords and tenants.

Revised URLTA can be enacted in its entirety and should be considered by any state that wants a modern, comprehensive set of rules to govern residential lease arrangements. However, the drafters recognized that some states may only want to enact provisions that are missing from their current law. Therefore, the Revised URLTA includes an appendix that serves as an adoption guide for states that want to update a current statute by adding provisions on one or more of the topics listed above.

The work of the Drafting Committee is available at [www.uniformlaws.org](http://www.uniformlaws.org), the ULC web site. A direct link to the Uniform Residential Landlord and Tenant Act is available [here](http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/RURLTA%202015_Final%20Act.pdf) ([http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/RURLTA%202015\\_Final%20Act.pdf](http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/RURLTA%202015_Final%20Act.pdf)).

Respectfully Submitted,

Richard Cassidy, President  
National Conference of Commissioners  
on Uniform State Laws  
February 2016

## GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Residential Landlord and Tenant Act by the American Bar Association 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 2015 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 previously approved a resolution to support the 1972 version of the Uniform Residential Landlord and Tenant 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 Revised Uniform Residential Landlord and Tenant Act has not yet been enacted in any state.

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 notified of drafting meetings and provided with tentative drafts. The drafting committee's work can be found here  
(<http://www.uniformlaws.org/Committee.aspx?title=Residential%20Landlord%20and%20Tenant%20Act>).

The ABA Advisor for the Revised Uniform Residential Landlord and Tenant Act was Peter Buchsbaum. The Section Advisor for the ABA Section on Real Property, Trust and Estate Law was Steven Eagle.

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

Liza Karsai, NCCUSL Executive Director  
111 N. Wabash Avenue, Suite 1010  
Chicago, Illinois 60602  
(312) 450-6604 (office)  
(678) 446-0305 (cell)  
[lkarsai@uniformlaws.org](mailto:lkarsai@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.)

Richard Cassidy, NCCUSL President  
Hoff Curtis, PC  
100 Main Street  
P.O. Box 1124  
Burlington, VT 05402  
(802) 864-6400 (office)  
(802) 238-2809 (cell)  
[rcassidy@uniformlaws.org](mailto:rcassidy@uniformlaws.org)

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

That the American Bar Association approves the Revised Uniform Residential Landlord and Tenant Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2015 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

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

The previous version of the Uniform Residential Landlord and Tenant Act was approved in 1972 and last amended in 1974 and had become outdated.

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

The revised act is a comprehensive update including new sections on lease obligations in cases of domestic violence or stalking, handling of security deposits and unearned rent, and disposition of a tenant's personal property after death or abandonment.

### 4. Summary of Minority Views

The ABA-RPTE Section approved the three new subjects included in the uniform act but did not take a position on the other revisions.

**AMERICAN BAR ASSOCIATION  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association approves the Uniform Commercial
- 2 Real Estate Receivership Act, promulgated by the National Conference of
- 3 Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to
- 4 adopt the specific substantive law suggested therein.



REPORT**THE UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT***Summary*

A receiver is someone appointed by a court to take possession of another person's property and manage it. Receivers can be used in a variety of situations, including:

- When the property is the subject of a lawsuit and its value must be preserved while the issue is litigated;
- When the property includes an operating business, to sell its assets in an orderly manner and maximize the return for its owners and/or creditors; and
- When requested by a creditor, to collect, preserve, and distribute the property of an insolvent or defaulting debtor.

Currently, receivership procedures vary widely from state to state, and sometimes even from court to court. The Uniform Commercial Real Estate Receivership Act (UCRERA) provides a consistent set of rules for receiverships involving commercial property, including:

**Due Process.** Under UCRERA, the court may issue an order only after notice and opportunity for a hearing, unless no interested party requests a hearing or special circumstances require the issuance of an order before a hearing can be held.

**Appointment.** UCRERA establishes uniform standards under which a court may appoint a receiver, and under which a mortgage lender may obtain appointment of a receiver, either as a matter of right or as a matter of the court's discretion.

**Identity and Independence.** Because a receiver is the agent of the court, UCRERA requires independent receivers. A party seeking the appointment of a receiver may nominate a person to serve, but the nomination is not binding on the court.

**Effect of Appointment.** On appointment, a receiver has the status of a lien creditor with respect to receivership property. However, pre-existing perfected security interests in receivership property are unaffected.

**Powers and Duties.** UCRERA sets out the receiver's presumptive powers, as well as those that the receiver may exercise only with court approval. The act also sets out the duties of both the receiver and the owner of receivership property.

**Use or Sale of Receivership Property.** Receivers can use or sell receivership property in the ordinary course of business, but must get court approval for uses or transfers of property outside the ordinary course of business. With court approval, sales may be free and clear of liens and rights of redemption, except that junior lienholders may not force a

# 115C

sale free and clear of liens without the consent of senior lienholders. Secured creditors are entitled to the proceeds of property sales according to existing priority rules.

**Existing Contracts and Leases.** A receiver may accept or reject a pre-existing contract with court approval, but UCRERA provides special protections for most commercial tenants of receivership property as well as tenants who occupy receivership property as their primary residences.

**Creditor Claims.** In most cases, a receiver must notify creditors of the receivership, and creditors must file claims with the receiver before receiving distributions from receivership property.

**Reporting.** A receiver must file periodic reports with the court overseeing the receivership, creating a public record of receivership accounts.

**Receivership in Context of Mortgage Enforcement.** Under UCRERA, a mortgage lender that requests appointment of a receiver is not liable as a possessor of receivership property and retains other remedies for enforcing the mortgage.

UCRERA provides a set of uniform rules that should provide more predictability to lenders and borrowers alike. It gives state courts guidance on the receivership process while preserving the court's flexibility to craft a remedy appropriate under the circumstances.

The work of the Drafting Committee is available at [www.uniformlaws.org](http://www.uniformlaws.org), the ULC web site. A direct link to the Uniform Commercial Real Estate Receivership Act is available [here](http://www.uniformlaws.org/shared/docs/appointment%20and%20powers%20of%20real%20estate%20receivers/UCRERA_Final%20Act_2015.pdf)

([http://www.uniformlaws.org/shared/docs/appointment%20and%20powers%20of%20real%20estate%20receivers/UCRERA\\_Final%20Act\\_2015.pdf](http://www.uniformlaws.org/shared/docs/appointment%20and%20powers%20of%20real%20estate%20receivers/UCRERA_Final%20Act_2015.pdf))

Respectfully Submitted,

Richard T. Cassidy, President  
National Conference of Commissioners  
on Uniform State Laws  
February 2016

**GENERAL INFORMATION FORM**

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Commercial Real Estate Receivership Act by the American Bar Association 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 2015 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?

No current ABA policies are affected.

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 Commercial Real Estate Receivership Act has not yet been enacted in any state.

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.

# 115C

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 notified of drafting meetings and provided with tentative drafts. The drafting committee's work can be found here (<http://www.uniformlaws.org/Committee.aspx?title=Commercial%20Real%20Estate%20Receivership%20Act>)

The ABA Advisor for the Uniform Commercial Real Estate Receivership Act was John Trott. Jeffrey Allen, James Schwartz, and Justin Williams were the Section Advisors for the ABA General Practice Section, and Kay Standridge Kress was the Section Advisor for the ABA Section on Business Law.

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

Liza Karsai, NCCUSL Executive Director  
111 N. Wabash Avenue, Suite 1010  
Chicago, Illinois 60602  
(312) 450-6604 (office)  
(678) 446-0305 (cell)  
[lkarsai@uniformlaws.org](mailto:lkarsai@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.)

Richard Cassidy, NCCUSL President  
Hoff Curtis, PC  
100 Main Street  
P.O. Box 1124  
Burlington, VT 05402  
(802) 864-6400 (office)  
(802) 238-2809 (cell)  
[rcassidy@uniformlaws.org](mailto:rcassidy@uniformlaws.org)



**EXECUTIVE SUMMARY**1. Summary of the Resolution

That the American Bar Association approves the Uniform Commercial Real Estate Receivership Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2015 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

The remedy of receivership is used to varying degrees in all states. Most commercial real estate loan contracts grant the lender the right to have a receiver appointed in case of default. However, the standard for appointment and the powers granted to receivers vary widely from state to state.

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

The act provides uniform standards for the appointment of receivers and gives courts needed guidance for granting powers to a receiver, while leaving enough flexibility for the court to design a remedy appropriate under the circumstances.

4. Summary of Minority Views

Some commercial lenders have expressed the view that lenders should have more power to control the court's actions. There is no known opposition within the ABA.



**AMERICAN BAR ASSOCIATION  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association approves the Uniform Home
- 2 Foreclosure Procedures Act, promulgated by the National Conference of Commissioners
- 3 on Uniform State Laws, as an appropriate Act for those states desiring to adopt the
- 4 specific substantive law suggested therein.



**REPORT****THE UNIFORM HOME FORECLOSURE PROCEDURES ACT***Summary*

The surge in foreclosure activity from 2007 through 2011 revealed major flaws in the current system. The bundling of individual mortgages into investment vehicles, sometimes without a clear paper trail of transactions, led to disputes over who had the legal right to foreclose on a property. Borrowers who fell behind on payments sometimes found themselves forced to deal with loan servicers that had no authority or incentive to negotiate a settlement. State court systems were overwhelmed with foreclosure cases, resulting in lengthy and expensive delays. The Uniform Home Foreclosure Procedures Act (UHFPA) provides an improved set of procedures designed to resolve residential foreclosure actions quickly, efficiently, and fairly to all concerned. Commercial real estate foreclosures are not affected by this act.

Article 1 contains definitions and general provisions. Through its definition of “mortgaged property,” UHFPA applies only to single-family homes and condominiums. All parties are required to act in good faith. Creditors and their servicers must refrain from making any misrepresentations about a homeowner’s rights. Municipalities may not enact local regulations that would conflict with the act, and any provision in a mortgage contract that purports to waive the borrower’s rights under this act is void.

Article 2 provides rules to ensure homeowners receive adequate notice of default before a creditor starts foreclosure proceedings. The notice must also disclose the homeowner’s right to cure the default.

Article 3 creates an innovative foreclosure resolution process where a neutral party attempts to help the parties negotiate a resolution agreeable to all. Homeowners facing foreclosure must be informed of their right to participate and provided with a list of local agencies or legal aid offices that provide counseling services. If the homeowner is occupying the property being foreclosed and makes a timely request for a meeting, the creditor is required to participate, but not necessarily to offer concessions.

Article 4 provides rules for the foreclosure process that help ensure fairness and a commercially reasonable sale. Section 403 provides the requirements for a creditor to foreclose when the document evidencing the obligation was lost or destroyed.

Article 5 provides for a negotiated resolution between the parties to a foreclosure action. Sometimes called “cash for keys,” this process allows the parties to agree on terms for the homeowner to vacate the property and turn over possession to the creditor without proceeding to a foreclosure sale.

# 115D

Article 6 provides an expedited foreclosure procedure for abandoned properties, to help preserve maximum value for the property being foreclosed and its neighbors.

Article 7 provides remedies for violations of the UHFPA, and Article 8 includes miscellaneous provisions on applicability and relation to other laws.

The recent foreclosure crisis was worse than necessary due to outdated legal procedures that extended the process for many foreclosure actions, allowing homes to physically deteriorate and lose even more in value. Clear foreclosure and pre-foreclosure procedures benefit everyone by reducing unnecessary litigation and allowing quick and efficient resolution.

UHFPA is appropriate for enactment in all states, whether a judicial or nonjudicial foreclosure process is used.

The work of the Drafting Committee is available at [www.uniformlaws.org](http://www.uniformlaws.org), the ULC web site. A direct link to the Uniform Home Foreclosure Procedures Act is available [here](http://www.uniformlaws.org/shared/docs/Residential%20Real%20Estate%20Mortgage%20Foreclosure%20Process%20and%20Protections/UHFPA_Final%20Act.pdf) ([http://www.uniformlaws.org/shared/docs/Residential%20Real%20Estate%20Mortgage%20Foreclosure%20Process%20and%20Protections/UHFPA\\_Final%20Act.pdf](http://www.uniformlaws.org/shared/docs/Residential%20Real%20Estate%20Mortgage%20Foreclosure%20Process%20and%20Protections/UHFPA_Final%20Act.pdf))

Respectfully Submitted,

Richard T. Cassidy, President  
National Conference of Commissioners  
on Uniform State Laws  
February 2016

**GENERAL INFORMATION FORM**

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Home Foreclosure Procedures Act by the American Bar Association 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 2015 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?

This resolution complements existing ABA policies on Housing Courts and on Housing and Community Economic Development Initiatives.

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 Home Foreclosure Procedures Act has not yet been enacted in any state.

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.

# 115D

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 notified of drafting meetings and provided with tentative drafts. The drafting committee's work can be found here (<http://www.uniformlaws.org/Committee.aspx?title=Home%20Foreclosure%20Procedures%20Act>)

The ABA Advisor for the Uniform Home Foreclosure Procedures Act was Barry Nekritz. Neil Rubenstein was the Section Advisor for the ABA Section of Business Law, and David Campbell was the Section Advisor for the ABA Section of Real Property, Trust and Estate Law.

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

Liza Karsai, NCCUSL Executive Director  
111 N. Wabash Avenue, Suite 1010  
Chicago, Illinois 60602  
(312) 450-6604 (office)  
(678) 446-0305 (cell)  
[lkarsai@uniformlaws.org](mailto:lkarsai@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.)

Richard Cassidy, NCCUSL President  
Hoff Curtis, PC  
100 Main Street  
P.O. Box 1124  
Burlington, VT 05402  
(802) 864-6400 (office)  
(802) 238-2809 (cell)  
[rcassidy@uniformlaws.org](mailto:rcassidy@uniformlaws.org)



## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

That the American Bar Association approves the Uniform Home Foreclosure Procedures Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2015 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

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

The recent housing downturn in the United States revealed flaws in the current foreclosure system. Widespread securitization of mortgage loans confused the issue of which party was entitled to enforce the mortgage. Courts were overwhelmed with cases resulting in lengthy delays, during which time some properties were abandoned and fell into disrepair, further eroding neighborhood property values.

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

The Uniform Home Foreclosure Procedures Act provides a sound set of rules for the foreclosure process. It protects creditors and homeowners from unethical abuse and encourages pre-foreclosure resolution when feasible. It also provides an expedited foreclosure process for abandoned property. The act is appropriate for both judicial and non-judicial foreclosure states.

### 4. Summary of Minority Views

The Uniform Home Foreclosure Procedure Act is based on sound public policy and aims to treat both lenders and homeowners with utmost fairness. As a result, some advocates from both groups would have preferred different policy choices and were dissatisfied with the final result. There is no known opposition within the American Bar Association.



**AMERICAN BAR ASSOCIATION  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association approves the Uniform Recognition and
- 2 Enforcement of Canadian Domestic-Violence Protection Orders Act, promulgated by the
- 3 National Conference of Commissioners on Uniform State Laws, as an appropriate Act for
- 4 those states desiring to adopt the specific substantive law suggested therein.



## **REPORT**

### **UNIFORM RECOGNITION AND ENFORCEMENT OF CANADIAN DOMESTIC-VIOLENCE PROTECTION ORDERS ACT**

#### *Summary*

The Uniform Recognition and Enforcement of Canadian Domestic-Violence Protection Orders Act provides for the enforcement of domestic violence protection orders issued by Canadian courts. Reflecting the friendship between the United States and Canada, citizens move freely between the two countries, freedom that in certain limited circumstances can work against victims of domestic violence. Many states enacted legislation recognizing the domestic violence orders of sister states, and in 2002, the Uniform Law Commission (ULC) approved the Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act (UIEDVPOA), encouraging states to recognize and enforce the domestic violence orders of other states. In 2011, the Uniform Law Conference of Canada (ULCC) approved the Uniform Enforcement of Canadian Judgments and Decrees Act (UECJDA), which provides for the recognition of foreign protection orders – including those of the United States – unless the foreign state of origin has been expressly excluded from the provisions of the act. By this act, enacting states accord similar recognition to protection orders from Canada.

This act draws from the UIEDVPOA and the UECJDA in its recognition and enforcement of Canadian domestic violence protection orders. The two Acts are similar in several important respects. Both recognize domestic violence protection orders without requiring that the party seeking enforcement register the foreign order. Likewise, both provide that a law enforcement agency or court respect a facially valid order until successfully challenged after the request for emergency action has passed.

The UIEDVPOA and UECJDA differ in other respects, with the UECJDA providing more narrow recognition and enforcement of protection orders from other countries than the UIEDVPOA provides for orders from sister states. The UIEDVPOA recognizes all parts of the sister state protection order, including parts of the order relating to custody and visitation. This act, like the UECJDA, pursues the narrower goal of addressing the emergency of threatened violence by recognizing and enforcing only the parts of the Canadian domestic violence protection order requiring no contact directly or indirectly with a protected individual. Other Acts and conventions deal with issues of custody between countries.

This act follows the UECJDA and its more limited approach on other issues. Because of the limits on enforcing the criminal orders of another country, this act enforces only Canadian civil domestic violence orders. While the UIEDVPOA's definition of protection orders includes certain criminal orders, such as anti-stalking orders, other sections of the UIEDVPOA recognize the problems inherent in enforcing the criminal law of a sister state. The international setting only multiplies the issues; therefore, the act recognizes and enforces only Canadian civil domestic violence protection orders.

# 115E

The act also limits recognition of Canadian domestic violence protection orders to those orders that issue from courts. The UIEDVPOA recognizes protection orders issued not just by courts, but also by tribunals, including an “agency...or other entity authorized by law to issue or modify a protection order.” Following the lead of the UECJDA, this act provides for narrower recognition, limiting the recognition of Canadian domestic violence protection orders to civil orders issued by Canadian courts.

The act defines protection orders more broadly than the UIEDVPOA only in one way. The UIEDVPOA limits recognition to orders “issued... under the domestic-violence [or] family-violence, or anti-stalking laws” of the state that issued the order. In this way, the act excludes orders that issue under more general statutes. The UECJDA has no such limitation, providing for the recognition of foreign protection orders “made by a court of a foreign state.” The Canadian drafters concluded that specifying the type of statute authorizing the order was unnecessary in light of other limitations. Since this act recognizes and enforces only direct or indirect no-contact provisions in a civil order, further specificity seemed unnecessary and unwise. In light of the emergency setting in which enforcement questions arise, this complicated determination of Canadian statutory authority could defeat the purpose of the act.

The act also provides uniform procedures for the cross-border enforcement of Canadian domestic violence protection orders. The act envisions that the enforcement of Canadian domestic violence protection orders will require law enforcement officers of enforcing states to rely on probable cause judgments that a valid order exists and has been violated. The act, however, provides that if a protected individual can provide direct proof of the existence of a facially valid order, for example, by presenting a paper copy or accessing an electronic registry, the copy or registry conclusively establishes probable cause. If there is no such proof, the act nevertheless requires enforcement if officers, relying on the totality of the circumstances, determine that there is probable cause to believe that a valid protection order exists and has been violated. The individual against whom the order is enforced will have sufficient opportunity to demonstrate that the order is invalid if and when the case is brought before the enforcing tribunal. Law enforcement officers, as well as other government agents, will be encouraged to rely on probable cause judgments by the act’s inclusion of an immunity provision, protecting agents of the government acting in good faith.

The act does not require individuals seeking enforcement of a protection order to register or file the order with the enforcing state. It does, however, include an optional registration process. This process permits individuals to register a Canadian domestic violence protection order by presenting a copy of the order to a responsible state agency or any state officer or agency. The issuing Canadian court must certify the copy presented for registration. The purpose of these procedures is to make it as easy as possible for the protected individual to register the protection order and facilitate its enforcement.

The work of the Drafting Committee is available at [www.uniformlaws.org](http://www.uniformlaws.org), the website of the Conference. A direct link to the Uniform Recognition and Enforcement of Canadian

Domestic-Violence Protection Orders Act is available [here](http://www.uniformlaws.org/shared/docs/Recognition%20and%20Enforcement%20of%20Canadian%20Domestic%20Violence%20Protection%20Orders/URECDVPOA_Final%20Act.pdf)  
([http://www.uniformlaws.org/shared/docs/Recognition%20and%20Enforcement%20of%20Canadian%20Domestic%20Violence%20Protection%20Orders/URECDVPOA\\_Final%20Act.pdf](http://www.uniformlaws.org/shared/docs/Recognition%20and%20Enforcement%20of%20Canadian%20Domestic%20Violence%20Protection%20Orders/URECDVPOA_Final%20Act.pdf))

Respectfully submitted,

Richard T. Cassidy, President  
National Conference of Commissioners  
On Uniform State Laws  
February 2016

## GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Recognition and Enforcement of Canadian Domestic-Violence Protection Orders 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 2015 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?

This resolution complements existing ABA policies on domestic violence, full faith and credit, and the ABA Policy approving the Uniform Interstate Enforcement of Domestic Violence-Protection Orders Act (03M113E).

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 and Enforcement of Canadian Domestic-Violence Protection Orders Act has not yet been enacted in any state legislature.

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 [here](http://www.uniformlaws.org/Committee.aspx?title=Recognition%20and%20Enforcement%20of%20Canadian%20Domestic-Violence%20Protection%20Orders) (<http://www.uniformlaws.org/Committee.aspx?title=Recognition%20and%20Enforcement%20of%20Canadian%20Domestic-Violence%20Protection%20Orders>).

The ABA Advisor for the Uniform Recognition and Enforcement of Canadian Domestic Violence Protection Orders Act was Melissa A. Kucinski. Allen M. Bailey was the Section Advisor for the ABA Family Law Section.

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

Liza Karsai, NCCUSL Executive Director  
111 North Wabash Ave., Suite 1010  
Chicago, IL 60602  
(312) 450-6604 (office)  
(678) 446-0305 (cell)  
[lkarsai@uniformlaws.org](mailto:lkarsai@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.)

Richard T. Cassidy, NCCUSL President  
Hoff Curtis PC  
100 Main St.  
P.O. Box 1124  
Burlington, VT 05402  
(802) 864-6400 (office)  
(802) 238-2809 (cell)  
[rcassidy@uniformlaws.org](mailto:rcassidy@uniformlaws.org)

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

That the American Bar Association approves the Uniform Recognition and Enforcement of Canadian Domestic-Violence Protection Orders Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2015 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

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

The Uniform Recognition and Enforcement of Canadian Domestic-Violence Protection Orders Act provides for the enforcement of domestic violence protection orders issued by Canadian courts. Reflecting the friendship between the United States and Canada, citizens move freely between the two countries, freedom that in certain limited circumstances can work against victims of domestic violence. Canada has granted recognition to protection orders of the United States and other countries in the Uniform Enforcement of Canadian Judgments and Decrees Act. By this act, enacting states accord similar recognition to protection orders from Canada.

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

Approval of the Uniform Recognition and Enforcement of Canadian Domestic-Violence Protection Orders 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.

### 4. Summary of Minority Views

None known.

**AMERICAN BAR ASSOCIATION  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association approves the Uniform Trust Decanting
- 2 Act, promulgated by the National Conference of Commissioners on Uniform State Laws,
- 3 as an appropriate Act for those states desiring to adopt the specific substantive law
- 4 suggested therein.



REPORT**THE UNIFORM TRUST DECANTING ACT***Summary*

“Decanting” is the term used to describe the distribution of assets from one trust into a second trust, like wine is decanted from the bottle to another vessel. Decanting can be a useful strategy for changing the outdated terms of an otherwise irrevocable trust, but can also be abused to defeat the settlor’s intent. Because decanting is an exercise of the trustee’s discretion and does not require beneficiaries to consent, certain tax penalties that would otherwise apply can be avoided. Every state allows decanting in some form, but only some states have statutes governing decanting, and those vary widely.

The Uniform Trust Decanting Act includes one stricter set of rules that applies when the settlor gave the trustee limited discretion over distributions, and another more liberal set of rules that applies when the trustee has expanded discretion. In both cases, the person exercising the decanting power is subject to all applicable fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

When the trustee has limited discretion over distributions, decanting is permitted for administrative or tax purposes, but the beneficial interests under the second trust instrument must be substantially similar to the beneficial interests under the first trust. In other words, the trustee may not exercise the decanting power to reduce or eliminate the interest of any beneficiary. However, if the trustee already has expanded discretion to reduce or eliminate the interest of beneficiaries under the terms of the first trust, UTDA provides more flexibility.

One common reason for decanting is to provide for a beneficiary who becomes disabled after the settlor executed the first trust. If the settlor did not anticipate the possibility of disability, the beneficiary may be ineligible for governmental benefits that would otherwise be available. Section 13 of the UTDA gives additional flexibility to trustees in those cases.

The UTDA limits decanting when it would defeat a charitable or tax-related purpose of the settlor, and Section 14 provides for prior notice to the state official that is responsible for protecting charitable interests. Section 16 prohibits decanting for the purpose of adjusting trustee compensation without the unanimous consent of the beneficiaries or court approval.

In summary, the UTDA provides a more complete set of rules for decanting than currently exists in any state. It is appropriate for states that have adopted the uniform Trust Code and for states that have a non-uniform trust law statute.

# 115F

The work of the Drafting Committee is available at [www.uniformlaws.org](http://www.uniformlaws.org), the ULC web site. A direct link to the Uniform Trust Decanting Act is available [here](http://www.uniformlaws.org/shared/docs/trustdecanting/UTDA_Final%20Act.pdf) ([http://www.uniformlaws.org/shared/docs/trustdecanting/UTDA\\_Final%20Act.pdf](http://www.uniformlaws.org/shared/docs/trustdecanting/UTDA_Final%20Act.pdf))

Respectfully Submitted,

Richard Cassidy, President  
National Conference of Commissioners  
on Uniform State Laws  
February 2016

**GENERAL INFORMATION FORM**

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Trust Decanting Act by the American Bar Association 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 2015 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?

No current ABA policies are affected.

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 Trust Decanting Act has not yet been enacted in any state.

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.

# 115F

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 notified of drafting meetings and provided with tentative drafts. The drafting committee's work can be found here (<http://www.uniformlaws.org/Act.aspx?title=Trust%20Decanting>)

The ABA Advisor for the Uniform Trust Decanting Act was Amy Erinrich Heller.

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

Liza Karsai, NCCUSL Executive Director  
111 N. Wabash Avenue, Suite 1010  
Chicago, Illinois 60602  
(312) 450-6604 (office)  
(678) 446-0305 (cell)  
[lkarsai@uniformlaws.org](mailto:lkarsai@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.)

Richard Cassidy, NCCUSL President  
Hoff Curtis, PC  
100 Main Street  
P.O. Box 1124  
Burlington, VT 05402  
(802) 864-6400 (office)  
(802) 238-2809 (cell)  
[rcassidy@uniformlaws.org](mailto:rcassidy@uniformlaws.org)



## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

That the American Bar Association approves the Uniform Trust Decanting Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2015 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

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

Trust decanting occurs in every state, but only nineteen states have statutory law on decanting and those statutes vary widely. Trustees asked to take over a decanted trust face uncertain liability for a predecessor's decanting action. Decanting can cause uncertain tax consequences in the absence of clear rules. An unethical trustee can decant under current law to defeat the settlor's objective for the trust.

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

The act provides two sets of uniform rules on decanting trust assets – a stricter set for trustees with limited discretion and a broader set for trustees with expanded discretion. The act also provides legal certainty to successor trustees and prevents unintended adverse tax consequences. Finally, the act protects charitable interests to a greater degree than any existing state law.

### 4. Summary of Minority Views

None known.



**AMERICAN BAR ASSOCIATION**  
**COMMISSION ON WOMEN IN THE PROFESSION**  
**BUSINESS LAW SECTION**  
**COMMISSION ON DISABILITY RIGHTS**  
**COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY**  
**REPORT TO THE HOUSE OF DELEGATES**  
**RESOLUTION**

1 RESOLVED, That the American Bar Association urges public companies in the United States to  
2 diversify their boards to more closely reflect the diversity of society and the workforce in the  
3 United States.  
4

5 FURTHER RESOLVED, That the American Bar Association urges public companies in the  
6 United States to adopt plans, policies and practices to diversify their boards and to include board  
7 composition in public disclosure materials.  
8

9 FURTHER RESOLVED, That the American Bar Association urges governments, investors and  
10 other market players to call on public companies in the United States to voluntarily adopt plans,  
11 policies and practices for achieving diverse boards and to publicly disclose such plans, policies  
12 and practices.



## REPORT

### **I. Introduction and Overview**

The Commission on Women in the Profession, its co-sponsors and supporters ask the House of Delegates to adopt this Resolution, which (a) urges public companies in the United States to diversify their boards; (b) urges public companies to adopt plans, policies and practices to diversify their boards and include information on board composition in public disclosure materials; and (c) urges state, federal and territorial governments to encourage public companies to adopt board diversity plans and policies. This Resolution does not ask federal, state, or territorial governments to enact regulations or legislation in support of diversity; nor does it seek to impose quotas on board composition. Instead, this Resolution requests that the ABA support the encouragement of voluntary compliance by companies in an effort to create diverse boards that more closely reflect the population and workforce of the United States. Diversity refers to individuals with a wide range of characteristics and experiences, including gender, race, ethnicity, age, sexual orientation, gender identity, and disability.

The ABA is committed to the elimination of bias and the enhancement of diversity in its own organization and in the legal profession and justice system. This commitment is not only recognized in prior resolutions passed by the House of Delegates, but also by the adoption of Goal III, which promotes full and equal participation in the association, the legal profession and the judicial system. There are eight diversity entities within the ABA charged with advancing Goal III: the Commission on Women in the Profession, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, the Commission on Disability Rights, the Center for Racial and Ethnic Diversity, the Coalition on Racial and Ethnic Justice, the Council for Racial and Ethnic Diversity in the Educational Pipeline, and the Commission on Hispanic Legal Rights and Responsibilities.

There is a worldwide movement to enhance diversity on corporate boards, but not necessarily a consensus on how best to achieve that goal. Some countries have enacted legislation that imposes quotas, others have enacted regulations. Other countries, like the United States, seek voluntary compliance, encouraging companies to develop their own policies and procedures for the best way to diversify their individual company board.

The ABA has been instrumental in providing a pipeline of women lawyers to serve on public and private company boards. This has assisted companies in efforts to identify diverse board candidates. Through the ABA initiative DirectWomen, the ABA has also been a leader in the effort to promote greater diversity on boards. Adoption of this Resolution would allow the ABA and its members to continue to provide broad based support for diverse boards and is closely aligned with other ABA policies supporting equal treatment and opportunity for all persons to advance and succeed.

## II. The ABA Has Been A Pioneer In the Effort to Increase the Representation of Women Lawyers on Corporate Boards

The ABA has been formally supporting the increase of women on corporate boards since 2007. In 2007, the DirectWomen Initiative was founded as a project of the Business Law Section of the American Bar Association. The mission of DirectWomen was then and remains today to increase the representation of women lawyers on corporate boards. DirectWomen identifies leading women lawyers from around the country who are able to provide the experience, independence, business judgment and diversity required for board effectiveness and good corporate governance. Each year, DirectWomen sponsors the DirectWomen Board Institute, a two day program for current and future directors. As of 2015, 146 women lawyers, many of whom are ABA members and leaders, have attended the Board Institutes. Indeed, 22% of the Alumnae of DirectWomen now sit on the boards of large public and private companies.

DirectWomen also holds seminars and other programs that provide information on the benefits of board diversity. Annually, DirectWomen also awards the Sandra Day O'Connor Board Excellence Award to women lawyers who have served with distinction as independent directors of public companies and have worked to advance the value of diversity in board positions. A selection committee chooses highly accomplished women lawyers who epitomize the spirit of DirectWomen and honors them and the companies on whose boards they serve for their achievements and commitment to promoting board diversity.

In addition to the general value of diverse boards, a recent study confirmed that inclusion of lawyers as directors on a corporate board contributes to increased value and a better informed perspective on litigation and regulatory risks.<sup>1</sup> There are other significant benefits to diverse boards which are set out more fully below. DirectWomen has grown to the point where it now operates independently of the ABA. However, the ABA Commission on Women in the Profession remains one of its key strategic partners, and ABA members continue to be a source of candidates for the Board Institute.

## III. The ABA's Efforts Supporting Equal Pay For Women Will Be Enhanced By Supporting Board Diversity

Increasing the number of women on corporate boards is in furtherance of the ABA's policy supporting equal pay for women, as evidenced by the passage of a resolution in 2010 (No. 107), supporting the enactment of the Equal Pay Act. A 2012 Study showed that having a greater number of women on Board compensation committees reduced the inequality in salaries paid to senior women executives, including the general counsel, as compared to their male counterparts.<sup>2</sup> A Catalyst study has shown that increasing the representation of women on corporate boards is associated with an increase in expanded executive opportunities for women.<sup>3</sup> Supporting this Resolution and urging public companies to promote more board diversity is directly aligned with the ABA's goal of supporting equal pay.

<sup>1</sup> Litor, Lubomire; Sepe, Simone and Whitehead, Charles, *Lawyers and Fools: Directors in Public Corporations*, Georgetown Law Journal Vol. 102 (2014).

<sup>2</sup> Shin, Taekjin; *The Gender Gap in Executive Compensation: The Role of Female Directors and Chief Executive Officers* (2011).

<sup>3</sup> Catalyst, *First Steps: Gender Diversity at the Top Pays Off From the Board Room to the C-Suite* (2013).

#### IV. The Statistics Show That Public Company Boards In the United States Are Not Diverse

The Securities and Exchange Commission (“SEC”) rules require public companies to disclose on proxy statements: (1) whether diversity is a factor in considering candidates for nomination to the board; (2) how diversity is considered in that process; and (3) how the company assesses the effectiveness of its policy for considering diversity. There is, however, no definition of “diversity” in the rule or guidelines for the type of information to be provided. This has resulted in disparate reporting results.

Despite the fact that there is no consensus on how to achieve board diversity, it is clear that board diversity is the focus of an ever-increasing amount of attention in the business and legal communities. It is now widely acknowledged that board diversity is not only a matter of good corporate governance, it is also a business imperative. There is a plethora of consultants, academics and non-profits providing research and commentary on this issue. News outlets are reporting on diversity efforts nationally and across the globe on a weekly and sometimes daily basis. Former and current officers and directors of public companies are speaking out to aid the effort of creating board diversity in the United States. The focus of the dialogue is on women and race. There is minimal or no data on board seats for LGBT and people with disabilities.

##### A. The Statistics

It is no secret that corporate boardrooms do not reflect the diversity of the population of the United States. The 2013 Census of the United States population shows a breakdown by gender of 50.8% women and 49.2% men. Breaking down the population by race shows:

- 77% White
- 17.1% Hispanic
- 13.2% African American
- 5.3% Asian
- 0.2% native Hawaiian and other Pacific Islander; and
- 2.4% who identify as two or more races.<sup>4</sup>

The 2013 Census also shows that 12.6 percent of the population reported having a disability.<sup>5</sup> Yet, a 2012 study by the Alliance for Board Diversity that looked at board seats of Fortune 500 Companies by gender and race showed that 73.3% of those board seats were held by white men and 13.4% of those board seats were held by white women.<sup>6</sup> In contrast, men of color accounted

<sup>4</sup> United States Census Bureau: <http://quickfacts.census.gov/qfd/states/0000.html>.

<sup>5</sup> [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_12\\_1YR\\_S1810&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_S1810&prodType=table)

<sup>6</sup> There are minimal to no statistics on diversity of corporate board composition other than for race and gender, such as sexual orientation, gender identity, and disability. However, on February 19, 2015 the California State Treasurer renewed his call for more diversity in corporate boardrooms and at the same time called for broadening the definition of diversity to include sexual orientation and gender identity. By the time this Report gets to the House at the Annual meeting, we suspect that there will be more support for this expanded definition, which comports with the American Bar Association definition of diversity and inclusion. See, [www.treasurer.ca.gov/news/releases/2015/20150219.asp](http://www.treasurer.ca.gov/news/releases/2015/20150219.asp)

for only 10.0% of the board seats and women of color held just 3.3% of the board seats of Fortune 500 companies. Of the 13.3% of board seats held by people of color, this study showed that African Americans held 7.4% of the board seats, Hispanics held 3.3%, and Asian Pacific islanders held 2.6%.<sup>7</sup>

Significantly, more research and data have been compiled regarding the number of women on corporate boards. A 2014 survey on the percentage of women serving on corporate boards of Fortune 1000 companies reports that the percentage of women (not distinguished by race) on these boards in 2014 was 17.7% compared to 16.6% for the same demographic in 2013.<sup>8</sup> The percentage of women on the boards of the S&P 500 companies remained flat for the last two years at 19.2 %.<sup>9</sup> Although the numbers are slowly rising, the change is not significant. The story for women of color is even worse. In 2014, women of color made up 2.8% of board seats in Fortune 500 companies.<sup>10</sup> As previously noted, this is down from 3.3% in 2012.

The InterOrganization Network's (ION) analysis of the 2013 proxy season, which includes data from almost 2800 companies in the U.S., "continues to show that with few notable exceptions, smaller companies generally lag behind their larger counterparts in electing women to boards. . . only 12.2 percent of board members in the companies included in this analysis were women."<sup>11</sup>

Unfortunately, there is still little data currently available that indicated the percentage of LGBT board members. However, studies are underway and the importance of LGBT diversity both in the workplace and on corporate boards has been examined and documented.

As previously noted, these statistics show that the make-up of corporate boards in the United States does not reflect the gender balance and diversity of the society and work force of the United States. This is so despite research that documents that diverse boards are important to corporate operations.

## B. The Importance of Diverse Corporate Boards

Plain and simple, diverse boards are good for business. Research shows that public companies with boards that are gender diverse and reflective of the diversity in the United States population have better decision making processes and overall stronger organizational health.

A Catalyst Study has determined that having more women on boards is a predictor for having more women in the C-Suite and in positions of leadership 5 years after board appointment, helping to solve the deficit of women in executive ranks.<sup>12</sup>

<sup>7</sup> *Missing Pieces: Women and Minorities on Fortune 500 Boards*, 2012 Alliance for Board Diversity Census, August 15, 2013, <http://www.theabd.org>. For related research See also, *Examining Cracks in the Ceiling: A Survey of Corporate Diversity Practices of the S&P 100*, Calvert Investments (March 2013), <http://www.Calvert.com/nrc/literature/documents/BR10063.pdf>; and Diversity, Inc. *Where's the Diversity in Fortune 500 CEO's*, <http://diversityinc.com/facts/wheres-the-diversity-in-fortune-500-ceos/>.

<sup>8</sup> Women on Boards 20/20 *Gender Diversity Index of Fortune 1000 Companies for 2014*.

<sup>9</sup> Catalyst, *Increasing Gender Diversity on Boards: Current Index of Formal Approaches* (2014).

<sup>10</sup> *Id.*

<sup>11</sup> Summary of Survey found in the Thirty Percent Coalition letter to Russell 1000 members October 24, 2014.

<sup>12</sup> <http://catalyst.org/knowledge/first-step-gender-diversity-top-pays-boardroom-c-suite>



A McKinsey and Company study entitled “Women Matter” showed that corporations in which women are most greatly represented on boards of directors, or in other senior management positions, are also the corporations that perform the best. In addition, this same study showed that corporations that have 3 or more women serving in senior management positions score more highly, on average, on the organizational performance profile than corporations with no women serving in senior management positions.<sup>13</sup>

A Catalyst report entitled “Corporate Performance and Women’s Representation on Boards” found that gender diversity on corporate boards contributes to more effective corporate governance and to positive governance outcomes through a variety of board processes, as well as through individual interactions. Women directors contribute to important corporate-level outcomes because they play direct roles as leaders and mentors, as well as indirect roles as symbols of opportunity for other women, and inspire those women to achieve and stay with their corporations.

A Catalyst Study entitled “Why Diversity Matters” discussed how Firms that implemented LGBT-friendly policies experienced increases in firm value, productivity, and profitability. Firms that discontinued gay-friendly policies found they experienced decreases in the same performance measures. This was especially true of larger firms needing employees with technical expertise, as gay-friendly policies likely have a greater impact on attracting or alienating that more limited prospective hiring pool than the hiring pool for lower skilled jobs.<sup>14</sup>

Deborah Rhode and Amanda Packel from Stanford University performed an analysis of significant amounts of research supporting the case for racial, ethnic and gender diversity on corporate boards. The article on their findings concludes that all diversity, not just gender diversity, can improve decision making and enhance a corporation’s public image by conveying commitment to equal opportunity and inclusion.<sup>15</sup> All of these findings align with the American Bar Association’s commitment to diversity and inclusion.<sup>16</sup>

---

<sup>13</sup> McKinsey, *Women Matter: Making the Breakthrough*. (2012)

<sup>14</sup> [http://www.catalyst.org/system/files/why\\_diversity\\_matters\\_catalyst\\_0.pdf](http://www.catalyst.org/system/files/why_diversity_matters_catalyst_0.pdf); *Why Diversity Matters*

<sup>15</sup> Deborah Rhode and Amanda Packel, *Diversity on Corporate Boards: How Much Difference does Difference Make?* 39 Delaware Journal of Corporate Law, 377 (2014).

<sup>16</sup> Some studies also conclude that diverse boards have an impact on financial performance. See, e.g., <http://catalyst.org/knowledge/first-step-gender-diversity-top-pays-boardroom-c-suite>; *Is There a Payoff from Top-Team Diversity: Between 2008 and 2010, Companies with More Diverse Top Teams Were also Top Financial Performers*, Thomas Barta, Markus Kleiner and Tilo Neumann, McKinsey Quarterly (April 2012), [http://mckinsey.com/insights/organization/is\\_there\\_a\\_payoff\\_from\\_top\\_team\\_diversity](http://mckinsey.com/insights/organization/is_there_a_payoff_from_top_team_diversity); Board Diversification Strategy: Realizing Competitive Advantage and Shareowner Value (February 18, 2009); See, Credit Suisse, “The GS Gender 3000: Women in Senior Management” September 2014; See, Credit Suisse, Gender Diversity and Corporate Performance August 2012; Nancy M. Carter and Harvey M. Wanger, *The Bottom Line: Corporate Performance and Women’s Representation on Boards* (2004-2008) (Catalyst 2011); See, e.g., Andre Chanavat and Katherine Ramsden, *Mining the Metrics of Board Diversity* (Thompson Reuters 2013); *Women in the boardroom: a global perspective* (Deloitte 2013); No More Excuses: The case for bold action to move women onto boards and into senior executive roles (Ernst & Young 2014).

## V. Why The ABA Should Encourage Public Companies To Adopt Plans, Policies And Practices To Diversify Their Boards And Include Information On Board Composition In Public Disclosure Materials

### A. There is Overwhelming Support For Diversity But The Statistics Referenced Above Show that the Majority of Companies are Not Creating Diverse Boards

In addition to encouraging companies to diversify their boards, this Resolution also urges the American Bar Association to encourage companies to enact policies and practices to diversify boards; and to include that information on board composition in public disclosure materials. Although there is significant support for the idea of board diversity, that support is not yet reflected in board composition. Research (and actions taken by companies that have diverse boards) shows that having policies and procedures in place and complying with those policies helps achieve the diversity goal. As a result, this Resolution encourages companies to adopt policies and procedures that can help in creating a diverse board.

As noted earlier, the American Bar Association has been at the forefront of the efforts to place more women on corporate boards with the founding of DirectWomen in 2007. Thus, the ABA has been an active voice in the promotion of diversity on corporate boards. The adoption of this Resolution will amplify that voice.

### B. Directors and Officers Favor Plans To Diversify Corporate Boards

A 2014 PWC study found that 57% of Directors on Fortune 500 Boards indicate that their boards are talking about recruiting new members with diverse backgrounds.<sup>17</sup> In a 2012 survey of U.S. corporate board members by Spencer Stuart, three-quarters of the respondents indicated that their company had taken steps to support and promote board diversity.<sup>18</sup> The Thirty Percent Coalition, a national organization of senior business executives, national women's organizations, institutional investors, corporate governance experts and board members working for increased board diversity, has a commitment from a cross section of corporate partners working together to increase board diversity. In addition The Thirty Percent Coalition has established a group of "Corporate Champions" comprised of former CEOs of U.S. companies and current members of corporate boards who are working with the Coalition to advocate for diversity on boards.<sup>19</sup>

---

<sup>17</sup> *Governance trends shaping the board of the future: Board performance and diversity* (PWC's 2014 Annual Corporate Director's Survey), p. 10.

<sup>18</sup> Catalyst: *Increasing Gender Diversity on Boards: Current Index of Formal Approaches*. New York: Catalyst, August 2014, citing Spencer Stuart and Corporate Board Member, *2012 Boardroom Diversity Survey: Summary Report* (2012); *Corporate Boards Taking Steps to Promote Diversity*, Spencer Stuart Press Release, July 2012.

<sup>19</sup> Founding members of the "Champions of Change" were: Aida Alvarex, nominating and governance committee member of Walmart; Doug Conant, former CEO of Campbell Soup, Chairman of Avon; Rosemarie Greco, former CEO Corestates Bank; Robert Igram, former CEO and Chairman of Glaxo Wellcome; William McCracken, former CEO and Chairman of CA Technologies, Pat Mitchell President and CEO, The Paley Center for Media; and James Turley, former chairman and CEO of Ernst and Young. Each of these members also serve on public company boards and their membership may be viewed at <http://thirtypercent.org/news>.

### C. Institutional Investors Favor Plans to Diversify Boards

Institutional Investors are also encouraging companies in their portfolios to address diversity in the boardroom. For the last three years, Institutional Investors representing more than \$3 trillion in assets under management along with some of the nation's leading women's organizations have sent letters to select companies in the Russell 1000 index urging them to embrace diversity on their corporate boards. Ninety-Six entities including State Treasurer's Offices, pension funds, mutual funds and investment managers, foundations, religious institutions and women's organizations signed the 2014 letters.<sup>20</sup>

New York State Comptroller Thomas P. diNapoli, who signed the Institutional Investor letter said: "The ability to draw on a wide range of viewpoints, background, skills and experience is vital to be competitive in the global markets... We are urging companies in our portfolio to increase board diversity, including gender diversity, as a means of increasing financial performance and generating long-term value for shareholders." CalSTRS Corporate Governance Director Anne Sheehan further supports these efforts and states, "[w]e believe that diversity of age, ethnicity, culture experience and education enrich the effectiveness and efficiency of boards."<sup>21</sup>

According to Catalyst, "[a]round the globe and across all avenues for change – from legislated quotas to an explosion of advocacy groups championing voluntary measure – efforts for calling for actions to increase board diversity are approaching a tipping point."<sup>22</sup> Many countries are significantly ahead of the United States in their efforts to diversity boards.<sup>23</sup> Granted, some of those countries have regulations or legislation requiring quotas which this Resolution does not advocate. However, the breadth of volunteer efforts at the national level and corporate interest pushing this agenda in the United States is significant.<sup>24</sup>

All of the organizations working to promote board diversity conclude that developing and executing on diversity policies will be the driver of change. A report prepared by Credit Suisse concluded that there are three main obstacles to achieving greater diversity on boards: cultural biases; work place related biases and structural policy issues. The study further found that policy (but not quotas) can significantly improve the diversity equation.<sup>25</sup> Social science research suggests that "requiring individuals to give reasons for particular actions improves decision making quality, reduces reliance on stereotypes and helps to level the playing field for underrepresented groups."<sup>26</sup> By passing this Resolution, the ABA will add its considerable influence to the growing call for corporations to voluntarily adopt policies and procedures that provide accountability for the creation of a diverse board.

<sup>20</sup> See, the content of the letter and the signatories at <http://www.30percentcoalition.org/outreach-efforts>.

<sup>21</sup> CalSTRS News Release October 22, 2014. Found on [www.30percentcoalition.org/news](http://www.30percentcoalition.org/news).

<sup>22</sup> Catalyst. *Increasing Gender Diversity on Boards: Current Index of Formal Approaches*. New York: Catalyst, August 2014.

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., work from the following advocacy groups: DirectWomen, ION, Thirty Percent Coalition, Women on Boards 20/20, Alliance for Board Diversity and Catalyst. This list is not inclusive and does not include local organizations working on the issue of board diversity at the state level.

<sup>25</sup> The CS Gender 3000: Women in Senior Management (Credit Suisse September 2014).

<sup>26</sup> Deborah Rhode and Amanda Packel, *Diversity on Corporate Boards: How Much Difference does Difference Make?* 39 Delaware Journal of Corporate Law, 377 (2014), p. 417 and n.264.

**VI. The American Bar Association Should Urge Federal, State and Territorial Governments to Encourage Public Companies in the United States to Voluntarily Adopt Plans, Policies and Practices for Achieving Diverse Boards, and to Publicly Disclose Those Plans, Policies and Practices**

As previously noted, on February 28, 2010, an SEC rule went into effect that requires publicly traded companies to disclose in their annual proxy and information statements how a corporate board or nominating committee considers diversity in identifying nominees for director. The rule requires public companies to disclose: (a) whether diversity is a factor in considering candidates for nominations for boards of directors; (b) how diversity is considered in that process; and (c) how the company assesses the effectiveness of its policy for considering diversity.<sup>27</sup> The rule does not define “diversity” or require a commitment to diversity from the companies. It only requires companies to disclose if they have a policy regarding board diversity. In public presentations shortly after the adoption of the rule, SEC Commissioner Luis Aguilar stated that “unfortunately while some companies provided useful information in the spirit of the SEC rule, many other companies provided only abstract disclosure – often times limiting their disclosure to a brief statement indicating diversity was something considered as part of an informal policy.”<sup>28</sup> Again, the rule does not define diversity.

An analysis of the data provided by public companies during the first two years of the SEC reporting rule found that 98% of the companies claim to consider diversity in making board appointments; but that only 8% reported having a formal diversity policy.<sup>29</sup> According to the author of the study,

... when interpreting diversity the ‘dominant corporate discourse is experiential ... rather than identity-based. In other words, most frequently [companies] define diversity in reference to a director’s prior experience, or other generic factors, rather than his or her socio-demographic characteristics.’ The rule would be stronger if the SEC made clear that consideration of diversity constitutes a policy triggering additional disclosure requirements, and if the Commission defined diversity to include race, gender, and other demographic characteristics.<sup>30</sup>

The study concludes (and Commissioner Aguilar concedes in a 2013 speech) that “identify related characteristics were what commentators on the rule wanted to see disclosed.”<sup>31</sup>

Three years after the enactment of the disclosure rule, the information disclosed by companies has not substantially improved. A recent study has shown that although over half of the S&P 100 companies disclose some level of diversity data, there is a lack of specific disclosure of the statistics regarding each board nominee’s gender, race, ethnicity, skills,

<sup>27</sup> See, Speech by SEC Commissioner Luis Aguilar, November 4, 2010: *Board Diversity: Why it Matters and How to Improve It*.

<sup>28</sup> *Id.*

<sup>29</sup> Deborah Rhode and Amanda Packel, *Diversity on Corporate Boards: How Much Difference does Difference Make?* 39 Delaware Journal of Corporate Law, 377 (2014), p. 419.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

experiences and attributes.<sup>32</sup> Commissioner Aguilar has stated that the collaborative actions of diversity advocates (which includes directors and officers of public companies) and shareholder resolutions urging companies to adopt charter language supporting board diversity has been instrumental in promoting real change.<sup>33</sup>

The voluntary approach to increasing diversity has been very successful in the UK. A Report released in October 2015 by the Women on Boards Davies Review Commission found that there are more women on FTSE 350 boards than ever before, with representation of women more than doubling since 2011 – now at 26.1% on FTSE 100 boards and 19.6% on FTSE 250 boards. The Davies Commission has also seen a dramatic reduction in the number of all-male boards. There were 152 in 2011. Today there are no all-male boards in the FTSE 100 and only 15 in the FTSE 250.<sup>34</sup> This private/public partnership; i.e. the urging by the Davies Commission to increase the number of women on boards has proven instrumental in increasing the number of women on boards in the UK. If the ABA passes this Resolution, the ABA can formally be a voice in the public/private partnership to move the needle on board diversity in the United States.

Recently, Representative Donald Beyer introduced H. Res. 445 “Expressing the sense of the House of Representatives that corporations should commit to utilizing the benefits of gender diversity in boards of directors and other senior management positions.” Just as the ABA support of the Equal Pay Act allowed the ABA to publicly support congressional efforts toward equal pay, support of this Resolution would allow the ABA and its constituents to speak out on congressional board diversity efforts.

This Resolution simply calls for the ABA to urge state, federal and territorial governments to continue to call on corporations to voluntarily adopt policies, plans and procedures for achieving a diverse board, and to publicly disclose those plans, policies and procedures within the current reporting requirements outlined by the SEC or the states. As you can see from the research cited above, this was truly the intent of the SEC Reporting Rule.

Others are already encouraging the board diversity that this Resolution seeks. On March 31, 2015, nine large public pension funds asked the SEC to require companies to disclose more about their boards’ diversity. The group called upon the SEC to update existing rules by requiring companies to create a chart of each board nominee’s gender, race, ethnicity, skills, experiences and attributes.<sup>35</sup> The SEC is already calling for companies to take this action on a voluntary basis and the ABA voice in support should be part of this coordinated effort in effecting real change.

Indeed, recognizing that a bar association’s commitment to equal opportunities for everyone, regardless of race or gender, encompasses support for diverse boards, in July 2012, the

---

<sup>32</sup> March 21, 2013 U.S. Securities and Exchange Commissioner Luis Aguilar, Inclusion is a Strength: Corporate America and the SEC Should Reflect America; *See, also*, <http://www.pionline.com/article/20150331/ONLINE/150339963/sec-should-increase-board-diversity-disclosure-8212-public-pension-funds>.

<sup>33</sup> *Id.*

<sup>34</sup> Women on Boards Davies Review Five Year Survey: Improving Gender Balance of British Boards, October 2015.

<sup>35</sup> <http://www.pionline.com/article/20150331/ONLINE/150339963/sec-should-increase-board-diversity-disclosure-8212-public-pension-funds>.

Philadelphia Bar Association Board of Governors passed a resolution supporting efforts by the City of Philadelphia to encourage companies that do business with the city to increase the diversity of their boards. In addition, resolutions encouraging board diversity have been passed in California, Illinois and Massachusetts.

There are many resources available to assist companies in developing policies and procedures to help them create a diverse board. By way of example, the Thirty Percent Coalition offers “Nominating Committee Model Charter Language on Board Diversity.” Many organizations are preparing candidates to move into a board role and/or are assisting companies in identifying qualified diverse candidates. Lack of qualified board candidates cannot be used as a legitimate excuse for maintaining a non-diverse board. The list below, although not exhaustive, shows the depth of resources available to companies seeking to diversify their boards. *See, for example* (and in no particular order), DirectWomen ([www.directwomen.org](http://www.directwomen.org)); Catalyst ([www.Catalyst.org](http://www.Catalyst.org)); InterOrganization Network ([www.ionwomen.org](http://www.ionwomen.org)); The Boston Club ([www.thebostonclub.com](http://www.thebostonclub.com)); Diverse Director Datasource ([gmi3d.com](http://gmi3d.com)); Diversified Search ([Diversifiedsearch.com](http://Diversifiedsearch.com)); Diversity in Boardrooms ([diversityinboardrooms.com](http://diversityinboardrooms.com)); Stanford Women on Boards Initiative ([www.stanford.edu](http://www.stanford.edu)); The Leader’s edge/Leaders by design ([www.the-leaders-edge.com](http://www.the-leaders-edge.com)); Trewstart ([Trewstart.com](http://Trewstart.com)); Women business leaders of the US health care industry foundation (WBL.org); women corporate directors directory ([women.corporate.directors.com](http://women.corporate.directors.com)); women in the boardroom ([www.womenintheboardroom.com](http://www.womenintheboardroom.com)); Watermark Institute Board Access ([www.wearewatermark.org](http://www.wearewatermark.org)); Executive Leadership Counsel ([www.elcinfo.com](http://www.elcinfo.com)); Hispanic Association on Corporate Responsibility ([www.hacr.org](http://www.hacr.org)); New American Alliance ([www.naaonline.org](http://www.naaonline.org)); Out Leadership (<http://outleadership.com>); and Director Diversity Initiative ([www.ddi.law.unc.edu](http://www.ddi.law.unc.edu)).<sup>36</sup>

## VII. Conclusion

The expectation that businesses diversify their boards is the “new norm.”<sup>37</sup> As a thought leader, the American Bar Association is an important part of the coordinated actions among companies, investors, governmental bodies, advocates and regulators in changing the face of corporate boards in the United States. This is a change that is long overdue.

Respectfully submitted,

Michele Coleman Mayes, Chair  
February, 2016

<sup>36</sup> This list was compiled from a list on the web page of the Thirty Percent Coalition; a general internet search for relevant organizations and list in a footnote of Commissioner Aguilar’s March 21, 2013 speech referenced in footnote 30.

<sup>37</sup> Catalyst, *Increasing Gender Diversity on Boards: Current Index of Formal Approaches* (2014).

**GENERAL INFORMATION FORM**

Submitting Entity: Commission on Women in the Profession

Submitted By: Michele Coleman Mayes, Chair, Commission on Women in the Profession

1. Summary of Resolution(s).

Diversity of Public Company Boards

Requests that the ABA support a Resolution that urges public companies in the United States to diversify their Boards to more closely reflect the diversity of the population and workforce of the United States; encourages public companies to adopt plans, policies and practices to diversify their Boards and to include Board composition in public disclosure materials; and encourages governments, investors and other market players to express their support for public companies in the United States voluntarily adopting such plans, policies and practices and to publicly disclose those plans, policies and practices.

2. Approval by Submitting Entity.

This resolution has been approved by the Commission on Women in the Profession.

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 is committed to the elimination of bias and the enhancement of diversity in its own organization and in the legal profession and justice system. This commitment is not only recognized in prior Resolutions passed by the House of Delegates but also by the adoption of Goal III, which promotes full and equal participation in the association, the legal profession and the judicial system. There are four Goal III entities within the ABA: The Commission on Women in the Profession, The Center for Racial and Ethnic Diversity, The Commission on Sexual Orientation and Gender Identity, and The Commission on Disability Rights.

In August 2012, ABA President Laurel G. Bellows appointed a Task Force on Gender Equity to recommend solutions for eliminating gender bias in the legal profession, with a principal focus on the disparity in compensation between male and female partners.

Current ABA President Paulette Brown has created the Commission on Diversity and Inclusion 360 to formulate methods, policy, standards and practices to best advance diversity and inclusion over the next ten years. The Commission will review and analyze diversity and inclusion in the legal profession, the judicial system and the American Bar Association with a goal of developing sustainable action plans.

Endorsing a Resolution that supports encouraging greater diversity on corporate boards compliments all of the work and commitment the ABA has made to diversity.

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.

If the Resolution is adopted, the ABA would be able to lobby for voluntary compliance of greater board diversity; adding its voice to the various state and national Resolutions that have been adopted.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

Business Law Section, Commission on Disability Rights, Commission on Sexual Orientation and Gender Identity, Commission on Racial & Ethnic Diversity, Diversity and Inclusion 360 Commission, Section of International Law and DirectWomen



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

**Melissa Wood**

Director, Commission on Women in the Profession  
American Bar Association  
321 North Clark Street  
Chicago, IL 60654  
T: 312.988.5676  
M: 773.315.5399  
[Melissa.Wood@americanbar.org](mailto:Melissa.Wood@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.)

Michele Coleman Mayes, New York Public Library, 476 5<sup>th</sup> Avenue, Room 214,  
New York, NY 10018-2788. Phone – 212.642.0115. Cell Phone – 917.327.9859.  
E-mail- [michelemayes@nypl.org](mailto:michelemayes@nypl.org).

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

#### Diversity of Public Company Boards

Requests that the ABA support a Resolution that urges public companies in the United States to diversify their Boards to more closely reflect the diversity of the population and workforce of the United States; encourages public companies to adopt plans, policies and practices to diversify their Boards and to include Board composition in public disclosure materials; and encourages governments, investors and other market players to express their support for public companies in the United States voluntarily adopting such plans, policies and practices and to publicly disclose those plans, policies and practices. Contact: Melissa Wood, Phone: 312/988-5676, E-mail: [melissa.wood@americanbar.org](mailto:melissa.wood@americanbar.org).

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

There is a worldwide movement to enhance diversity on corporate boards, but not necessarily a consensus on how best to achieve that goal. Some countries have enacted legislation which imposes quotas, others have enacted regulations. Other countries seek voluntary compliance, encouraging companies to develop their own policies and procedures for the best way to diversify their individual company board.

The United States follows the voluntary compliance model. Securities and Exchange Commission ("SEC") rules require public companies to disclose on proxy statements: (1) whether diversity is a factor in considering candidates for nomination to the board; (2) how diversity is considered in that process; and (3) how the company assesses the effectiveness of its policy for considering diversity. But there is no definition of "diversity" in the rule or guidelines for the type of information to be provided. This has resulted in disparate reporting results. This Resolution does not seek to change that voluntary compliance and only seeks to add the support of the American Bar Association and its already public commitment to diversity and inclusion to the current voices encouraging companies to take a more rigorous approach to establishing and outlining their diversity efforts.

Despite the fact that there is no consensus on how to achieve board diversity, it is clear that board diversity is top of mind with thought leaders. There is a plethora of consultants, academics and non-profits providing research and commentary on this issue. News outlets are reporting on diversity efforts nationally and across the globe on a weekly and sometimes daily basis. Former and current officers and directors of public companies are speaking out to aid the effort of creating board diversity in the United States.

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

The Resolution encourages diversity on public company boards. If the ABA resolution passes, ABA will publically be able to support diversity on corporate boards.

4. Summary of Minority Views

The minority view supports allowing companies the opportunity to place directors on boards without outside influence. However, the Resolution does not set any required rules for board placements, it solely encourages creation of diverse boards. That encouragement already exists in many forms in the U.S. and throughout the world.



**AMERICAN BAR ASSOCIATION  
NATIONAL NATIVE AMERICAN BAR ASSOCIATION  
STATE BAR OF SOUTH DAKOTA**

**RESOLUTION**

1       RESOLVED, That the American Bar Association urges state, territorial, and tribal bar  
2       admission authorities to consider the impact on minority applicants in deciding  
3       whether to adopt the Uniform Bar Examination (“UBE”) in their jurisdiction, and to  
4       measure or otherwise track the performance of minority applicants on the UBE  
5       subsequent to its adoption;

6  
7       FURTHER RESOLVED, That the American Bar Association urges state, territorial,  
8       and tribal bar admission authorities to consider including subjects not included on the  
9       UBE, particularly Indian Law in each state and territory with sizable American Indian  
10      populations or trust land, when adopting the UBE in their jurisdiction.



## **REPORT**

### **Introduction**

The American Bar Association has long held that diversity of the legal profession is essential for the maintenance of our system of justice. Unfortunately, the pipeline to a diverse and inclusive legal profession is rife with barriers. One such prominent barrier is the bar exam. With the rise of the Uniform Bar Examination (UBE) across jurisdictions, it is essential that jurisdictions fully consider the effect of the UBE on minority and historically underserved candidates, as well as the effect on typically underserved and locally relevant legal topics.

### **I. Considering the Impact on Minority Students**

#### **A. Effect on Pipeline to the Legal Profession**

While racial and ethnic minorities make up approximately 36% of the U.S. population, they make up less than 12% of the practicing attorneys in this country. The racial divide is only widening. It will be impossible to achieve true diversity at the current rate of matriculation into the profession. The pipeline into the legal profession is “leaking” at all points, from pre-kindergarten to the bar exam. Fewer and fewer minority students are enrolling in college or university, matriculating, or enrolling in law school. While the number of minority students matriculating from law school continues to rise, their numbers remain very small in relationship to their increasing numbers in the overall population. In response to these dire rates, ABA President Paulette Brown has identified diversity and inclusion within the legal profession as one of her key focal areas, including specifically pipeline projects to address the barriers facing diverse students. The ABA’s Council for Racial and Ethnic Diversity in the Educational Pipeline is specifically tasked with working to increase the number of diverse students who are on track to becoming lawyers.

#### **B. The Minority Test-Gap: LSAT, MBE, and the UBE**

Studies show that a test score gap between minority (especially Black students) and majority students begins as early as the fourth grade. This gap unfortunately continues throughout the student’s career. The LSAT is often used as predictor of success in law school. Racial minorities historically receive lower LSAT scores than their white counterparts, and the Law School Admission Council (makers and administrators of the LSAT) warn against over-reliance on numerical qualifiers alone. Indeed, the institutional environment of specific law schools as experienced by minority students leads to deviations from performance expectations as predicted by the LSAT. As early as 1974, the U.S. Supreme Court has questioned the continued use of the LSAT precisely because it is not race-neutral and produces racially disparate impacts. Recent research shows that minority examinees still have significant gaps in LSAT scores from their majority counterparts which cannot be attributed to individual qualifications, but the test itself.

Similar to the LSAT, bar passage rates for racially diverse law students are generally lower than whites, though the vast majority of all students who take the bar exam do

eventually pass. The oft-cited 1998 LSAC National Longitudinal Bar Passage Study found that 94.8% of all students eventually pass the bar. However, Blacks had the lowest bar passage rate at 77.6% while whites passed the bar exam at a 96.7% rate. More recently, in California, 73% of White first-time bar exam takers passed the July 2014 bar exam while only 59% of minority students passed. Only 42% of first-time Black takers passed. Also unfortunately notable is the low absolute number of graduates who took the exam. For the July 2014 California Bar Exam, the total reported number of first-time takers was 2,869 white persons, compared to 238 Blacks, 542 Hispanics, 739 Asians, and 380 other minorities. When transitioning from a state bar exam to the UBE, it is critical for state bar administrators to consider the racial disparities currently present, and how the UBE might affect those disparities.

The UBE, prepared and coordinated by the National Conference of Bar Examiners, is a uniformly administered and graded exam comprised of the Multistate Essay Examination (MEE), the Multistate Performance Test (MPT), and the Multistate Bar Examination (MBE). UBE scores can be transferred to other UBE jurisdictions. Therefore, the more states opt to offer the UBE over a state-specific exam, the more applicants that are offered mobility and are relieved of the temporal and financial burden of taking multiple exams. Unfortunately, because the UBE is only in its fifth year, we do not have the longitudinal data to fully understand the effect of the UBE on minority applicants.

The three components to the UBE are all weighted differently; the MBE is weighted 50%, the MEE 30%, and the MPT 20%. Most jurisdictions currently utilize the MBE as a component of their state bar exam. However, not all jurisdictions give such substantial weight to the MBE. For example, if California were to adopt the UBE, students in California, a minority-majority state, would see a significant increase in the importance of the MBE, as California currently weighs it as 35% of the total bar exam score.

Because the UBE places the most weight on the MBE, it is vitally important for states considering adopting the UBE to consider how the MBE emphasis might negatively impact minority students. The National Council of Bar Examiners acknowledges that racial minorities score lower on the MBE, but argues that

[r]esearch indicates that differences in mean scores between racial and ethnic groups correspond closely to differences in those groups' mean LSAT scores, law school grade point averages, and scores on other measures of ability to practice law, such as bar examination essay scores and performance test scores.

The NCBE essentially relinquishes its role in the systemic discrimination disadvantaging minority examinees' Law School Admission Test (LSAT) scores, bar exam scores, and law school G.P.A.'s. Nevertheless, there is a woeful lack of research concerning the test-gap in MBE scores between minority and majority examinees. Without further study, it is difficult, if not impossible, to understand how the MBE affects minority applicants.

In addition, states considering adopting the UBE should consider how the MBE interacts with the phenomenon known as "stereotype threat," the pressure that people feel when they fear that their performance could confirm a negative stereotype about their group. This pressure manifests itself in anxiety and distraction that interferes with intellectual



functioning. A student need not believe the stereotype is accurate to be affected. He or she need only be aware of the stereotype and care about performing well. Stereotype threat is

[o]ne of the most extensively studied topics in social psychology over the past two decades. In hundreds of studies, scientists have confirmed the existence of stereotype threat and have measured its magnitude, both in laboratory experiments and in the real world. Because of stereotype threat, standard assessments of academic performance underestimate the ability of students targeted by negative stereotypes by an average of 0.18 standard deviations, the equivalent of 62 points on the SAT.

Combating stereotype threat has been a particular concern of minority communities who have repeatedly called for attention to research that demonstrates that test scores can be adversely affected by candidates' unconscious reaction to widespread stereotypes disparaging the intellectual abilities of minority group members.

Considering the impact of the UBE on minority applicants is directly in line with existing ABA policy. In 2006, the ABA adopted Resolution #113, urging bar association and bar examiners to ensure that the bar examination does not result in disparate impact on bar passage rates of minority candidates. Also in 2006, the ABA supported the changes to Standards 210-212 concerning equal opportunity and diversity. In 2012, the ABA adopted policy to urge law school admissions test to provide accommodations that best ensure that the skills of the test-takers are measured, not their disabilities. Finally, Goal III of the ABA is to eliminate bias and enhance diversity. Considering the effects of the UBE on minority students, and tracking those effects subsequent to the implementation of the UBE both fall squarely within existing ABA policy, will assist in the realization of Goal III of the ABA, and will, most importantly, aid in strengthening the pipeline for minorities into the legal profession.

## **II. Considering the Impact the UBE on Indian Law**

The appeal of the UBE is its uniformity. Nevertheless, the UBE does not prohibit state bar examiners from testing or otherwise ensuring competency with respect to local law. This can take the form of online courses, webinars, CLE programs, or addendums to the exam itself. While the bar exam is not intended to require specialized knowledge, it is intended to ensure basic competency of its licensed attorneys, including the ability to at least recognize issues of law that are likely to arise within that jurisdiction.

With 567 federally recognized tribes, 426 tribal court systems, a \$30 billion-a-year gaming industry, and tribal natural resource extraction enterprises generating billions, Indian law is a burgeoning area in at least over twenty states. Indian Law is becoming increasingly relevant to every area of legal practice. So it was no surprise when states began to include Indian Law as part of their state bar examinations--a positive trend--since Indian law is a complex legal landscape, which warrants at least acknowledgment of new attorneys. In fact, Indian Law is so complicated, that many have advocated for simplifying changes; including the ABA, which has called for changes to criminal and civil jurisdiction in two recent resolutions.

However, in 2013, Washington stopped including Indian law on the essay portion of its bar exam, and opted to use the UBE essay subjects. In 2014, after adopting the UBE, New Mexico eliminated Indian law from their bar exam. Arizona, despite the advocacy from their state bar association and presence of 22 federally recognized tribes within their borders, decided against adding Indian Law as a subject precisely because it was considering adopting the UBE.

The UBE and the testing of other relevant legal issues do not need to be mutually exclusive. For example, when the state of Washington adopted the UBE, it eliminated the use of their prior exam which included Federal Indian Law as an essay subject since 2004. However, Washington also developed the Washington Law Component as its own state-specific addition to the UBE which tests examinees on Indian Law. Washington enjoys all the benefits of administering the UBE while maintaining federal Indian law as a subject, to the benefit of all attorneys that wish to practice law in their state, which shares borders with 29 federally recognized tribes. Moreover, especially in the case of federal Indian law, the inclusion of the subject on the state bar exam directly effects whether the course is taught at ABA-approved law schools.

When adopting the UBE, the benefits of uniformity and increased mobility for its attorneys should not be considered to the exclusion of valuing essential legal areas that fall outside of the big six. This requested consideration also falls squarely within existing ABA policy. In 2011, the ABA adopted Resolution # 10B, urging law schools, firms, and CLE providers to provide the knowledge, skills, and values that are required of the successful modern lawyer. Bar administrators should similarly consider what subjects should be required for the successful modern lawyer.

### **III. Conclusion**

The UBE offers uniformity, easing the burden on both bar administrators and on applicants. It also offers increased mobility, a critical need in a tightened legal market. However, the pipeline to the legal profession remains rife with barriers for minorities. The bar exam is a critical juncture in that pipeline. When considering adopting the UBE, these barriers must be acknowledged and assessed, especially when the legal profession remains to be one of the most under-represented professions in the country. Additionally, the blessings of the UBE's uniformity do not necessarily need to exclude state-specific legal areas of importance. This is especially important when it comes to federal Indian law, a topic historically not even offered in many law schools.

Respectfully submitted,

Linda Benally, President  
National Native American Bar Association  
February 2016

**GENERAL INFORMATION FORM**

Submitting Entity: National Native American Bar Association

Submitted By: Linda Benally, President

1. Summary of Resolution(s).

This resolution call for state, territorial, and tribal bar administrators, when considering the adoption of the Uniform Bar Exam (UBE), to consider the impact on underserved populations. The legal profession is unfortunately one of the least racially diverse professions in the country. Barriers exist all along the pipeline into the profession, including the bar exam, in which minorities disproportionately struggle. When considering whether to adopt the UBE, bar administrators should consider effects on the pipeline into the legal profession, and should track the performance of examinees if the UBE is adopted.

Secondly, this resolution call for bar administrators, when considering the adoption of the UBE, to nevertheless consider including supplemental topics of local importance on their bar exams. Specifically, jurisdictions with significant American Indian/Alaska Native populations should consider including Federal Indian law as a testable subject. As Federal Indian law becomes more and more of a prominent field, as it is institutionally complex, and because of its complexity attorneys should at least be able to identify when an Indian law issue has arisen, jurisdictions with significant Native populations should be expected to be familiar with its key elements.

2. Approval by Submitting Entity.

National Native American Bar Association: November 16, 2015

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

No. (Mention 109 from LSD here?)

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

- American Bar Association, *Resolution, Report, No. 10B* (2011) (urging law schools, firms, and CLE providers to provide the knowledge, skills, and values that are required of the successful modern lawyer).  
This resolution will support the goal of Resolution 10B (2011), ensuring that jurisdictions thoughtfully considering the effects of the UBE when adopting, and that jurisdictions also include other locally relevant topics if need be to contribute to the creation of successful modern lawyers.
- American Bar Association, *Resolution, Report No. 113* (2006) (urging the

National Conference of Bar Examiners, the Law School Admission Council, and all state and territorial bar associations to ensure bar examinations and admission policies do not result in a disparate impact on minority candidates, and to support pre-law and other readiness programs).

This resolution would squarely support the goals of Resolution 113 (2006), prioritizing the consideration of pipeline into the legal profession for minority candidates specifically pertaining to the UBE.

- American Bar Association, *Resolution, Report No. 111* (2012) (urging law school admissions test to provide accommodations that best ensure that the skills of the test-takers are measured, not their disabilities.)  
This resolution would support the spirit of this resolution by questioning and measuring whether the UBE effectively achieves its goal of ensuring the competency of incoming new lawyers, and not unnecessarily disproportionately impacting minority candidates.

- ABA, *Recommendation, Report No. 111A* (Feb. 2015) (adopting all of the recommendations contained in the Indian Law and Order Commission's 2013 report, except for the new circuit court provision of recommendation 1.2); and ABA, *Recommendation, Report No. 113* (Aug. 2015) (adopting key recommendations of the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence report).  
This recommendation would support the goals of both Resolutions 111A (Feb. 2015) and 113 (Aug. 2015), highlighting the complexity of Indian law and the need for attorneys to be well-versed in its complexities.

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. None.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The National Native American Bar Association will work with the American Bar Association's Center for Racial and Ethnic Diversity, the National Conference of Bar Examiners, the Conference of Chief Justices and the ABA HOD members to disseminate official ABA policy to local bar examiners to encourage the tracking and studying of the impact of the UBE on underserved populations with the relevant jurisdictions.

8. Cost to the Association. N/A
9. Disclosure of Interest. None.
10. Referrals. Law Student Division, Law Practice Division, National Conference of Bar Examiners, Section of Legal Education, Senior Lawyers Division, TTIPS, NCBP and NABE, diversity entities including Diversity and Inclusion 360 Commission, and the Conference of Chief Justices

11. Contact Name and Address Information.

Linda Benally President  
National Native American Bar Association  
P.O. Box 11145 Tempe,  
AZ 85284  
[Linda.benally@pinnaclewest.com](mailto:Linda.benally@pinnaclewest.com)

Mary Smith  
Immediate Past President  
National Native American Bar Association 17533  
Maple Drive  
Lansing, Illinois 60438  
[Marysmith828@hotmail.com](mailto:Marysmith828@hotmail.com)  
202-236-0339

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This resolution call for state, territorial, and tribal bar administrators, when considering the adoption of the Uniform Bar Exam (UBE), to consider the impact on underserved populations. The legal profession is unfortunately one of the least racially diverse professions in the country. Barriers exist all along the pipeline into the profession, including the bar exam, in which minorities disproportionately struggle. When considering whether to adopt the UBE, bar administrators should consider effects on the pipeline into the legal profession, and should track the performance of examinees if the UBE is adopted.

Secondly, this resolution call for bar administrators, when considering the adoption of the UBE, to nevertheless consider including supplemental topics of local importance on their bar exams. Specifically, jurisdictions with significant American Indian/Alaska Native populations should consider including Federal Indian law as a testable subject. As Federal Indian law becomes more and more of a prominent field, as it is institutionally complex, and because of its complexity attorneys should at least be able to identify when an Indian law issue has arisen, jurisdictions with significant Native populations should be expected to be familiar with its key elements.

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

The legal profession is unfortunately one of the least racially diverse professions in the country. Barriers exist all along the pipeline into the profession, from kindergarten to the bar exam. Minority candidates perform disproportionately poorly on the bar exam, including on the Multistate Bar Exam (MBE), a multiple choice portion of the exam adopted by most states. The Uniform Bar Exam (UBE) include the MBE, but gives it a considerably increased weight of 50%.

Secondly, the appeal of the UBE is its uniformity. The collateral effect of the exam is that subjects of local concern (but not necessarily national), are removed from the exam. Bar admission administrators should consider still including these subjects in addition to the UBE. This is especially critical when it pertains to Federal Indian Law. Lawyers within jurisdictions with significant American Indian/Alaska Native populations are more likely to encounter an Indian law issue and should at least be able to recognize it as such. However, states have been tending to remove Indian law from the bar exam rather than add it, and with its exclusion from the bar exam, so too is the subject excluded from law school curriculum.

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

This policy position will allow the ABA to speak on the ever-burgeoning topic of the UBE, as well as on the pipeline issues particular to the UBE.

4. Summary of Minority Views

Supporters of the UBE argue for the increased mobility and convenience that one uniform bar exam would offer new applicants, particular young lawyers. With one exam, attorneys would be more free to move about the country, and unburdened by the costs financially and temporally of multiple bar exams.

This resolution is not necessarily in conflict with supporters of the UBE, but merely calls for considerations of the effect of the UBE on minority candidates and local-subjects.





This resolution with report was received after the November 18, 2015 filing deadline. Pursuant to §45.5 of the House Rules of Procedure, this late resolution will be considered by the House of Delegates if the Committee on Rules and Calendar recommends a waiver of the time requirement and the resolution is approved by a two-thirds vote of the delegates voting.

**AMERICAN BAR ASSOCIATION**

**HEALTH LAW SECTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges Congress to enact legislation to  
2 encompass services provided by advanced practice providers within the locum tenens exception  
3 to the prohibition on reassignment of Medicare billing privileges.

4 FURTHER RESOLVED, That the American Bar Association urges the Center for Medicare and  
5 Medicaid Services (“CMS”) to promulgate regulations and draft guidance to enable advanced  
6 practice providers to bill under the locum tenens or reciprocal billing reassignment exceptions  
7 using the Q6 or similar modifier.

8 FURTHER RESOLVED, That the American Bar Association urges the regional Medicare  
9 Administrative Contractors (“MAC”) to draft guidance enabling advanced practice providers to  
10 bill under the locum tenens or reciprocal billing reassignment exceptions using the Q6 modifier.



## REPORT

### Introduction

Given the shortage of primary care physicians, team-based care models have shifted to incorporating increasingly more advanced practice providers (“APPs”) working independently or in collaboration with or under the supervision of physician practitioners. The Association of American Medical Colleges recently forecasted that the demand for physician practitioners continues to grow faster than the available supply, leading to a projected shortfall of between 46,100 and 90,400 physicians by 2025.<sup>1</sup> Working in tandem with the decline in physician practitioners, employment of nurse practitioners, nurse anesthetists, and nurse midwives is expected to grow thirty-one percent (31%) between 2012 and 2022.<sup>2</sup> Physician assistants are expected to grow thirty-eight percent (38%) between 2012 and 2022.<sup>3</sup> APPs are needed to help fill the forecasted shortage in primary care physicians; APPs, within their scopes of practice, are capable of handling many routine medical procedures and visits.

Moreover, utilization of APPs is linked to increased revenue and patient satisfaction. In a summary of key findings from *MGMA Performance and Practices of Successful Medical Groups: 2014 Report Based on 2013 Data*, better-performing practices reported that the top three reasons for utilizing APPs are to accommodate increased patient demand, enhance revenue, and increase physician productivity (75.82%, 67.97%, and 67.97% respectively).<sup>4</sup> APPs are expanding beyond the primary care space, now working in hospitals, emergency departments, inpatient and outpatient surgical facilities, and in specialty practices. APPs are crucial components of the health care delivery team, from both a financial and patient safety perspective.

Nevertheless, as it concerns payment for services of APPs, *substitute* services of APPs may not be billed under the locum tenens or the reciprocal billing reassignment exceptions. Section 1842(b)(6)(D) of the Social Security Act specifically states that billing for substitute services may be done only by a “*physician* for *physician services* furnished by a second physician to patients of the first physician.”<sup>5</sup> As the demand for APPs continues to rise, certain accommodations must be made to reduce unnecessary administrative burdens on these practitioners. The resolutions herein urge the American Bar Association to afford the same privileges to APPs as are currently afforded to physician practitioners, specifically as it concerns billing for the services of locum tenens APPs.

---

<sup>1</sup> ASS’N OF AM. MED. COLLS., THE COMPLEXITIES OF PHYSICIAN SUPPLY AND DEMAND: PROJECTIONS FROM 2013 TO 2025: FINAL REPORT (Mar. 2015), [https://www.aamc.org/download/426242/data/ihreportdownload.pdf?cm\\_mmc=AAMC\\_-\\_ScientificAffairs\\_-\\_PDF-ihreport](https://www.aamc.org/download/426242/data/ihreportdownload.pdf?cm_mmc=AAMC_-_ScientificAffairs_-_PDF-ihreport).

<sup>2</sup> BUREAU OF LAB. STATS., U.S. DEP’T. OF LAB., OCCUPATIONAL OUTLOOK HANDBOOK, NURSE PRACTITIONERS, 2014-15 ed., *available at* [www.bls.gov/ooh/healthcare/nurse-anesthetists-nurse-midwives-and-nurse-practitioners.htm](http://www.bls.gov/ooh/healthcare/nurse-anesthetists-nurse-midwives-and-nurse-practitioners.htm).

<sup>3</sup> BUREAU OF LAB. STATS., U.S. DEP’T. OF LAB., OCCUPATIONAL OUTLOOK HANDBOOK, PHYSICIAN ASSISTANTS, 2014-15 ed., *available at* [www.bls.gov/ooh/healthcare/physician-assistants.htm](http://www.bls.gov/ooh/healthcare/physician-assistants.htm).

<sup>4</sup> MED. GRP. MGMT. ASS’N, MGMA PERFORMANCE AND PRACTICES OF SUCCESSFUL MEDICAL GROUPS: 2014 REPORT BASED ON 2013 DATA: KEY FINDINGS SUMMARY REPORT, 2, <http://www.mgma.com/Libraries/Assets/Key-Findings-SuccessfulGroups-FINAL.pdf>.

<sup>5</sup> Social Security Act § 1842(b)(6)(D), 42 U.S.C. § 1395u (emphasis added).

## Current State of the Law and Proposals for Change

Currently, Medicare may pay the patient's regular physician for services of a locum tenens physician during the absence of the regular physician where the regular physician pays the locum tenens physician on a per diem or similar fee-for-time basis, and certain other requirements are met.<sup>6</sup> In particular, a patient's regular physician may "submit the claim, and (if assignment is accepted) receive the Part B payment, for covered visit services (including emergency visits and related services) of a locum tenens physician who is not an employee of the regular physician and whose services for patients of the regular physician are not restricted to the regular physician's offices," if the following conditions are met:<sup>7</sup>

- The regular physician is unavailable to provide the visit services;
- The Medicare beneficiary has arranged or seeks to receive the visit services from the regular physician;
- The regular physician pays the locum tenens for his/her services on a per diem or similar fee-for-time basis;
- The substitute physician does not provide the visit services to Medicare patients over a continuous period of longer than 60 days subject to the exception noted below; and
- The regular physician identifies the services as substitute physician services meeting the requirements of this section by entering HCPCS code modifier Q6 (service furnished by a locum tenens physician) after the procedure code.

Regional MAC guidance further echoes that the policy of billing for locum tenens physician services does not apply to billing for APP services. For example, Noridian guidance provides that "services of non-physician practitioners [*e.g.*, CRNAs, NPs and PAs] may *not* be billed under the locum tenens or reciprocal billing reassignment exceptions. These provisions apply only to physicians."<sup>8</sup>

Noridian and other regional MAC guidance<sup>9</sup> mirrors the language in Section 1842(b)(6)(D) of the Social Security Act, which in summary states that billing for substitute services may be done only by a physician for services provided by a second physician. However, to the extent an APP is authorized to reassign Medicare billing privileges when classified as either an employee or independent contractor, we see no reasonable justification for not extending the same privilege to APPs acting in a locum tenens capacity. Present support for cost-effective use of APP services warrants Congress enacting legislation extending the locum tenens exception to also encompass services provided by APPs. CMS and the regional MACs should draft written guidance and policies to this same effect.

---

<sup>6</sup> *Id.*; Medicare Claims Processing Manual Ch. 1, § 30.2.1.H.

<sup>7</sup> *Id.* at § 30.2.11.B (emphasis added).

<sup>8</sup> *Incident To and Locum Tenens Questions and Answers*, NORIDIAN HEALTHCARE SOLUTIONS (last accessed Aug. 24, 2015), <https://med.noridianmedicare.com/web/jeb/education/event-materials/incident-to-and-locum-tenens-qa>.

<sup>9</sup> *See also Reassignment By Nonphysician Practitioners*, WPS HEALTH INSURANCE (last accessed Aug. 24, 2015), <http://wpsmedicare.com/j5macpartb/claims/submission/reassign-nonphys.shtml>.

With the increased reliance by physicians on APPs in medical groups, hospitals, and other health care settings, reducing unnecessary administrative burdens on APPs should be a priority. Currently, the physician performing in a locum tenens role is not required to submit Medicare enrollment materials (*e.g.*, Forms CMS-855I or CMS-855R) prior to providing or billing for services. Rather, use of the Q6 modifier is sufficient for the services of the locum tenens physician to be reimbursed under the regular physician's Medicare billing number.

Notably, in order for a provider or supplier group to bill on behalf of an APP performing in a "locum tenens" role, each APP must contract with the billing provider or supplier (either as an employee or independent contractor). Assuming that each APP is already enrolled in Medicare (*i.e.*, has already completed a CMS-855O form and obtained a National Provider Identifier ("NPI")), each APP must also submit Medicare enrollment applications CMS-855I (indicating change of practice location) and CMS-855R (reassigning payment to the provider or supplier group). (Physician assistants do not complete a CMS-855R form; only the CMS-855I is required.)

In short, use of the Q6 modifier to indicate that APPs are performing in a "locum tenens" role will result in claims denials from the regional MACs. There is currently no way for a APP's services to be billed akin to a locum tenens physician's services without first undergoing the CMS-855I change of practice location information and CMS-855R reassignment of billing rights Medicare enrollment process.

However, the administrative burden of undergoing the change of information and reassignment enrollment process for substitute APPs hinders productivity and detracts from the APP's more critical patient-centric responsibilities (*e.g.*, charting, making appropriate patient referrals, obtaining patient histories and performing routine physical exams, and ordering diagnostic procedures and tests). It is neither sensible public policy nor an efficient use of resources to require APPs to complete the enrollment process prior to enabling them to bill Medicare Part B akin to locum tenens physicians using the Q6 modifier.

## **Conclusion**

The resolutions herein request that the American Bar Association urge Congress to enact legislation enabling APPs to bill under the locum tenens or reciprocal billing reassignment exceptions, or either alternatively or in addition to the adoption of legislation, urge CMS and the regional MACs to draft written guidance to the same effect. Support for adopting these resolutions may be found by accepting a consistent contextual reading of Section 1842(b)(6)(D) of the Social Security Act with the current health care delivery model, which highlights the important role APPs play in the cost-effective and safe provision of health care services.

The Health Law Section requests that the American Bar Association, House of Delegates adopt the resolutions stated herein.

Respectfully Submitted,

William W. Horton, Chair  
February 2016

GENERAL INFORMATION FORM

Submitting entities: Health Law Section

Submitted by: William W. Horton, Chair  
Health Law Section

1. Summary of Recommendation.

The Resolution urges Congress to enact legislation and the Centers for Medicare and Medicaid Services to implement regulations and guidance permitting the *locum tenens* services delivered by advanced practice providers to be billed in a manner commensurate with the *locum tenens* services furnished by physicians. The Resolution would seek to eliminate the administrative hurdles, including those unique requirements for Medicare enrollment, that currently prohibit rapid reassignment of Medicare billing privileges for advanced practice providers performing in a capacity similar to a *locum tenens* physician.

2. Approval by Submitting Entities

The Council of the Health Law Section approved the filing of this Resolution and Report on November 4, 2015.

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

There has not been a similar resolution filed.

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

There are no known Association policies directly relevant to this Resolution.

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

The timing of the proposed Resolution is ripe, given current Congressional activity and administrative implementation of changes to the Medicare physician reimbursement system, as required by the Medicare Access and CHIP Reauthorization Act of 2015. As the Centers for Medicare and Medicaid Services revisits its guidance with respect to payment of physician services in the coming calendar year, it would be appropriate that it also reconsider its payment policies for advanced practice providers at that time.

6. Status of Legislation. (If applicable)

There is no current legislation pending proposing relevant changes to payment for advanced practice provider services. However, there may be legislative activity supplementing those changes made to Medicare reimbursement policy in the Medicare Access and CHIP Reauthorization Act of 2015, enacted on April 16, 2015, or in the

Bipartisan Budget Act of 2015, enacted on November 2, 2015. Inclusion of the issues addressed in the Resolution would be appropriate for corrective legislation supplementing either of these laws. Further, the Centers for Medicare and Medicaid Services may be able to make certain changes to regulations or informal guidance proposed in the Resolution, even in the absence of legislative activity, that would address payment for advanced practice providers performing in a capacity similar to a *locum tenens* physicians at the same time it makes other changes to physician payment policy required by the Medicare Access and CHIP Reauthorization Act of 2015.

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 State and Local Government Law  
 Section of Science and Technology Law  
 Law Practice Division  
 Law Student Division  
 Young Lawyers Division  
 Commission on Law and Aging  
 Commission on Disability Rights  
 Commission on Women in the Profession  
 Standing Committee on Ethics and Professional Responsibility  
 Standing Committee on Lawyers' Professional Liability  
 National Association of Bar Executives  
 National Bar Association Inc.  
 National Conference of Bar Presidents

11. Contact Name and Address Information.

William W. Horton, Chair  
ABA Health Law Section  
Jones Walker LLP  
One Federal Place, Suite 1100  
1819 Fifth Avenue North  
Birmingham, Alabama 35203  
(205) 244-5221  
whorton@joneswalker.com

Simeon Carson, Director  
ABA Health Law Section  
321 N. Clark St.  
Chicago, IL 60654-7598  
(312) 988-5824  
simeon.carson@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.)

J.A. (Tony) Patterson Jr, Delegate  
Kalispell Regional Healthcare  
310 Sunnyview Ln  
Kalispell, MT 59901-3129  
T: (406) 751-4175  
C: (406) 249-5671  
tpatterson@krmc.org

Robyn S Shapiro, Delegate  
ABA Health Law Section  
Drinker Biddle & Reath LLP  
777 E Wisconsin Ave, Ste 3125  
Milwaukee, WI 53202-5319  
T: (414) 221-6056  
C: (414) 379-8305  
robyn.shapiro@dbr.com



## EXECUTIVE SUMMARY

1. Summary of the Resolution.

The Resolution urges Congress to enact legislation and the Centers for Medicare and Medicaid Services to implement regulations and guidance permitting the *locum tenens* services delivered by advanced practice providers to be billed in a manner commensurate with the *locum tenens* services furnished by physicians. The Resolution would seek to eliminate the administrative hurdles, including those unique requirements for Medicare enrollment, that currently prohibit rapid reassignment of Medicare billing privileges for advanced practice providers performing in a capacity similar to a *locum tenens* physician.

2. Summary of the Issue that the Resolution Addresses.

The Resolution would permit the use of the Q6 modifier in billing for the services of advanced practice providers in the same manner as currently permitted by individuals or organizations billing for the services of *locum tenens* physician. This would permit the services of an advanced practice provider to be billed under the Medicare billing number for the physician or advanced practice provider whom the *locum tenens* advanced practice provider is replacing. The Resolution would also eliminate the requirement that the advanced practice provider submit, and the Medicare administrative contractor approve, Medicare enrollment applications currently required before any organization may bill on behalf of an advanced practice provider.

3. Please Explain How the Proposed Policy Position will Address the Issue?

The Resolution would apply existing statutory provisions and Centers for Medicare and Medicaid Services regulations and guidance to the performance of *locum tenens* services by an advance practice provider in the same manner currently applied to physician services performed on a *locum tenens* basis.

4. Summary of Minority Views.

No minority views or opposition have been identified.



## INDEX OF RESOLUTIONS WITH REPORTS

---

Administrative Law and Regulatory Practice .....	106A-106B
Association of the Bar of the City of New York .....	113
Austin Bar Association .....	113
Brooklyn Bar Association.....	113
Business Law, Section of .....	116
Cincinnati Bar Association .....	113
Civil Rights and Social Justice, Section of.....	113, 114
Client Protection, Standing Committee on .....	105
Criminal Justice Section .....	10A, 102, 105
Disability Rights, Commission on .....	116
Disaster Response and Preparedness, Standing Committee on .....	113
Dispute Resolution, Section of .....	100
Diversity and Inclusion 360, Commission on .....	107
Ethics and Professional Responsibility, Standing Committee on .....	103
Executive Director, Report of the.....	3
Family Law, Section of .....	112A-112B
Future of Legal Services, Commission on .....	105
Group and Prepaid Legal Services, Standing Committee on.....	113
Health Law, Section of .....	100, 111, 300
Homelessness and Poverty, Commission on .....	111, 114
Intellectual Property Law .....	108A-108C
International Law, Section of .....	103
International Trade in Legal Services, Task Force on.....	103
Law Practice Division .....	105, 109, 113
Law Student Division .....	109
Lawyer Referral and Information Service, Standing Committee on .....	113
Legal Aid and Indigent Defendants, Standing Committee on .....	105
Legal Education and Admissions to the Bar, Section of .....	109
National Conference of Bar Examiners .....	109
National Conference of Commissioners on Uniform State Laws .....	115A-F
National Native American Bar Association .....	117
New York County Lawyers Association .....	10A
New Jersey State Bar Association.....	10B
Oregon State Bar .....	113
Paralegals, Standing Committee on .....	101
President, Report of the.....	1
Professional Discipline, Standing Committee on .....	103, 105
Real Property, Trust and Estate Law, Section of .....	112A-112B
Science and Technology Law, Section of .....	100, 111, 112A-112B
Scope and Correlation of Work, Report of the Committee on .....	4
Senior Lawyers Division .....	109
Sexual Orientation and Gender Identity, Commission on .....	116
Specialization, Standing Committee on .....	104
State Bar of South Dakota.....	117
Tort Trial and Insurance Practice Section.....	109
Treasurer, Report of the .....	2
Women in the Profession, Commission on .....	116
Young Lawyers Division .....	110
Youth at Risk, Commission on .....	111

