Resolutions with Reports to the House of Delegates
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 numbered 10A, 100A through 177, 400A and 400B can be found in this book. Proposals to amend the Association’s Constitution, Bylaws and House Rules of Procedure are numbered 11-1 through 11-12 and also can be found in this book. Any additional Resolutions with Reports submitted by state or local bar associations will be numbered in the “10” series. Late Resolutions with Reports 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/2018-chicago-annual-meeting.html (click on Informational Reports).

*This report will be sent electronically prior to the opening session of the House of Delegates meeting.

RESOLUTIONS WITH REPORTS TO THE HOUSE OF DELEGATES

Hyatt Regency Chicago Hotel
Grand Ballroom, Ballroom Level, East Tower
Chicago, Illinois
August 6-7, 2018

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RESOLUTIONS WITH REPORTS

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Report of the Standing Committee on Constitution and Bylaws ............................. 11A

*This report will be sent electronically prior to the opening session of the House of Delegates meeting.
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All sessions of the House of Delegates meeting will be held on Monday, August 6 and Tuesday, August 7, 2018, in the Grand Ballroom, Ballroom Level, East Tower, at the Hyatt Regency Chicago Hotel, in Chicago, Illinois. It is anticipated that the first session of the House meeting will begin at 9:00 a.m. on Monday morning and will recess at approximately 5:30 p.m. On Tuesday morning, the meeting will reconvene, and will adjourn no later than 1:00 p.m., when the House has completed its agenda.

The Final Calendar of the House of Delegates meeting will be placed on House members’ desks at the opening session on Monday morning, August 6. 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.


Any late Resolutions with Reports, those received after May 8, 2018, 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 present and voting. Late Resolutions with Reports will be posted to the ABA website prior to 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, Deborah Enix-Ross, Presiding

Presentation of Colors

Invocation

1. Report of the Committee on Credentials and Admissions
   Hon. Adrienne Nelson, Oregon
   Approval of the Roster

2. Report of the Committee on Rules and Calendar
   Paula J. Frederick, Georgia
   Approval of the Final Calendar

3. Report of the Secretary
   Mary L. Smith, Illinois
   Approval of the Summary of Action

4. Statement by the Chair of the House of Delegates
   Deborah Enix-Ross, New York

5. Statement by the President
   Hilarie Bass, Florida

6. Statement by the Treasurer
   Michelle A. Behnke, Wisconsin

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 Proposals to Amend the Association’s Constitution and Bylaws 11-1 through 11-12

10. Presentation of Resolutions with Reports of Sections, Committees and Other Entities
    100A-177 Resolutions with Reports
    300 Late Resolutions with Reports
    400A-B Resolutions with Reports on Archiving

ADJOURNMENT
### AMERICAN BAR ASSOCIATION 2017-2018
### BOARD OF GOVERNORS

#### OFFICERS

<table>
<thead>
<tr>
<th>Position</th>
<th>Name</th>
<th>Location</th>
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</thead>
<tbody>
<tr>
<td>President</td>
<td>Hilarie Bass</td>
<td>Miami, FL</td>
</tr>
<tr>
<td>President-Elect</td>
<td>Robert M. Carlson</td>
<td>Butte, MT</td>
</tr>
<tr>
<td>Chair, House of Delegates</td>
<td>Deborah Enix-Ross</td>
<td>New York, NY</td>
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<tr>
<td>Secretary</td>
<td>Mary L. Smith</td>
<td>Lansing, IL</td>
</tr>
<tr>
<td>Treasurer</td>
<td>Michelle A. Behnke</td>
<td>Madison, WI</td>
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<tr>
<td>Immediate Past President</td>
<td>Linda A. Klein</td>
<td>Atlanta, GA</td>
</tr>
<tr>
<td>Executive Director</td>
<td>Jack L. Rives</td>
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#### BOARD OF GOVERNORS

<table>
<thead>
<tr>
<th>District</th>
<th>Member Name</th>
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<tbody>
<tr>
<td>First District</td>
<td>Frank H. Langrock</td>
<td>Middlebury, VT</td>
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<tr>
<td>Second District</td>
<td>W. Anthony Jenkins</td>
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<tr>
<td>Third District</td>
<td>Penina K. Lieber</td>
<td>Pittsburgh, PA</td>
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<td>Fourth District</td>
<td>Allen C. Goolsby</td>
<td>Richmond, VA</td>
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<td>E. Fitzgerald Parnell III</td>
<td>Charlotte, NC</td>
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<tr>
<td>Sixth District</td>
<td>Lee A. DeHiggin III</td>
<td>Marietta, GA</td>
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<tr>
<td>Seventh District</td>
<td>J. Timothy Eaton</td>
<td>Chicago, IL</td>
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<td>Eighth District</td>
<td>Andrew Joshua Markus</td>
<td>Miami, FL</td>
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<tr>
<td>Ninth District</td>
<td>Doreen D. Dodson</td>
<td>Saint Louis, MO</td>
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<tr>
<td>Tenth District</td>
<td>David S. Houghton</td>
<td>Omaha, NE</td>
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<td>Eleventh District</td>
<td>Hon. Leslie Miller</td>
<td>Tucson, AZ</td>
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<td>Twelfth District</td>
<td>Randall D. Noel</td>
<td>Memphis, TN</td>
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<tr>
<td>Thirteenth District</td>
<td>Maryann Elizabeth Foley</td>
<td>Anchorage, AK</td>
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<td>Fourteenth District</td>
<td>John L. McDonnell, Jr.</td>
<td>San Francisco, CA</td>
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<tr>
<td>Fifteenth District</td>
<td>Mark H. Alcott</td>
<td>New York, NY</td>
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<tr>
<td>Sixteenth District</td>
<td>Hon. William C. Carpenter Jr.</td>
<td>Wilmington, DE</td>
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<td>Seventeenth District</td>
<td>Alan Van Etten</td>
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<tr>
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<td>Paula E. Boggs</td>
<td>Sammamish, WA</td>
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<td>Nineteenth District</td>
<td>David L. Brown</td>
<td>Des Moines, IA</td>
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<tr>
<td>Position</td>
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<td>City, State</td>
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<td>----------------------------------------</td>
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<td>Goal III Disability Member-at-Large 2019</td>
<td>Scott C. LaBarre</td>
<td>Denver, CO</td>
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<td>Goal III Minority Members-at-Large 2018</td>
<td>Orlando Lucero</td>
<td>Albuquerque, NM</td>
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<td>2020</td>
<td>Myles V. Lynik</td>
<td>Phoenix, AZ</td>
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<td>Goal III Women Members-at-Large 2019</td>
<td>Lonelle S. Masters</td>
<td>Washington, DC</td>
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<td>2020</td>
<td>Hon. Eileen A. Kato</td>
<td>Seattle, WA</td>
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<td>Judicial Member-at-Large 2018</td>
<td>Hon. Ramona G. See</td>
<td>Torrance, CA</td>
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<td>Law Student Member-at-Large 2018</td>
<td>Grace Meredith Parnell</td>
<td>Cambridge, MA</td>
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<td>Section Members-at-Large 2018</td>
<td>Ilene K. Gotts</td>
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<td>2018</td>
<td>Bernard T. King</td>
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<td>Linda L. Randell</td>
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<td>2019</td>
<td>Benjamin E. Griffith</td>
<td>Oxford, MS</td>
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<td>Kevin L. Shepherd</td>
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<td>Darcee S. Siegel</td>
<td>Bal Harbour, FL</td>
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<td>2020</td>
<td>Lynne B. Barr</td>
<td>Boston, MA</td>
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<td>Tom Bolt</td>
<td>St. Thomas, VI</td>
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<tr>
<td>2020</td>
<td>Michael H. Byowitz</td>
<td>New York, NY</td>
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<td>Young Lawyer Members-at-Large 2018</td>
<td>Erica R. Grinde</td>
<td>Missoula, MT</td>
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<td>Clary Edward Rawl, Jr.</td>
<td>North Charleston, SC</td>
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<td>Lynne B. Barr</td>
<td>Boston, MA</td>
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<td>Tom Bolt</td>
<td>St. Thomas, VI</td>
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<td></td>
<td>Michael H. Byowitz</td>
<td>New York, NY</td>
</tr>
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</table>

BOARD OF GOVERNORS (cont.)
### COMMITTEES OF THE HOUSE OF DELEGATES

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**Members:**
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- Laurel G. Bellovs, Chicago, IL
- Allen E. Brennecke, Marshalltown, IA
- Robert M. Carlson, Butte, MT
- 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
- Patricia Lee Refo, Phoenix, AZ
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- Colin H. Lindsay, Louisville, KY
- Barbara Mendel Mayden, Nashville, TN
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          Sharon Gerstman, Buffalo, NY
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          Ruth L. Kleinfield, Manchester, NH
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          Andrew M. Schpak, Portland, OR
          Robyn S. Shapiro, Milwaukee, WI
          Neal R. Sonnett, Miami, FL
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          Neal R. Sonnett, Miami, FL
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Suzanne E. Gilbert, Orlando, FL
Rew R. Goodenow, Reno, NV
Amit D. Ranade, Seattle, WA

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Robert N. Weiner, Fort Worth, TX
Walter H. White, Jr., Washington, DC

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Amie C. Martinez, Lincoln, NE
Shenique A. Moss, Detroit, MI
Edith G. Osman, Miami, FL
Linda Sue Parks, Wichita, KS
Michael Haywood Reed, Philadelphia, PA
Palmer Gene Vance II, Lexington, KY
Charles John Vigil, Albuquerque, NM
Karol Corbin Walker, Newark, NJ
Carolyn B. Witherspoon, Little Rock, AR

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Suzanne E. Gilbert, Orlando, FL
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C. Elisia Frazier, Pooler, GA
Glenn P. Hendrix, Atlanta, GA
Jill Marie Kastner, Milwaukee, WI
Mark A. Robertson, Oklahoma City, OK
Jennifer A. Rymell, Fort Worth, TX
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Robert N. Weiner, Washington, DC
Walter H. White, Jr., Washington, DC

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Amie C. Martinez, Lincoln, NE
Shenique A. Moss, Detroit, MI
Edith G. Osman, Miami, FL
Linda Sue Parks, Wichita, KS
Michael Haywood Reed, Philadelphia, PA
Palmer Gene Vance II, Lexington, KY
Charles John Vigil, Albuquerque, NM
Karol Corbin Walker, Newark, NJ
Carolyn B. Witherspoon, Little Rock, AR
TECHNOLOGY AND COMMUNICATIONS
CHAIR: Daniel Warren Van Horn, Memphis, TN
VICE-CHAIR: Margaret D. Plane, Salt Lake City, UT
MEMBERS: Denise R. Avant, Chicago, IL
Lori Ann Colbert, Anchorage, AK
Janet Green-Marbley, Columbus, OH
Akira Heshiki, Portland, OR
Christopher S. Jennison, Silver Spring, MD
Mario A. Sullivan, Chicago, IL

TELLERS
CHAIR: Allison Block-Chavez, Albuquerque, NM
VICE-CHAIR: Christopher Lake Brown, Mansfield, OH
MEMBERS: Katherine S. Chappelear, Columbus, OH
Lacy L. Durham, Dallas, TX
Mark David Nichols, Deerfield Beach, FL

TECHNOLOGY AND COMMUNICATIONS
CHAIR: Daniel Warren Van Horn, Memphis, TN
VICE-CHAIR: Margaret D. Plane, Salt Lake City, UT
MEMBERS: Denise R. Avant, Chicago, IL
Lori Ann Colbert, Anchorage, AK
Janet Green-Marbley, Columbus, OH
Akira Heshiki, Portland, OR
Christopher S. Jennison, Silver Spring, MD
Mario A. Sullivan, Chicago, IL

TELLERS
CHAIR: Allison Block-Chavez, Albuquerque, NM
VICE-CHAIR: Christopher Lake Brown, Mansfield, OH
MEMBERS: Katherine S. Chappelear, Columbus, OH
Lacy L. Durham, Dallas, TX
Mark David Nichols, Deerfield Beach, FL
REPORT OF THE ABA PRESIDENT TO THE HOUSE OF DELEGATES

The report of the President will be presented at the time of the Annual Meeting of 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 Annual Meeting of the House of Delegates.
REPORT OF THE EXECUTIVE DIRECTOR
to the
HOUSE OF DELEGATES
(submitted June 1, 2018)
This report highlights American Bar Association activities from December 1, 2017 to June 1, 2018.

Introduction

When we gather in Chicago for the Annual Meeting in August, it will be a historic moment for the American Bar Association. It is an opportunity to celebrate the 140th anniversary of the Association and our unparalleled contributions to the legal profession and to the American justice system. From developing and maintaining ethical standards for lawyers to advancing civil rights for all Americans, we can be proud of the ABA’s extensive legacy of service.

The ABA continues to adapt. Faced with membership and revenue challenges common throughout the association world, we are taking transformative steps to reshape the ABA into a more effective and efficient organization. These changes, which I will highlight in this report and in my presentation to the House of Delegates at the Annual Meeting, impact virtually every aspect of the Association, from our staff structure and ABA programs, to the way we engage members.

Late last year, the Board of Governors directed me to undertake a major reorganization of ABA staff. This was intended to help us focus on activities in which the Association has the greatest impact, to improve efficiencies in operations, and to make us more approachable and easier to engage for existing and prospective members.

The reorganization involved much more than merely moving groups around an organization chart; the new construct refocused staff support and thus resources of the Association, which resulted in the loss of some staff positions. At the Midyear Meeting in Vancouver, the Board of Governors authorized the ABA to offer a generous Voluntary Separation Incentive Program (VIP) for senior ABA staff members who had provided long and loyal dedication to the ABA.

In all, 111 people were eligible for VIP and 42 ultimately accepted. Of those 42 positions, one was grant funded, eight were section funded, and 33 were funded by general operations. The costs associated with VIP will be borne by general operations. By June 2019, those costs will be repaid in savings created by the reorganization, and then the lower costs will inure to our benefit into the future. Today, the ABA staff has 862 people -- the smallest number since 1996. The staff reorganization enables us to continue to provide the services our Association and our profession need and expect to receive.

VIP was enormously useful because it shaped and set up the overall staff reorganization that took effect in April. Thanks to a meaningful degree to the decisions made by those who...
accepted VIP, the need to cut currently-filled positions during the reorganization lessened. In the end, only about one percent of then-filled staff positions were eliminated.

Under the reorganization, we revamped the staff structure and created nine Centers based on the four goals of the Association:

Goal I is to serve our members. This will be supported by:

- **Center for Operations and Finance** which is principally involved with the operational and financial aspects of the Association. These are primarily staff-led functions focused on the daily operations of the Association, such as Administrative Services, Human Resources, Meetings & Travel, and Financial Services.

- **Center for Member Engagement** emphasizes improving interactions with members and potential members in recruiting, retention, communications, and services. The Center provides Association-wide opportunities as part of the ABA’s comprehensive strategy to provide members with enhanced value. The Center also works to ensure the Association’s message is consistent and persuasive. Its responsibilities include Membership, Member Communications, Marketing, Email, and Publishing.

- **Center for Member Practice Groups** comprises of the ABA’s Sections, Divisions, and Forums. Support for our entities is crucial, so they can develop and execute membership and financial programs to put the ABA on a more sustainable path. The Section Officers Conference will be housed within the Center and it will continue to serve as a resource for Section, Division, and Forum leaders to share information and to discuss and consider issues of mutual concern.

Goal II of the Association is to improve our profession. It will be supported by the following Centers:

- **Center for ABA Policy and Governance** supports the ABA leadership, including entities responsible for the creation of ABA policies. It also provides support to state, local, and specialty bar associations and the national organizations representing bar association leadership and staff. It includes the Policy Office, Office of the President, and Bar Services.

- **Center for Access to Justice and the Profession** focuses on the delivery of legal services to those in need. It also works to increase the Association’s role to educate the public on law and the legal profession. Its many entities include the Standing Committee on Ethics and Professional Responsibility, the Standing Committee on Public Education, the Cybersecurity Task Force, and the Center for Innovation.

- **Center for Accreditation and Education** provides guidance and approval for a variety of organizations that educate legal professionals. It includes the Section of Legal Education and Admissions to the Bar, the Standing Committees on Paralegals, and the Standing Committee on Specialization.

- **Center for Operations and Finance** which is principally involved with the operational and financial aspects of the Association. These are primarily staff-led functions focused on the daily operations of the Association, such as Administrative Services, Human Resources, Meetings & Travel, and Financial Services.

- **Center for Member Engagement** emphasizes improving interactions with members and potential members in recruiting, retention, communications, and services. The Center provides Association-wide opportunities as part of the ABA’s comprehensive strategy to provide members with enhanced value. The Center also works to ensure the Association’s message is consistent and persuasive. Its responsibilities include Membership, Member Communications, Marketing, Email, and Publishing.

- **Center for Member Practice Groups** comprises of the ABA’s Sections, Divisions, and Forums. Support for our entities is crucial, so they can develop and execute membership and financial programs to put the ABA on a more sustainable path. The Section Officers Conference will be housed within the Center and it will continue to serve as a resource for Section, Division, and Forum leaders to share information and to discuss and consider issues of mutual concern.

Goal II of the Association is to improve our profession. It will be supported by the following Centers:

- **Center for ABA Policy and Governance** supports the ABA leadership, including entities responsible for the creation of ABA policies. It also provides support to state, local, and specialty bar associations and the national organizations representing bar association leadership and staff. It includes the Policy Office, Office of the President, and Bar Services.

- **Center for Access to Justice and the Profession** focuses on the delivery of legal services to those in need. It also works to increase the Association’s role to educate the public on law and the legal profession. Its many entities include the Standing Committee on Ethics and Professional Responsibility, the Standing Committee on Public Education, the Cybersecurity Task Force, and the Center for Innovation.

- **Center for Accreditation and Education** provides guidance and approval for a variety of organizations that educate legal professionals. It includes the Section of Legal Education and Admissions to the Bar, the Standing Committees on Paralegals, and the Standing Committee on Specialization.
The ABA’s Goal III is to eliminate bias and enhance diversity. Directly supporting these efforts is:

- **Center for Diversity in the Profession** works to ensure the Association and profession represent society’s rich diversity. It is comprised of the Commission on Disability Rights, Commission on Hispanic Legal Rights and Responsibilities, Center for Racial and Ethnic Diversity, 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, Legal Opportunity Scholarship Fund, Commission on Sexual Orientation and Gender Identity, and Commission on Women in the Profession.

The ABA’s Goal IV is to advance the rule of law in America and around the globe. Its entities include:

- **Center for Global Programs** includes the Center for Human Rights, the Rule of Law Initiative (ROLI), and the ABA’s Representatives and Observers to the United Nations. They help us develop closer collaborations with lawyers and legal associations worldwide, and help enhance the legal systems of other nations.

- **Center for Public Interest Law** which represents those who are underserved by the profession. The Center on Children and the Law, Commission on Immigration, and the Standing Committee on Gun Violence are part of this Center.

In addition to the nine Centers, four offices continue as direct reports to the Executive Director:

- **Office of General Counsel** which oversees the Association’s legal affairs and works to ensure regulatory compliance across all operational areas

- **Governmental Affairs Office (GAO)** advances our advocacy efforts before Congress, the Executive Branch, and other national and international entities

- **Office of Internal Audit** performs ABA’s internal audit responsibilities

- **Media Relations and Strategic Communications (MR)** develops and conveys the ABA’s media and public messaging. More about recent changes to MR will be discussed later in this report.

The reorganization achieves $4.5 million in savings. Its central purpose, however, was to improve the staff structure and provide a more rational framework for the Association and its entities. This will help the Board as well as staff to better understand the implications of funding decisions. Such an examination is critical, as the Association must make optimal choices on the allocation of resources.

To help further that objective, the Board of Governors has initiated a realignment of the many programs and entities within the ABA. As this report is being written, the Board is...
prioritizing ABA program and working to find at least an additional $1.5 million in savings for Fiscal Year 2019.

During the prioritization process, the Board is basing decisions on the following criteria:

- Does a program serve existing members?
- Does a program attract new members?
- Is it a duplication or redundant of an existing program?
- Is it a successful program, using data and other evidence?
- Is the program something only the ABA can do?
- Does this program have other possible sources of funding than ABA general operations revenue funds?

The Board’s realignment will result in the elimination of some Association activities as a result of the prioritization decisions. It will also help break down the many silos we have around the Association that discourage communication and cooperation between ABA entities and staff members.

While the ABA has a healthy amount of revenue and reserves by most measures, the Association’s history of approving funding for new initiatives, without strategically reexamining the ongoing and competing demands for resources, necessitates a more disciplined approach that focuses on the ABA’s key priorities. Absent such actions, we cannot make the changes necessary to ensure our Association remains relevant to attorneys and the profession we serve in the years to come.

Effective communications are critical to everything the American Bar Association does. We must engage successfully with our members, the media, and the public if we are to thrive as a relevant and dominant voice for America’s lawyers in the decades to come, and if we are to grow as an organization.

Membership

In previous reports to the House of Delegates, and at the Midyear Meeting in February, I updated ABA leadership on our new membership model (NMM), earlier referred to as “OneABA.” Following discussions at the June 2017 Board of Governors meeting, I appointed a staff working group led by Deputy Executive Director Jim Dimos to focus on this concept and flesh out its details, in close collaboration with our volunteer leaders and members. This group has met regularly since then, and has worked diligently to get a broad consensus on what the NMM should entail.

The new model under development offers great promise for our efforts to gain and maintain more dues-paying lawyer members through sensible pricing and a bundle of attractive benefits. Those benefits may include membership in two specialty groups as part of a member’s dues payment; access to a large CLE library; and member-only access to online ABA content behind a paywall.

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We will also move forward with a simplified dues structure. At a special meeting in April, the Board of Governors strongly supported a Sense of the Board Resolution to reduce the number of dues price points from 157 to five. The House of Delegates is expected to vote on the new dues structure at the Annual Meeting in August.

Another component of the NMM is expected to be a new membership billing model and renewal cycle. The Association’s practice has been to provide the same “membership year” for every member, aligned with our fiscal year, from September 1 through August 31. But of course, members do not join or change their membership with the ABA on such a schedule. While necessary in the days of paper invoices and hard copy ledger books, technology allows us to provide members with the convenience to engage with the Association without the constraint of the “bar year.” A change to anniversary billing will simplify member communications, reduce the need for free trials and proration of dues, and can help with year-round recruiting.

As noted in past updates to the House, development of the NMM has been driven by data and research from the very beginning. Last year we hired Dr. J.P. Dubé, a nationally respected economics professor and pricing expert, who used interviews and surveys of lawyers to help us determine what attorneys seek from ABA membership, and how much they would pay in dues. His major survey received feedback from 17,500 lawyers across the country. This fiscal year, we also retained the services of Avenue, a Chicago-based marketing firm that received survey responses from 15,250 lawyers. About 35 percent of respondents to both Dr. Dubé and Avenue were non-members of the Association who offered candid assessments of the ABA and how we could improve our value proposition and member experience.

In other Membership news, as of May 25, the overall ABA membership count was 385,438, which is up 5.9 percent from the same time last year. Our continued success with law school outreach is a major factor in this growth -- over the last year, the ABA saw a 14.4 percent increase in student members, to 112,301. During the same period, we also saw a slight 2.9 percent rise in our lawyer members to 258,185, and a drop in our associate members of 1.1 percent to 14,952.

As typically happens this time of year, current membership totals are below the final FY 2017 counts, when we ended the year with 412,499 members. This is because the third and final drop for dues non-payment occurred on April 6. Our membership team is currently actively working to recruit new members and win back those who have left the ABA. We anticipate our final FY 2018 membership totals will be above 400,000.

Recruiting and retaining dues-paying lawyer members continue to be a major challenge for the Association, and a prime focus of our membership efforts. Over the last 10 years, we have lost approximately 56,000 dues-paying attorneys. Out of more than 1.3 million attorneys in this country, fewer than 200,000 are currently dues-paying members of the ABA. While that is of course a matter of concern, the enormous growth opportunity is clear. We must successfully engage lawyers and demonstrate the substantial benefits of membership in the national professional association.
The ABA has increased its use of social media to grow membership and increase interest in the Association. An example is our Briefly Speaking Facebook campaign, which ran from January through the end of May. The campaign asked experienced lawyers to post career advice for first-year attorneys. More than 1,000 lawyers provided tips for those entering the profession on such topics as opening a solo firm, trial practice, and advice for business lawyers. The advice varied from the practical, such as the importance of checking out the courtroom before your first appearance, to principles to live by like how to treat courtroom staff and opposing counsel. It is very heartening to note how so many experienced lawyers take a pride in our profession and offer a helping hand to new practitioners.

Planning is underway for President Bass' next managing partner forum, scheduled for June 19 in Denver, Colorado. As President, she has thus far held forums in seven cities and met with a combined 84 leaders from National Law Journal 500 firms -- representing a combined total of over 25,000 lawyers at the firms -- to discuss important issues affecting the legal profession and to explain how the ABA is addressing these issues. We have discussed Full Firm membership with many of the firms that attend these programs and follow up efforts continue.

The Group Membership recruitment campaign has enrolled 75 new group accounts for FY 2019 as a result of calls from membership staff. Group membership offers firms the opportunity to consolidate all their lawyer memberships onto one invoice [no discounts are provided]. More than 900 new group accounts have been created since these staff efforts began in 2014.

As of May 25, Full Firm membership stands at 26,157 members, an increase of 5.3 percent from the same time last year. FY 2018 Full Firm dues revenue is at $5,494,797, up 4.7 percent from a year ago. Overall Group membership is at 71,064 members, which is down about 1 percent from this time last year. FY 2018 Group dues revenue is at $19,534,145, a decrease of 0.9 percent from the prior year.

We currently have 100 schools participating in the Full School Enrollment Program, up from 93 at the same period last year. Research is being done to confirm our contact list prior to sending out new student orientation materials in June. A major approach has been to offer Group enrollment to law schools.

The Law Student Division Premium program continues to grow and evolve. The Premium program offers an enhanced group of benefits to law students for an annual fee of $25. Later this summer, the Division will expand its bar review prep member benefit, bringing new flexibility and greater value to our student members. The Division is also working on an overhaul of the student representative program, which provides the Association with a presence on all 204 ABA approved law schools around the country. As of mid-April, 23,684 students were enrolled in the Premium program, an increase of 82.3 percent from the year before.

ABA Emails

The ABA continues its work to enhance and better target the emails we distribute to our members. We have successfully reduced the number of messages sent by the Association. In
FY 2016 we distributed some 280 million emails, and that number will be reduced to about 150 million by the end of FY 2018.

A new staff Email Working Group has been set up to review our current email system and processes. The ABA currently uses Maestro as its email platform to distribute email campaigns to its members and market ABA products. Since the ABA adopted Maestro in 2002, many improved technologies have been created, enabling more personalized messages, better analytics, and email creation tools that are easier to use. We are currently evaluating responses to a Request for Proposals for a new email platform, which we intend to have in place by next spring. In addition to greater personalization, the new platform will allow us to connect with members through social media, further reduce the number of emails sent (thanks to multi-messaging), and a new Preference Center will be developed to give people more control over their email experience. Staff will be extensively trained before the new program is launched.

ABA Website

We continue to work on a dramatically improved website, which will feature enhancements in many areas and will be readily accessible on mobile devices. The launch of the new ABA website has been delayed as a result of our extraordinarily complex operating environment. We have been working very closely with the vendor to ensure all problems are overcome as quickly as possible. We have been very clear that we strongly desire (and expect) to launch the website before the Annual Meeting in August. We are doing all possible to reach that goal, although we’re facing significant challenges.

On the content side, which involves the information available on the website, material from our current site has been migrated into the new production environment for testing, review, and the building of new content. ABA staff has been trained in content development, publication creation, and Product and Meeting creation. Entities were instructed to have their microsite landing pages and launch critical content up-to-date by the end of May and will work with groups in June if they had any difficulty meeting this deadline to ensure all content is up. Digital Engagement staff will continue to work with these groups to refine content until and after launch.

The new site will also feature substantial improvements to eCommerce transactions. In that regard, we are at a critical stage as our vendor works to complete and perfect three complex eCommerce transaction flows: join, renew, and meeting registration. Once these three areas are fully resolved, we will rapidly finalize the countdown to launch.

While the process of migrating to a new website has taken longer than anticipated, we are committed to getting this right -- and to have a dynamic final product that will serve the Association’s online needs well into the future. The Board has been advised that these final phases of work are under a fixed-price contract, and that has saved the Association immense costs, as the vendor has run into unanticipated problems -- for which the vendor is financially responsible.

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Insurance

In April of FY 2016, the ABA started a new insurance program as a benefit for members. Since we had no program on which to build, we created the program from the ground up. Slowly but steadily, we have expanded and enhanced the insurance program, which currently offers 24 insurance products for ABA members. The products are highly rated and the pricing is extremely competitive.

I’m pleased to report sales of our insurance products have increased steadily as well. As of mid-May, we have already exceeded sales from FY 2017 and FY 2016 combined, and we are on pace to double that business. The third-party administrator of ABA Insurance, USI Affinity, is extremely enthused about our progress and prospects for the future. We are now focusing on accelerated growth through more effective marketing to solos, firms, non-members and members, and greater collaboration between ABA entities thanks to the recent staff reorganization. We are also looking at ways to work with state and local bars. We’re on track to have an exceptionally robust insurance program within the five-year point.

Center for Innovation

On April 30, the ABA Center for Innovation, in conjunction with the Legal Services Corporation (LSC), launched the Legal Tech for A Change Project. This program will match legal technology companies with local LSC grantees to provide free software and technology assistance to financially-strapped legal aid providers across the nation. A vetting committee comprised of members of the Center, legal aid professionals, and LSC will ensure the software provided is both useful and appropriate for the needs of the legal services offices. So far, tech giants Metajure and ROSS Intelligence have agreed to donate products. A website to recruit legal technology companies to the program, is now operational. To date, nine technology companies have volunteered for the program. The project was highlighted at the Equal Justice Conference held in San Diego in May.

In other Center for Innovation news:

- The Miranda Project is an app being developed for use by police officers to inform people who have limited knowledge of English of their rights. Field testing has begun with two chosen prototype tools utilizing uniform, court certified, plain-language Spanish translations of the warning, along with pictographic representations. Following successful testing of the Spanish language tools, the Center will develop additional language translations, along with developing tools for the hearing impaired.
- The State Bar of Michigan has agreed to sponsor an Innovation Fellow. The Fellow will work on a state data collection project the Center is conducting in conjunction with several state bar associations. Additionally, the National Center for State Courts has agreed to sponsor a NextGen Fellow who will work on a court improvement project.
- The Center received a $20,000 grant to provide an expansion of its FloodProof program in Texas and to implement programs in the U.S. Virgin Islands and Puerto Rico.

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FloodProof is a mobile app that directs flood victims to appropriate legal services in their region.

- Liberty Mutual joined with the Center on a new data collection project that will develop a robust database on the legal profession, justice system, and access to justice issues.

**Finances**

Eight months through our fiscal year (April 30, 2018), the Association generated consolidated operating revenues of $134.5 million and incurred operating expenses of $136.3 million, which resulted in a deficit of $1.8 million. The $3.8 million operating revenue shortfall to budget is more than offset by a $4.6 million favorable expense variance, resulting in a $0.8 million favorable net variance with budget. Consolidated operating revenue decreased by $2.8 million compared to FY 2017, while consolidated operating expenses decreased $1.4 million compared to prior year. More detailed information on the Association’s financial status is provided in the Treasurer’s Report.

As of May 18, charitable donations from individuals and organizations received through the ABA Fund for Justice and Education (FJE) total $2,223,345. That represents a year-to-date increase of nearly 20 percent in revenue from FY 2017 and a year-to-date increase of 50 percent from FY 2016. The ABA/FJE is on target to reach its fundraising goal of approximately $3.63 million for FY 2018. This goal was determined after the ABA/FJE surpassed its FY17 goal of $2.99 million by raising nearly $3.30 million.

**ABA Preferred Rate Program, Leverage, and Advantage**

The ABA Preferred Rate Hotel Program currently includes 155 hotel properties in 17 countries. The Program is comprised of four and five-star luxury properties with negotiated rates of up to 40 percent off published rates. The total annual non-dues revenue collected from hotels in participation fees billed for the current fiscal year amounts to just over $500,000. Revenues are projected to grow next year due to the planned increase in the participation fees and an increase of properties in strategic locations.

ABA Leverage is a complimentary global sourcing and contracting meeting service operating within the ABA’s Meeting and Travel Department which assists in negotiating hotel rates for groups of 10 or more rooms per night. ABA Leverage was established three years ago, and in that time, the service has secured more than 40 clients, including some of the largest law firms in the country and 19 legal associations. ABA Leverage generates just under $400,000 in non-dues revenue annually from hotel commissions.

ABA Advantage remains a meaningful element of the ABA membership value proposition. In FY 2017, the program generated about $5.5 million in marketing fees and royalties for the Association. Preliminary data shows ABA members spent more than $280 million with ABA Advantage program partners in the first seven months of FY 2018. The ABA discounts saved members more than $7.5 million during that period. The program’s revenue is about 3 percent behind FY 2017’s results.

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The Chicago Move and Construction Project at ABA Headquarters was completed on time and under budget. By the end of March, some 541 staff members relocated as a result of the Project, which saw the ABA give up space in the lobby, 90 percent of Lower Level 1, and the 16th floor. The renovated space has been widely praised by staff and recent visitors to the building. As earlier reported to the Board, the renegotiated lease saves substantial costs for the Association.

Advocacy

ABA Day in Washington, DC, our annual opportunity to lobby Congress on issues important to the legal profession, was conducted April 10 to 12. More than 300 lawyers from 48 states, DC, and the U.S. Virgin Island went to Capitol Hill to speak with lawmakers and their staffs.

This year, the focus was on three key issues. The first was to ensure funding for the Legal Services Corporation (LSC), which provides financial support for low-income Americans who need civil legal help. This program had been targeted for elimination by the White House, but thanks in large measure to ABA efforts, this year Congress granted the program a $385 million appropriation which was later increased by $25 million to $410 million. We’re pushing for at least $482 million in FY 2019 funding.

The second ABA Day priority is to protect the Public Service Loan Forgiveness Program (PSLF). Under PSLF, qualified participants were promised student loan forgiveness after 10 years of working in public service; this includes lawyers working at nonprofits. The ABA has been at the forefront of efforts to preserve the program and to have it applied as intended in the legislation. Strained and unacceptable interpretations of the program’s application have caused the ABA to take a number of actions, including a lawsuit against the Department of Education. The Association is a very strong proponent of the incentive promised by PSLF to help those who choose to work in public service.

The third ABA Day priority involved the Legal Orientation Program (LOP), which provides legal information to undocumented adults awaiting a determination of their immigration status understand their rights. On April 10, the Justice Department announced the program would be suspended at the end of the month. That happened as ABA Day was just underway, and our staff colleagues at the GAO worked into the night to prepare participants to lobby lawmakers on behalf of this most worthy issue. Thanks to ABA pressure, the Justice Department quickly reversed its decision and announced it would continue funding LOP for another year. We can take pride in this accomplishment, which demonstrates the powerful impact our Association has on behalf of those in need.

GAO assisted President Bass in drafting her statement and preparing to testify April 18 at a Senate Judiciary Subcommittee on Border Security and Immigration hearing on immigration courts. The hearing focused on alternative structures for organizing immigration courts. GAO also helped prepare testimony for President Bass on LSC funding for submission on April 27 to
the House and Senate Appropriations Subcommittees on Commerce, Justice, Science, and Related Agencies.

On February 7, GAO sent a letter to key contacts in the Senate Judiciary Committee, reminding them to support the Sentencing Reform and Corrections Act (SRCA) during a scheduled markup. GAO also participated in a Twitter campaign to support the bill. The bill was approved by the Committee by a vote of 16 to five on February 15.

On December 20, 2017, Congress passed sweeping tax reform legislation known as H.R. 1, the “Tax Cuts and Jobs Act,” which includes several key tax provisions on which the ABA successfully lobbied. The final bill included ABA-supported language that applies the same 20 percent deduction for “qualified business income” to the owners of all pass-through businesses -- including law firms -- on an equal, non-discriminatory basis, though only up to certain income thresholds. Although the deduction is phased out for owners of professional service businesses who earn more than $315,000 annually (for married taxpayers filing jointly) or $157,500 annually (for individuals), many high-income law firm partners will still benefit from other provisions lowering the top individual income tax rate from 39.6 percent to 37 percent and raising the income thresholds for the top brackets.

Consistent with other ABA recommendations, the final tax bill also preserved the existing deductions for student loan interest and upfront litigation-related expenses. Perhaps most importantly, the final bill did not include ABA-opposed mandatory accrual accounting proposals that would have required many law firms to pay taxes on their work in progress, accounts receivable, and other “phantom income” long before it is received from clients. After Congress passed the final bill, President Bass sent an email to law firm managing partners and corporate general counsels as part of her “PartnerUp” campaign -- and a separate email to ABA members -- explaining how these key tax issues were addressed in the final bill.

**Media Relations and Strategic Communications**

As part of the recent staff reorganization, we have made significant changes in our communications strategy. Now called Media Relations and Strategic Communications (“MR;” formerly Communications and Media Relations, or “CMR”), our team has a new focus to proactively promote the ABA and its mission and accomplishments.

The MR changes involve several areas:

**Strategic Messaging.** MR will work more closely with the Office of the President, Membership, the GAO, and other entities to develop consistent messaging about the ABA, our brand, and our mission. MR will also work to ensure this messaging more closely guides presidential appearances, media interviews, and other media outreach, including editorial boards and other opportunities with the media.

**Rapid Media/Public Response.** To stay relevant, the ABA must be responsive to the media, particularly on stories involving the ABA. MR will identify areas where the ABA should weigh in publicly and will develop responses that should be delivered in a timely manner. MR
Proactive Media and Public Outreach. To better control the ABA’s message, MR will regularly identify topics and messages that speak to the ABA’s mission and pitch them to the media through interviews, editorial boards, op-ed campaigns, social media campaigns, and other opportunities.

Social Media and New Media. Twitter has been widely adopted across the Association, and there are other social media and multimedia opportunities that hold promise for the ABA and our entities. These include podcasting, audio embeds in newsletters, Facebook Live presentations, blogging, Instagram, and Snapchat. MR will incorporate such state-of-the-art communication tools into its communications vehicles and train interested individuals or entities in the best practices for each of these opportunities.

In addition to these efforts, in June the Board of Governors will be asked to approve three key initiatives to enhance the ABA brand and showcase the Association’s pivotal role within the legal profession. For each of these programs, MR will work with relevant entities to pull together information and then disseminate it effectively. The first initiative is an annual “State of the Profession,” which will provide a broad range of updated demographic information, such as how many lawyers practice in America, the percentage of women and minorities within the profession, how many attorneys are solo, and other key statistics. The second is an “Access to Justice Index,” which will assess how many Americans have proper access to the justice system, legal aid, and pro bono resources. This will be compiled on both the national and state-by-state levels. Finally, an annual “ABA Survey of Constitutional Knowledge” will measure the public’s understanding of basic civics concepts and determine where awareness and education are needed.

Our launch of each of these efforts should produce extensive positive media interest, highly anticipated annual updates, and helpful ABA-branded resources for the legal profession and for the public at large. These projects will also enhance the Association’s reputation and profile among media influencers.

In other ABA communications news, MR worked with GAO and the Commission on Immigration on messaging that opposed the proposed cut to the LOP, resulting in a media statement from President Bass which was referenced by news outlets such as CNN, Texas Monthly, and the Houston Chronicle. As noted above, these swift efforts by ABA stakeholders helped preserve the LOP program for this next year.

Amid a national focus on workplace sexual misconduct, MR reached out to several news outlets to pitch ABA efforts to combat the problem. Both Bloomberg and The American Lawyer interviewed President Bass, who informed the publications of a recently passed House of Delegates resolution to address harassment in the legal profession and a newly updated ABA manual of law firm best practices to help fight the misconduct.

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As attendees gathered for the Midyear Meeting in Vancouver, the San Diego Union Tribune on February 5 published a story on President Bass’ Initiative on Achieving Long-Term Careers for Women in Law, a study to determine why women at various stages in their careers are leaving law firms and to propose solutions to combat the problem.

MR reached out to almost 1,500 news outlets in promotion of the Midyear Meeting. In total, the Division contacted 2,203 U.S. and Canadian reporters through personalized outreach. It also produced 15 news releases, nearly 30 staff-written web stories, and almost 30 video clips.

A signature initiative of President Bass, the ABA Homeless Youth Legal Network, was the focus of an opinion editorial bylined by Bass that appeared in several national news outlets, including the Florida Sun Sentinel, GVwire, and Inside Sources. In the op-ed, Bass urged lawyers to serve the legal needs of homeless youth and introduced the network’s resources, such as training and technical assistance in the unique needs of homeless young people.

On December 20, 2017, the Inside Cybersecurity news service reported on the rise in cybersecurity targeted at law firms, as printed following a MR news release on the 2017 ABA TECH REPORT; and Pittsburgh’s Tribune-Review published a December 18 article on ABA guidance on when lawyers can reveal private information on former clients without their permission, based on a MR press release on the topic.

Data on ABA law school admissions, tuition, and other related concerns was the subject of a December 18 news release distributed nationwide. The statistics shared by MR from the ABA’s 2017 Standard 509 Information Report were reported by numerous news outlets, such as the National Law Journal, Indiana Lawyer, and the Wall Street Journal.

A New York Times op-ed on the rise in number of Immigration and Customs Enforcement (ICE) arrests at U.S. court houses provided an opportunity for President Bass to emphasize the importance of equal access to justice in a MR-prepared letter to the editor published on December 12. Such enforcement actions by ICE “discourage immigrants from coming to court as witnesses, plaintiffs and defendants and undermine the country’s promise of justice for all,” Bass said, noting ABA policy passed in August that calls on Congress to add court houses to the list of “sensitive locations” in which immigration enforcement actions can be taken only in emergency circumstances.

ABA Legal Fact Check continues to be a MR priority with several timely posts associated with the top news headlines, including ones on the First Amendment Rights of high school students; the courts’ approach to gun control legislation; the law supporting “chain migration”; and treason as a legal matter and its history, as noted by Detroit Legal News. Additionally, journalist Dan Abrams maintains an archive of all Legal Fact Check posts, which he re-publishes on his Law & Crime news site here. Legal Fact Check was also recent featured in Associations Now, a publication of the American Society of Association Executives.
Global Programs

I am delighted to welcome Alberto Mora as the ABA’s new Associate Executive Director for Global Programs and Director of ROLI. He assumed his new duties on May 31. Alberto brings to the Association broad experience and a very successful record of protecting and advancing the rule of law. He comes to us from the Harvard Kennedy School of Government, where he serves as a senior fellow at the Carr Center for Human Rights Policy. He previously served as the chief legal officer at Mars, Inc. (2008 - 2013) and Walmart International (2006 - 2008).

Prior to his corporate work, Alberto was General Counsel of the Navy and Marine Corps (2001-2005) with management responsibility for some 640 attorneys and 214 support personnel across 146 offices throughout the United States and overseas. In that role, he had oversight responsibilities for the Naval Criminal Investigative Service, and he served as the agency’s chief ethics officer and, on occasion, as acting Secretary of the Navy. He has been a partner in law firms and also served as the General Counsel for the United States Information Agency (1989-1993). Before law school, he served as a Foreign Service Officer for three years.

As we welcome Alberto to the ABA staff, we also say farewell to Betsy Andersen, whose appointment as Executive Director of the World Justice Project was recently announced. We wish her the very best as she pursues her new opportunity.

ROLI and the China Law Society conducted a conference on implementation of China’s recently adopted anti-domestic violence law from April 22 to April 23 in Beijing. The goal of the conference was to build the capacity of the justice sector to effectively implement the new law and train participants on key provisions. The discussion focused on key issues faced by judges related to implementing the law and recommendations on how to improve it. Approximately 40 participants from various sectors such as the judiciary, academia, and the Women’s Federation attended the event. The event marked the first time that ROLI has been permitted to carry out activities in China since January 2017.

On April 5, ROLI finalized informational videos for the Philippines which serve to promote the use of the Find Justice mobile app and provide the public with information on how to download and use it. The free app was developed by ROLI in conjunction with the Supreme Court and the Integrated Bar of the Philippines and connects individuals with pro bono legal services. It also provides contact information and location for trial courts, judicial reforms, and case filing procedure.

In April, ROLI hosted Trafficking in Persons (TIP) experts from the DOJ (a federal prosecutor and TIP coordinator) and the San Diego Police Department. A meeting was held with Jordan’s Minister of Justice and head of the country’s anti-human trafficking national committee, and with the directors of the human rights and anti-human trafficking units at the Ministry. A workshop for prosecutors and detectives addressed modern investigation methods using Internet-based evidence and digital evidence taken from crime scenes, interviewing victims, and addressing criminal charges against TIP victims.

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The ROLI Annual Conference on Rule of Law Issues, When People Flee: Rule of Law and Forced Migration, was held on Tuesday, April 17 at the George Washington Elliott School of International Affairs. The conference was co-sponsored by the Elliott School, and the ABA Section on Litigation, the Center for Human Rights, the Commission on Immigration, and the Section of Civil Rights and Social Justice. In sessions with three breakout panels, participants examined the origin, transit, and destination experiences of migrants in three different migration paths: Syria to Europe, Sub-Saharan Africa to Europe, and Central America to the United States. The conference was well attended by over 200 participants representing U.S. government agencies, the European Union, U.N. agencies, NGOs (non-governmental organizations), researchers, scholars, and journalists.

From March 12 to 16, ROLI conducted a workshop in Peru’s Amazon region on the criminal investigation of illegal gold mining and transnational crimes for 70 participants, including environmental prosecutors, eight environmental judges, scientific police, and coast guards. Peruvian Attorney General Pablo Sánchez Velarde attended on Thursday to highlight the importance of the training for fighting environmental and organized crimes and commended ROLI’s training methodology.

At the end of March, an eight-person delegation of judges, prosecutors, and staff persons from Bahrain’s Ministries of Justice and Interior traveled to the U.S. to participate in a study tour to DC and Maryland to learn more about how alternatives to detention programs are managed in the U.S. Meeting with judges and parole/probation staff, the Bahrainis are gathering information to assist them as they continue develop their alternatives to detention program to minimize incarceration in the country.

In February, the Center for Human Rights hosted the Dean of the Warsaw Bar Council who traveled from Poland to attend meetings on Capitol Hill and with the State Department to raise awareness of the declining independence of the judiciary in Poland and discuss how the U.S. can help.

ROLI in February completed a month-long, four-course legal skills training program at Prince Sultan University in Riyadh, Saudi Arabia. The participating group of female law students developed practical legal skills as they were trained in Accounting for Lawyers, Law Practice Management, Legal Writing, and Oral Advocacy. In the last week of the course, they learned to develop case analysis to advocate for clients, question witnesses, and present oral arguments at both the trial and appellate levels.

From January 9 to 12, ROLI supported the visit of President Bass to Vietnam. The trip included meetings with the U.S. Ambassador, Vietnam Bar Federation leadership, Vice Minister of Justice, Chief Justice of the Supreme Court, and Prime Minister. ROLI and the Vietnam Bar Federation co-hosted a day-long seminar on legal ethics to inform on-going reform of the Vietnamese legal ethics code. Joining President Bass on the visit were President-Elect Bob Carlson, ROLI Chair Judge Margaret McKeown, and leaders of the Litigation Section, among others.

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This year, this Justice Defenders Program continued to offer cost-effective support to frontline advocates working to defend fundamental freedoms, combat endemic corruption, and promote good governance. It has provided assistance in a total of eight cases and three campaigns, on behalf of seven individual defenders and 12 NGOs. The Program delivers both technical legal assistance in immediate cases against human rights defenders and to address corruption and weak institutions that fail to protect them from attacks and frivolous criminal charges. It supported journalists facing charges for publishing accounts of corruption; advocates providing legal aid to the most vulnerable members of their communities; women defenders facing harassment and intimidation for demanding accountability for security force abuses; and advocates pressing for judicial independence in the face of endemic corruption.

The Justice Defenders Program’s work from prior years also bore fruit this spring in a landmark criminal case against five security force officers convicted of using excessive force when they fired upon unarmed protesters in 2015. In 2015, the Program supported a local human rights group and its lawyers representing protestors fired upon by Tunisian security forces. A court recently found the officers guilty of using excessive force against peaceful protesters who led to the killing one protester. They received sentences that ranged between five years and life in prison and the final judgment in their case referenced the arguments and authorities submitted by the counsel for the families, who feel the support was instrumental in achieving justice for their loved ones.

Judge Russell Canan of the DC Superior Court served as a legal specialist and substantive expert for ROLI’s Kazakhstan Judicial Program from April 14 to 20. ROLI, particularly the Central Asia team, has worked extensively with Judge Canan for a number of years, including introducing him to multiple study tour delegations to Washington, DC to provide an overview to the criminal justice system. He traveled to Astana for meetings with our primary partner, the Supreme Court of the Republic of Kazakhstan, to serve as international expert for a criminal law roundtable ABA ROLI conducted for judges, prosecutors, and defense attorneys. At the roundtable, Judge Canan discussed how two new mechanisms introduced in the Criminal Procedure Code of Kazakhstan, summary proceedings and the role of the investigating judge, are implemented in the U.S. criminal justice system and facilitated a discussion with the participating judges on how the mechanisms as introduced in Kazakh legislation could be improved. As the result of the roundtable, the participants adopted recommendations that the Supreme Court will use to improve the implementation of those mechanisms to ensure they achieve their goal of protecting citizens’ rights.

In December, ROLI programming in the North Kivu region of the Democratic Republic of the Congo was suspended following an attack on a U.N. base by the militant group Allied Democratic Forces. While no ROLI personnel were directly affected, 15 U.N. peacekeepers and five Congolese soldiers were killed. This was the most serious loss of life the U.N. has suffered in a single day since 1993, and underscores why ROLI staff continue to practice extreme caution when traveling to unstable, rural localities.

On December 11, 2017, ROLI’s Latin America and Caribbean Division Director and El Salvador Country Director attended the launch of the USAID/WorldVision "Fortalecimiento del Sistema de Justicia Juvenil" (Strengthening of the Juvenile Justice System) project. ROLI is a landmark criminal case against five security force officers convicted of using excessive force when they fired upon unarmed protesters in 2015. In 2015, the Program supported a local human rights group and its lawyers representing protestors fired upon by Tunisian security forces. A court recently found the officers guilty of using excessive force against peaceful protesters who led to the killing one protester. They received sentences that ranged between five years and life in prison and the final judgment in their case referenced the arguments and authorities submitted by the counsel for the families, who feel the support was instrumental in achieving justice for their loved ones.

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sub-grantee on the project which aims to provide technical support to find alternative sentencing for youth offenders, develop referral systems to address the specific needs of each youth, and reduce recidivism rates through life and education planning.

ROLL in coordination with the Philippines’ Cebu Hall of Justice, hosted a visit to showcase the court system and its many features to the new Philippine Mission Director in late 2017. A docket clerk from the Office of the Clerk of Court demonstrated how a case is docketed and raffled, while a judge showed how the information kiosk can be used by the public to monitor and track the status of cases.

Governance and Public Services

The new ABA National Lawyer Regulatory Data Bank platform successfully launched in February, with features including enhanced bulk search functionality, increased user-friendly email notification to disciplinary counsel when a lawyer licensed in their jurisdiction has been added to the Data Bank, and a “recently disciplined lawyers” function.

The ABA’s Free Legal Answers, the web-based pro bono brief advice service, has now surpassed 27,800 client questions. More than 4,600 pro bono attorneys are registered to respond to civil legal questions. The number of questions submitted has increased by 20 percent over the past three months.

The Center for Pro Bono promoted events to serve homeless youth on or around International Day for Street Children on April 12, in connection with President Bass’ initiative on the legal needs of homeless youth. Organizations around the country held 38 events in March and April for homeless awareness.

The Commission on Lawyer Assistance Programs launched a new "Path to Law Student Well-being" podcast series in collaboration with the Section of Legal Education and Admissions to the Bar. The inaugural two-part episode features two short conversations with notable law school professors and deans from across the country. Part One discusses ways individual faculty members can notice, engage with, and support students they suspect are in distress. Part Two provides steps faculty can take to promote student well-being through their teaching in the classroom, including concrete actions for law school administrators.

The Commission on Women in the Profession in May partnered with the Minority Corporate Counsel Association and the Center for WorkLife Law at the University of California, Hastings College of Law, to release an anticipated research report, You Can’t Change What You Can’t See: Interrupting Racial & Gender Bias in the Legal Profession. This report provides new data about and toolkits to address the damaging effects of implicit bias in the legal workplace.

The Standing Committee on Ethics and Professional Responsibility issued Formal Ethics Opinion 481, A Lawyer’s Duty to Inform a Current or Former Client of the Lawyer’s Material Error on April 17. In this opinion, the Committee tackles the issue of whether a lawyer has a duty to inform a current client or a former client of the lawyer’s material error. Material error is defined as an error reasonably likely to harm or prejudice a client or an error of such a nature that...
it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. The Committee concluded that Model Rule of Professional Conduct 1.4, Communication, requires notice of a material error to a current client. No similar duty is owed to a former client.

The Center for Professional Responsibility’s Director Tracy Kepler and Professionalism Counsel Theresa Gronkiewicz attended the National Legal Mentoring Consortium conference, “Mentoring: Meeting the Challenges of a Changing Legal Profession” at the University of South Carolina School of Law. William Hubbard, Past President of the ABA, was one of the keynote speakers and Professionalism Committee member Michelle West and Ms. Kepler served as panelists in two separate programs addressing the following topics: “Best Practices: Building Sustainable Programs for Law Schools, State Bar Associations, and Court Program” and “Mentoring and Wellness.” A diverse group attended the Conference including leaders from law firms, bar associations, courts, and law schools from 22 different states, Brazil, and Canada.

Entity Activities

The Death Penalty Representation Project and Commission on Disability Rights partnered to launch a new website http://www.capitalclemency.org. The site is designed to improve the public’s understanding of clemency in death penalty cases and provide hundreds of critically-needed resources for lawyers and other stakeholders, including a new publication, Representing Death-Sentenced Prisoners in Clemency: A Guide for Practitioners. This Initiative was initially made possible by an ABA Enterprise grant in 2015.

The Section of International Property Law sent a letter to the U.S. Trade Representative outlining intellectual property rights considerations during the renegotiations of the North American Free Trade Agreement (NAFTA), noting that a modernized NAFTA should take account of effective trade secret and intellectual property rights protection and address deficiencies in the current agreement. The letter provided recommendations for trade secrets, trademarks, patents, copyrights, regulatory exclusivity, digital trade, and investor-state dispute settlement system issues.

The second Annual National Judicial Outreach Week was held the week of March 4 to 10 in an effort to educate the public on the unique role of the judiciary and the importance of judicial independence and the rule of law. The Judicial Division (JD) supported this initiative by sharing the Judicial Outreach Network Committee’s informational toolkit/packet with judges and lawyers in the Division’s six conferences, and with the public and other members of the judiciary. The JD also promoted Judicial Outreach Week on its website, Twitter, and Facebook.

As a cost-saving measure, the Commission on Disability Rights (CDR) hosted its 2018 Spring Business Meeting at Venable LLP in Baltimore, Maryland. The firm gave a presentation about its diversity and inclusion initiatives and activities, and CDR offered to collaborate on efforts aimed at the recruitment, hiring, retention, and advancement of lawyers with disabilities.

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ways to increase awareness of mental health on campuses and to best serve law students with mental health conditions.

The ABA Center on Children and the Law’s staff have long been involved with individual states in assisting them to improve the quality of legal representation for children and parents involved in the child welfare system. In March, ABA attorney Mimi Laver received news (and gratitude) from several states which have received legislative allocations to expand representation. Notably, in Oregon the Office of Public Defense Services will be expanding its high-quality representation model for children and parents into several new counties due in part to work Mimi has done connecting them to existing models in other states. In Wisconsin, the state legislature passed a bill to create parent representation in five pilot counties (with the hope of expanding throughout the state in the future).

On February 11 and 12, the ABA Center on Children and the Law hosted a Work Group meeting for the U.S. Department of Health and Human Services Children’s Bureau focused on Primary Prevention and Strengthening Communities to protect against unnecessary entry into the child welfare system. Jerry Milner, the Associate Commissioner of the Children’s Bureau, attended the two-day event and led the discussions. Other participants included leaders from the Centers for Disease Control, HeadStart, and child welfare agencies across the country.

The Solo, Small Firm and General Practice Division’s timely CLE webinar titled “Sexual Harassment: The Employer’s Role in Prevention” was held on January 31. Several entities cosponsored this program including: Center for Professional Development; Commission on Domestic and Sexual Violence; Criminal Justice Section; Division for Public Services; and the Law Practice Division.

In March, the Commission on Women in the Profession published a manual — Zero Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession. It contains practical advice for legal employers and employees, including sample policies for prohibiting harassment and for progressive discipline. The manual includes up-to-date summaries of case law and best practices on developing and enforcing anti-harassment policies. It addresses new subject areas such as LGBTQ rights and gender-based bullying, and draws on the personal experiences of professionals who deal with sexual harassment issues every day, including lawyers, judges, educators, investigators, mediators, and legislators. The goal of the publication is to provide practical guidance for addressing and eliminating sexual harassment in the workplace. The preface to the manual is written by Brandeis University Professor Anita Hill, who made news in 1991 when she accused Supreme Court nominee Clarence Thomas of sexual harassment.

The Commission on Women in the Profession has also selected its 2018 Margaret Brent Women Lawyers of Achievement award winners. Established by the Commission in 1991, this award recognizes and celebrates the accomplishments of women lawyers who have excelled in their field and have paved the way to success for other women lawyers. The 2018 Margaret Brent Women Lawyers of Achievement Awards will take place on Sunday, August 5, at the ABA Annual Meeting in Chicago and will honor:
• Patricia Kruse Gillette: Author and Speaker on Gender and Diversity Issues, Retired
  Partner of Orrick, Kensington
• Eileen M. Letts: Partner at Zuber Lawler & Del Duca LLP
• Honorable Consuelo B. Marshall: U.S. District Judge, U.S. District Court in Los Angeles
• Cynthia E. Nance: Dean Emerita, Nathan G. Gordon Professor of Law, Director of Pro Bono and Community Engagement, University of Arkansas School of Law, and
• Tina Tchen: Partner at Buckley Sandler LLP

From December 13 to 15, 2007 in Houston, Texas, the ABA Working Group on Unaccompanied Minor Immigrants and the Commission on Immigration co-sponsored a national conference with Kids in Need of Defense, titled “National Conference on Representation and Advocacy for Unaccompanied Immigrant Children.” For the first time in 10 years, legal service providers and pro bono attorneys serving unaccompanied children came together to learn from one another, strengthen relationships, and plan future advocacy. The conference took place at the South Texas College of Law Houston, a law school that hosts four legal service providers of unaccompanied children, including the ABA’s Children’s Immigration Law Academy. The conference attracted 194 participants from 17 states, the District of Columbia, Mexico, Guatemala, Honduras, and El Salvador. For three days, attendees participated in over 30 unique sessions dealing with issues they confront daily in their practices, and gained inspiration and perspective from the opening and closing plenary speakers. The conference was funded through a grant from the John D. and Catherine T. MacArthur Foundation.

In December 2017, the Center on Children and the Law facilitated and participated in an event designed to re-examine how federal Child and Family Services Reviews are conducted, with a particular emphasis around how the state child welfare agencies are integrating the recommendations from the U.S. Department of Health and Human Services. The Center hosted judges and child welfare agency staff from 13 states, along with leaders in federal government, technical assistance providers and others from across the country who work on improving outcomes for children and families involved in the child welfare court system.

ABA Journal

Once again, the ABA Journal demonstrated it is the most respected news magazine for lawyers in America, as it was awarded a host of awards and recognitions this spring. At the National Azbee Awards held in Washington, D.C. in May, the Journal received five gold awards and 10 total honors, including recognition as a top-three magazine in the Magazine of the Year category. Also in May, the Chicago Headline Club (one of the largest chapters of the Society of Professional Journalists) presented their Lisagor Awards. The Journal won for “Best Feature Story” and “Best Illustration.” A full listing of the Journal’s recent awards can be found here.

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historically significant actions will also help us better engage new and prospective members, and make us more relevant to today’s legal community.

One hundred forty years ago, ABA’s founders joined together to create an Association dedicated to defending liberty, pursuing justice, and serving the legal profession. Today, we carry on that essential legacy. If we expect the ABA to remain the leading voice of America’s lawyers for another 140 years, we must act now to position the Association for the future.

I look forward to meeting with you in Chicago. As always, I welcome and encourage your comments, questions, and suggestions as we move forward.

Respectfully submitted,

Jack L. Rives
Executive Director
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 2018 Midyear 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 Saturday, April 28, 2018 in Phoenix, Arizona. Scope will meet again in conjunction with the ABA’s Annual Meeting on Saturday, August 4, 2018, in Chicago, Illinois.

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:

**Armed Forces Law, Standing Committee on** - Scope commended the Standing Committee on Armed Forces Law for doing good work.

**Federal Judiciary, Standing Committee on** - Scope commended the Standing Committee on Federal Judiciary for its excellent work as an independent, peer reviewed, non-partisan committee. It is particularly important in turbulent times. One of the ABA’s fundamental goals is to, “Advance the Rule of Law preserve the independence of the legal profession and the judiciary.” Scope also commended and encourage the Standing Committee for its initiative to explore establishing a totally secure portal for voting and information sharing. Scope concluded the Standing Committee’s continuing to act totally independent and insulated from the remainder of the ABA in its decision-making and policymaking is critical and must be preserved.

**Law and National Security, Standing Committee on** - Scope commended the Standing Committee on Law and National Security for doing good work.

**Lawyer Assistance Programs, Commission on** - Scope began its review of the Commission on Lawyer Assistance Programs (Commission) at its 2017 Fall Meeting. During that meeting Scope concluded that the Commission is active and not engaging in a function that unnecessarily overlaps with or duplicates the activities of other ABA entities. Scope members invited the Commission to share their perspectives on the following issues: should the ABA continue to be in this business and should the Commission continue to be housed in the Division for Legal Services or moved under the umbrella of the Center for Professional Responsibility. Scope received the Commission’s perspectives and thanked the Commission for the additional information.

**Responsibility. Scope received the Commission’s perspectives and thanked the Commission for the additional information.**
Pro Bono and Public Service, Standing Committee on - Scope commended the Standing Committee on Pro Bono and Public Service for doing excellent work.

Publishing Oversight, Standing Committee on - Scope began its review of the Standing Committee on Publishing Oversight at its 2017 Spring meeting. As a result of that review, Scope concluded that the Standing Committee is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. Scope commended the Standing Committee for working hard to address the issues caused by the new approach the Association decided to take in regard to publishing. The Standing Committee is a hard-working committee that appears to have gotten back on track during the past year. Scope recognized in the previous two years the Standing Committee was struggling and not working at optimal level. To avoid having vacant positions, during the appointment process, should the President-Elect not accept the Section Officers Conference’s (SOC) recommendations and an agreement cannot be reached on appointees, SOC should inform the Standing Committee’s Board Liaison and Chair. Additionally, given the ongoing publication challenges, recent staff changes, and the Standing Committee’s work on developing a comprehensive mission, vision and strategic plan, Scope will continue to monitor the Standing Committee with a follow-up review Spring 2018. As a result of that review, Scope concluded the Standing Committee on Publishing Oversight is functioning well and commends the Standing Committee for its good work.

Gatekeeper Regulation and the Profession, Task Force on - Scope commended the Task Force on Gatekeeper Regulation and the Profession on doing good work.

Scope deferred its review of the following entities:

Working Group on Unaccompanied Minor Immigrants
Commission on Immigration
Commission on Interest on Lawyers Trust Accounts
Commission on Youth at Risk
StC on Delivery of Legal Services
StC on Gavel Awards
StC on Group and Prepaid Legal Services
StC on International Trade in Legal Services
StC on Legal Aid and Indigent Defendants
StC on Lawyer Referral and Information Service
StC on Lawyers’ Professional Liability
StC on Paralegals
StC on Public Education
SpC on Death Penalty Representation Project
Cybersecurity Legal Task Force
Scope deferred its review of the Cybersecurity Legal Task Force to Scope’s 2019 Spring meeting.

Forum on Communications Law
Forum on Entertainment & Sports Industries
Scope agreed to defer the Forums on Communications Law, and Entertainment & Sports Industries to its 2019 Spring Meeting where Scope will take a broader look at all the Forums and their policies.

Working Group on Task Based Billing Codes
Scope deferred its review of the Working Group on Task Based Billing Codes to Scope’s 2020 Spring meeting.

Scope 2018 Annual Agenda will include:
Working Group on Building Public Trust in the American Justices System
Center for Innovation Governing Council

Respectfully Submitted,

Thomas M. Fitzpatrick, Chair
Amelia Helen Boss
W. Andrew Gowder, Jr.
Jennifer (Ginger) Busby
José C. Feliciano, Sr.
Michael G. Bergmann, Chair, SOC
Ilene Knaile Gotts, ex-officio
Ramona G. See, ex-officio

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Ramona G. See, ex-officio

Friday, May 4, 2018
The Committee on Scope and Correlation of Work ("Scope") consists of five members of the Association, one of whom is elected each year by the House of Delegates to serve a full (5 years) term beginning with the adjournment of the Annual Meeting during which he or she is elected.

Association policy provides that Scope nominations are presented to the House of Delegates by the Scope Nominating Committee ("Nominating Committee") consisting of the Chair of the House of Delegates as Chair, and as members: the Scope Committee Chair, the Board of Governors Improving the Profession Committee Chair, the member of Scope with the longest continuous service on the Committee who is not the chair, and the Section Officers Conference Chair.

The Nominating Committee was fortunate to have the difficult task of selecting from twelve (12) exceptional applicants with impressive credentials. However, only one nominee could be selected. The Nominating Committee voted to nominate Linda L. Randell of Hamden, CT, to fill the vacancy that will occur at the conclusion of the 2018 Annual Meeting.

It is the belief of the Nominating Committee that the breadth of Ms. Randell’s extensive background in bar activities and her knowledge of the Association as a whole qualifies her for membership on the Committee on Scope and Correlation of Work.

Respectfully Submitted,

Deborah Enix-Ross, Chair
Thomas M. Fitzpatrick
Amelia H. Boss
Hon. Ramona G. See
Michael G. Bergmann

Dated: July 2018
RESOLVED, That the American Bar Association urges states to adopt General Provisions for Regulation of Online Providers of Legal Documents to establish reasonable standards of product reliability and efficacy, provide consumers with information and recourse against abuse, ensure consumers are made aware of the risks of proceeding without attorneys, inform consumers where affordable attorneys can be found, and protect confidential information; and

FURTHER RESOLVED, That until such time as the General Provisions are adopted, online providers of legal documents are encouraged to adopt the Statement of Best Practices to provide a common-sense approach to self-regulation of online providers of legal documents.
I. Introduction

Online legal forms provide enhanced access to justice for people of modest means; however, the impact on consumer protection of the online sales of these forms has received only modest attention. In 2016, the New York County Lawyers Association established a Task Force on On-Line Legal Providers. The Task Force sought to study and undertake such steps necessary to consider all relevant issues, including convening a public forum entitled “Should Online Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not?” The forum included presenters from all perspectives, including stakeholders, and examined the following topics:

- What does the online legal document sale industry do? Who uses it? How new is it? How big is it? Are legal documents like other consumer goods? Are there legal documents that should not be sold without advice from a lawyer?
- Some safeguards are required for consumer use of legal forms: which ones are provided? Which ones are lacking?
- If additional safeguards are required, should they be self-imposed or required by legislative action? Should the addition of safeguards provide a basis to regulate industry activity?

The forum reflected that:

Online legal forms providers (OLPs) are a worldwide multi-billion dollar industry that has created a new market;

Online legal documents can genuinely benefit many people, especially low- and moderate-income persons, small businesses, and startups, as the public interest is served by having accurate and modestly priced online legal forms available; and

1 This report is a summary of the full report prepared by the Task Force on On-Line Legal Providers of the New York County Lawyers Association with the help of NYCLA staff and associates at the law firm of Seward & Kissel LLP. It was approved and adopted by the New York State Bar Association House of Delegates on November 4, 2017. The report can be accessed in its entirety at http://www.nycla.org/pdf/NYCLA%20Task%20force%20Report%20-%20Online%20Providers%20of%20Forms%20%282017%29.pdf.

2 The members of the Task Force included NYCLA Past Presidents Arthur Norman Field, James B. Kobak, Jr., and Michael Miller; NYCLA Ethics Institute Director Sarah Jo Hamilton; NYCLA Committee on Professionalism and Professional Discipline Chair Ronald C. Minkoff, NYCLA Law and Technology Committee Co-Chair Joseph J. Bambara; and then-NYCLA Treasurer Vincent T. Chang.
Most important, many OLPs do not now provide basic protections for sensitive consumer information or form consumer use of online forms.

Based upon research, review and discussion, this report concludes that there is a need for some form of regulation in order to (i) establish minimum standards of product reliability and efficacy, (ii) provide consumers with information and recourse against abuse, (iii) ensure consumers are made aware of the risks of proceeding without attorneys, (iv) inform consumers how affordable attorneys can be found, and (v) protect consumers’ confidential information. The process by which consumers select and generate an online legal form can simulate the process of legal advice; the computer is programmed to make certain judgments, and the information gathered is highly personal in many cases. The potential for harm, as with medical information, can be very high if there is a mistake or disclosure. This report focuses solely on the Task Force’s investigation concerning issues related to on-line legal documents.

Regulation is justified based upon the particular risks of handling personal information and not on a record of consumer abuse. Such regulation must target specific issues and practices to protect the public while allowing responsible providers to serve a significant need. The market success of OLPs strongly suggests that the nation’s lawyers have not yet met this need effectively through traditional models of practice.

This report proposes a set of regulatory standards which provide for consumer protection in such areas as disclosure, consumer privacy, and warranties. Such standards are essential to ensure reasonable protection to the public. In the area of customer privacy and protection of consumer data, regulators and legislators should give strong consideration to legislation similar to that enacted in Massachusetts and North Carolina to provide protection for legal information provided to OLPs.

While traditional regulatory and legislative approaches are appropriate and desirable, the adoption of industry-wide voluntary standards is a useful interim measure. To that end, this report offers a statement of Best Practices for Document Providers, which it calls on OLPs to voluntarily adopt immediately.

Even before NYCLA’s report was adopted by the New York State Bar Association on November 4, 2017, it received support and approval from numerous New York county bar associations, including the Brooklyn Bar Association, The Suffolk County Bar Association, the Bar Association of Erie County, the Queens County Bar Association, the Monroe County Bar Association and The New York City Bar Association.
II. A History of Legal Forms and Unauthorized Practice Concerns

The legal form industry did not start online; at least as far back as the 1700s, books were written on "do-it-yourself" law and the concept of a scrivener service pre-dates the internet.1 An 1859 book entitled “Everybody’s Lawyer and Counsellor in Business” contains 400 pages of legal forms and information.4 Many court systems and governmental agencies make legal forms available to the public.5

As at least one court has noted, the fact that OLP legal forms now reside on the internet is not what creates problems for OLPs; rather, such problems, if they exist, flow from the ways OLP personnel advertise, draft, manipulate or help consumers create these documents.6 Often much more is being sold than mere blank forms and access to software. Today, online legal forms generate approximately $4.1 billion in annual revenue, providing, among other things, forms in a host of areas including trademarks, patents, copyrights, wills, living trusts, as well as LLC and corporate formation.7

Bar associations have historically commenced litigation against OLPs, contending that these companies were engaging in the unauthorized practice of law (UPL). Much of it has been either settled favorably to the OLPs or been outright unsuccessful. It is also important to note that the Federal Trade Commission (FTC) and Department of Justice (DOJ) have long been hostile to a broad interpretation of UPL legislation. In a 2016 letter, they jointly recommended that the North Carolina General Assembly revise the definition of UPL to avoid undue burdens on “self-help products that may generate legal forms.”8 They stated that these self-help products and other interactive software programs for generating legal documents would promote competition by enabling non-lawyers “to

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2 FRANK CROSBY, EVERYBODY’S LAWYER AND COUNSELLOR IN BUSINESS (1859).
3 Such forms appear on, for example, the website of the New York office of Court Administration (https://www.nycourts.gov/forms/) and the website of California’s court system (https://www.courts.ca.gov/forms.htm).
provide many services that historically were provided exclusively by lawyers." They also contended that:

Interactive websites that generate legal documents in response to consumer input may be more cost-effective for some consumers, may exert downward price pressure on licensed lawyer services, and may promote the more efficient and convenient provision of legal services. Such products may also help increase access to legal services by providing consumers additional options for addressing their legal situations.

The online legal document industry is still in the early stages of development. The more appropriate UPL analysis may be a comparison between (a) a product based on client information and seller algorithms prepared by lawyers without loyalty or confidentiality, and (b) a lawyer using similar algorithms to assist in a consumer-based practice. The different is primarily human interaction, loyalty and confidentiality.

This report acknowledges that under appropriate circumstances, OLPs can have significant benefit on the public interest, and unlike approaches seeking an outright ban on alternatives to the use of lawyers, explores a more nuanced means of protecting consumers.

III. The Online Legal Services Market

As noted above, online legal documents generate billions of dollars annually and the OLP business is growing in size every year. Indeed, "as computers grow more powerful and ubiquitous, legal work will continue to drift online in different and evolving formats." As Arthur Norman Field, past president of the New York County Lawyers Association, put it, "the public has voted that it wants online legal providers and they are here to stay."
LegalZoom estimates that it has served four million customers, and that its forms may have created one million corporations and that someone uses its forms to write a will every three minutes in the United States. And while LegalZoom is the market leader, it has many competitors and emulators offering a variety of forms and related services, including RocketLawyer and Avvo.

Why have OLPs been this successful? The answer is that OLPs provide cost-savings and convenience for individuals and small businesses of limited means. Those starting small businesses—particularly internet start-ups and others whose businesses require the protection of intellectual property—simply cannot afford the hourly rates many lawyers charge for their services. Though some lawyers provide substantial rate reductions and other favorable financial arrangements for start-ups, those arrangements (such as deferring costs) still create financial pressure on start-up companies. These businessmen view the economic equation as simple: they would rather rely on an inexpensive legal form (in order to obtain some degree of protection) than pay money (and risk financial stability) to hire an attorney.

OLPs need not be considered adverse to the legal profession. It has been noted that many attorneys work with OLPs, which provide them in turn with clients and revenue that they would not otherwise obtain. This has notably generated some controversy, as many argue that the referrals amount to the unlawful practice of law. However, this is outside the scope of this report.

IV. OLPs and the “Justice Gap”

It has been posited that the overwhelming majority of low-income individuals and families, and roughly half of those of moderate income, face their legal problems without a lawyer. This “justice gap” is huge and is not closing. According to some estimates, 13 See Statement of Charles Rampenthal, supra note 4.


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10A

“about four-fifths of the civil legal needs of the poor and two to three-fifths of middle income individuals remain unmet.” Low cost internet legal providers can present the promise of affordable legal services for underserved populations of low and middle income consumers who cannot afford lawyers.

It has been thought by some that one potential method of closing the “justice gap” is the use of online legal service platforms that provide legal assistance at a significantly discounted rate over traditional private attorney or firm prices. Online legal services could, at least in theory, meet the needs of the large sectors of the population which are not eligible for legal assistance and yet do not have the resources to retain attorneys. According to a recent article, LegalZoom charged as little as $69 for wills, $149 for business formation, and $169 for trademark registration. A reasonable regulatory regime could help ensure that OLPs play a role in addressing the justice gap, while protecting consumers.

V. The Need for Consumer Protection Regulation

In considering the appropriate extent of regulation of OLPs, it is important to note that it is overly simplistic to contend that they are currently “unregulated”—ostensibly, they are regulated by the FTC, the DOJ and attorneys general. The organized bar and non-governmental consumer protection groups and agencies also provide a degree of oversight. The FTC/DOJ position on OLPs recognizes on-line forms as a substitute for legal services in some situations without addressing the extent of appropriate consumer safeguards. This report does not propose a case for intrusive regulation of OLPs. Rather, regulators, legislators and bar associations need to consider important protections for the consumer (and at a minimum promote the adoption of voluntary best practices standards).


17 ABA COMM., supra note 6, at 3 (citing Deborah Rhode, Access to Justice 3 (2004)).
19 Id.
VI. Existing Regulatory Models

In developing this Report’s regulatory and best practice proposals, several existing models were reviewed and served as guideposts, including: (i) the ABA Model Regulatory Objectives,22 (ii) the North Carolina settlement,23 (iii) the Washington Attorney General Settlement,24 and (iv) the Missouri settlement.25

VII. Best Practices and Proposed General Provisions and Considerations for Regulation of Online Providers of Legal Documents

The organized Bar should take leadership to encourage reasonable regulation to protect the public, while working with all OLPs to find ways to satisfy their concerns. In that spirit, this report proposes General Provisions and Considerations for Regulation of Online Providers of Legal Documents (Appendix I), which strikes a reasonable balance and avoids regulations that would unduly impair OLPs' businesses.26 In addition, the organized Bar should encourage OLPs to immediately voluntarily adopt the Best Practices for Document Providers (Appendix II), to incorporate regulatory recommendations. If properly employed, these would help provide consumer protection in the legal form industry in such areas as disclosure, consumer privacy, and warranties.27

These recommendations are intended to counter the one-sided nature of OLP form contracts. Typically, such contracts contain no warranties and, indeed, often disclaim warranties. These contracts also generally contain arbitration clauses that may require the consumer to bear costs and arbitrate in a distant place, or force consumers to waive

23 See N.C. GEN. STAT. § 84-2.2 (2016).
26 For example, the regulatory regime in Florida was so burdensome that, at least at one point, OLPs avoided that state. See G. Blankenship, Technology rapidly transforms the legal services marketplace: Panel plans “aggressive” recommendations to help lawyers enter this market “before it’s too late”, The Fla. Bar News (Jan. 15, 2015), https://www.floridabar.org/news/flb-news/2015/01/01/flbnews20150101/50c5380c8fa8ad496b525bc5506786fc2DFCD2FA693B5AE085257DC400485D50endocument.pdf.
27 LegalZoom’s General Counsel stated that LegalZoom already adheres to the great majority of these provisions. Rampenthal described many of these provisions as “best practices.” See Statement of Charles Rampenthal, supra note 4.

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their rights to a trial by jury and preclude class actions. Use of any online service involves disclosure of personal data and potential disclosure of sensitive information about a user’s transactions and circumstances. OLPs may make use of this data for marketing purposes, or may try to sell it outright. Typically, nothing in the contract precludes them from doing so.

This report urges OLPs to utilize self-regulation pending regulation or legislation. A voluntary standard is not a substitute for effective governmental regulation. It is unlikely that the industry is cohesive enough to adopt an industry-wide self-regulatory scheme and, even if it did, it is highly unlikely that such regulation would provide adequate and sufficient safeguards to effectively protect the public. However, regulation or legislative action may be difficult to achieve quickly; accordingly, encouraging self-regulatory efforts by individual OLPs, such as adoption of best practices, may end up as the principal means of guarding consumer interests.

Broadly speaking, the General Provisions and Considerations for Regulation of Online Providers of Legal Documents and Best Practices for Document Providers contain three general categories:

Standards for disclosure and transparency;
Standards for the protection of personal information provided by the consumer;
Provisions relating to arbitration and dispute resolution.

Several of the more important provisions recommended deserve special mention.


As an initial matter many of the proposals’ provisions track the recommendations of the FTC and DOJ in their letter to the North Carolina legislature. Thus, the proposal contains a number of disclosure-related provisions, consistent with the FTC/DOJ letter. The proposal also adopts the proposed regulation of the Joint Letter, “that advertisers should ensure that disclosures are clear and conspicuous on all devices and platforms consumers may use.”

28 See Letter from Marina Lao and Robert Potter to Bill Cook, supra note 9 at 10 (“a commercial software product for generating legal forms should not falsely represent, either expressly or impliedly, that it is a substitute for the specialized legal skills of a licensed attorney....”).

29 See id.

28 See Letter from Marina Lao and Robert Potter to Bill Cook, supra note 9 at 10 (“a commercial software product for generating legal forms should not falsely represent, either expressly or impliedly, that it is a substitute for the specialized legal skills of a licensed attorney....”).

29 See id.
b. Requirement of Clickwrap Agreements

The proposal also requires the use of so-called "clickwrap" agreements in which website users are required to click on an "I agree" box after being presented with a list of terms and conditions of use.30 "Clickwrap" agreements are more readily enforceable, since they "permit courts to infer that the user was at least on inquiry notice of the terms of the agreement, and has outwardly manifested consent by clicking a box."31 "Browsewrap" agreements are treated differently under the law than "clickwrap" agreements.32 Courts will generally enforce browsewrap agreements only if they have ascertained that a user "had actual or constructive knowledge of the site’s terms and conditions, and ... manifested assent to them."33 In fact, courts have stated that "the cases in which courts have enforced ‘browsewrap’ agreements have involved users who are businesses rather than ... consumers."34

c. Provisions Regarding Warranties

Warranty protection is essential in this area because (unlike, e.g., the internet purchase of a consumer product) flaws in many legal forms cannot easily be discerned by most lay customers.35 For this reason, warranty protection is a fundamental aspect of the General Provisions and Considerations for Regulation of Online Providers of Legal Documents and Best Practices.

d. Provisions Regarding Arbitration

The proposals contain several provisions related to arbitration and dispute resolution. Once again, many OLP form contracts require resolution in arbitration rather than in court, and require that arbitration take place in distant locations inconvenient to

30 "‘Clickwrap’ agreements are distinguished from ‘browsewrap’ agreements, where a website’s terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen." Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176 (9th Cir. 2014). “The defining feature of browsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists.” Be In, Inc. v. Google Inc., No. 12-cv-03373, 2013 WL 5568709, at *6 (N.D. Cal. Oct. 9, 2013).
32 Schnabel v. Trilegiant Corp., 697 F.3d 110, 129 n. 18 (2d Cir. 2012).
32 Schnabel v. Trilegiant Corp., 697 F.3d 110, 129 n. 18 (2d Cir. 2012).
33 Id. (quoting Cvent, Inc. v. Eventbrite, Inc., 739 F. Supp.2d 927, 937 (E.D. Va. 2010)).
35 Even with respect to other, typical consumer products, “[a]pproximately one-third of states, in their enacted versions of section [UCC Section] 2-314, prevent merchants from disclaiming the implied warranty of merchantability under certain circumstances. Some of these statutes also preclude any attempt to limit remedies available for a breach of warranty.” Ethan R. White, Big Broker and Buyers, 51 WAKE FOREST L. REV. 917, 934 (Fall 2018).
the customer. In addition, most of these forms prohibit class action lawsuits. All of these restrictions reduce the likelihood that aggrieved customers would pursue their legal remedies. Restrictions on litigation are not uncommon in other form contracts; however, in this situation, it is appropriate to permit the customer to have the option of preserving his or her day in a court in his or her home state.

Additionally, the proposal would forbid provisions in OLP contracts which bar class action litigation. As one consumer advocacy group has put it, "class action waivers prevent consumers who have been harmed on a systemic basis from joining together to seek remedies from the offending company—which is often the only method of obtaining redress."36

e. Customer Privacy

The proposed General Provisions and Considerations for Regulation of Online Providers of Legal Documents and the proposed Best Practices also focus on the protection of consumer information and contain one possible interim framework. Laws such as the Massachusetts Privacy Law37 or HIPAA provide other longer-term regulatory solutions.

It should be noted that, at the outset, many OLPs’ activities (such as the mere sale of forms) do not involve confidential information. In addition, information should be treated differently depending on the level of sensitivity. However, consumer protection safeguards are necessary for sensitive information and OLPs must assure such protection in order to ensure the viability of their business models.

Conclusion

The online document form industry touches the lives of millions of consumers and small businesses and continues to grow rapidly. Online legal forms are widely used, and their presence—and eventually their effect on future transactions—already is, and increasingly will be, significant.

This is not a passing phenomenon and the impact of online forms and related activities—be they adequate substitutes for lawyers’ services or not—cannot be dismissed

37 See Massachusetts Regulation 201 CMR 17.00.

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as inconsequential. Although First Amendment consideration may apply to the content of forms themselves, the First Amendment does not require specific practices involved in the online sale of forms be free from any regulation. Some regulation of this industry is important. Meeting an unmet need is not a valid argument for ignoring consumer risk.

The General Provisions and Considerations for Regulation of Online Providers of Legal Documents and the statement of Best Practices for Document Providers provide a common-sense approach to regulation or self-regulation of OLPs. If enacted or adopted, they would:

- establish reasonable standards of product reliability and efficacy;
- provide consumers with information and recourse against abuse;
- ensure consumers are made aware of the risks of proceeding without attorneys;
- inform consumers where affordable attorneys can be found; and
- protect confidential information.

Such regulations would protect the public while allowing responsible providers to serve a demonstrated need that traditional models of practice have not been able to meet.

Respectfully Submitted,

Michael Miller
President, New York State Bar Association

Michael J. McNamara
President, New York County Lawyers Association

August 2018

APPENDIX I
GENERAL PROVISIONS AND CONSIDERATIONS FOR REGULATION OF ONLINE PROVIDERS OF LEGAL DOCUMENTS

The Usefulness and Propriety of Forms

(1) An OLP should be required to provide clear, plain language instructions as to how to complete forms and the appropriate uses for each form.

(2) There should be a warranty either (a) that the form of documents provided to customers will be enforceable in the relevant State, or (b) that the OLP will inform its customers, in plain language, that the document is not enforceable in the relevant State and what steps can be taken to make it enforceable, including if necessary the retention of an attorney. OLPs should not be permitted to limit this warranty, or recovery under this warranty, in any way.

(3) Documents should be kept up-to-date and account for important changes in the law.

(4) If the OLP selects the service agent for a document, the OLP will be legally responsible for the proper recording or filing of the document.

Protection of Customers

(5) OLPs should be required to sue only clickwrap agreements with their customers and require the customers’ consent and express opt-in to any changes made to the customer agreement after the initial registration.

(6) OLPs should be required to inform their customers of all of the ways (if any) they intend to use and share customers’ personal and legal information with the OLPs’ business associates and ask for consent and express opt-in authorization before initiating the relationship.

(7) OLPs should be required to inform customers, in plain language, that the personal information customers provide is not covered by the attorney-client privilege or work product protection.

(8) OLPs should be required to regulate the collection and use of customers’ personal and legal information and use “best of breed” data security practices to maintain the privacy and security of the information provided.
(9) OLPs should be required to protect customers’ information from unauthorized use or access by third persons and OLPs should be required to inform customers of any breach of their systems.

(10) OLPs should be required to make all efforts to remedy and cure any harm a breach of customers’ personal and legal information may cause.

(11) OLPs should not be permitted to sell, transfer or otherwise distribute customers’ personal information to third persons without express opt-in authorization.

(12) OLPs should be required to retain customer information and any completed forms for a period of three years, and make the form available for the customers’ use during that period free of charge.

Recommendation of Attorneys to Assist

(13) OLPs should be required to inform their customers, in plain language, of the importance of retaining an attorney to assist them with any legal transaction.

(14) OLPs should not be permitted to advertise their services in a manner that suggests that their services are a substitute for the advice of a lawyer.

Dispute Resolution

(15) OLPs should be required to disclose their legal names, addresses, and email addresses to which their customers can direct any complaints or concerns about their services.

(16) OLPs should be required to submit to the jurisdiction of the courts of the customer’s state for the resolution of any dispute with the customer, and should not be permitted to require arbitration of any disputes.

(17) OLPs should not be permitted to preclude their customers from joining in class actions, or require shifting of legal fees to customers.

(18) Any notification to be provided should be required to be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of OLPs’ websites, the required words, statements or notifications shall appear on their home pages.
The Usefulness and Propriety of Their Forms

(1) Document provider services (“Providers”) shall provide customers with clear, plain language instructions as to how to complete their forms, and the appropriate uses for each form.

(2) Providers will warrant either (a) that the form of documents they provide to their customers will be enforceable in the relevant State, or (b) that Providers will inform their customers, in plain language, that the document is not enforceable in the relevant State and what steps can be taken to make it enforceable, including if necessary the retention of an attorney. Providers will not limit this warranty, or recovery under this warranty, in any way.

(3) Providers will keep their documents up-to-date and account for important changes in the law.

(4) If a Provider selects the service agent for a document, the Provider shall be legally responsible for the proper recording or filing of the document.

Protection of their Customers

(5) Providers will use only clickwrap agreements with their customers and require the customers’ consent and express opt-in to any changes made to the customer agreement after the initial registration.

(6) Providers will charge their customers a reasonable fee for their services.

(7) Providers will inform customers of all of the ways (if any) they intend to use and share customers’ personal and legal information with their business associates and ask for customers’ consent and express opt-in authorization before the Providers begin a customer relationship.

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(9) Providers will regulate the collection and use of customers' personal and legal information and will use “best of breed” data security practices to maintain the privacy and security of the information customers provide.

(10) Providers will protect customer information from unauthorized use or access by third persons and will inform customers of any data breach that might affect them.

(11) Providers will make all efforts to remedy and cure any harm a breach of customers' personal and legal information may cause.

(12) Providers will not sell, transfer or otherwise distribute a customer's personal information to third persons without the customer's express opt-in authorization.

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Recommendation of Attorneys to Assist

(14) Providers will inform their customers, in plain language, of the importance of retaining an attorney to assist them should their customers have questions regarding any legal transaction, including without limitation transactions involving the customers' money, property, intellectual property, estate, trusts, matrimonial status or custody rights, and where an affordable attorney can be found.

(15) Providers will not advertise their services in a manner that suggests their documents are a substitute for the advice of a lawyer.

Dispute Resolution

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Any notifications to be provided pursuant to this Statement of Best Practices will be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of their website, the required words, statements or notifications shall appear on their home page.
1. **Summary of Resolution.**

The resolution urges states to adopt General Provisions for Regulation of Online Providers of Legal Documents and, until such time as General Provisions are adopted, online providers of legal documents are encouraged to adopt Statements of Best Practices.

2. **Approval by Submitting Entity.**

This report was approved by the New York State Bar Association House of Delegates on November 4, 2017.

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?**

N/A

Neither policy would be affected by adoption of this proposal.

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:
   It is anticipated that the report would be disseminated widely and promoted to states and online legal documents providers.

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

   N/A

10. Referrals.
    Business Law Section
    National Association of Bar Executives
    National Conference of Bar Presidents
    Law Practice Division

11. Contact Name and Address Information. (Prior to the meeting.)
    Michael Miller, Esq.
    President, New York State Bar Association
    666 Fifth Avenue, Suite 1717
    New York, NY 10103
    mmiller@nysba.org
    (212) 545-7000

12. Contact Name and Address Information. (Who will present the report to the House.)
    Michael Miller, Esq.
    President, New York State Bar Association
    666 Fifth Avenue, Suite 1717
    New York, NY 10103
    mmiller@nysba.org
    (212) 545-7000
EXECUTIVE SUMMARY

1. Summary of the Resolution.

The resolution urges states to adopt General Provisions for Regulation of Online Providers of Legal Documents to establish reasonable standards of product reliability and efficacy, provide consumers with information and recourse against abuse, ensure consumers are made aware of the risks of proceeding without attorneys, inform consumers where affordable attorneys can be found, and protect confidential information; and until such time as the General Provisions are adopted, urges online legal forms providers to adopt a Statement of Best Practices to provide a common-sense approach to self-regulation of online providers of legal documents.

2. Summary of the issue which the Resolution addresses.

Minimum standards are needed to allow online legal forms providers to meet a significant need while protecting consumer privacy and protection of customer data.

3. Explanation of how the proposed policy position will address the issue.

The report proposed a set of regulatory standards to provide consumer protection. Pending the adoption of such standards, the report proposes best practices to enable self-regulation of online legal forms providers.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

No minority or opposing views have been identified.

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No minority or opposing views have been identified.
SPONSOR: Edward Haskins Jacobs

PROPOSAL: Amends §1.2 of the Constitution to include the following language as one of the purposes of the Association: “to defend the right to life of all innocent human beings, including all those conceived but not yet born.”

Amends §1.2 of the Constitution to read as follows:

§1.2 Purposes. The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government; to defend the right to life of all innocent human beings, including all those conceived but not yet born; to advance the science of jurisprudence; to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the profession and of the public.

(Legislative Draft - - Additions underlined; deletions struck-through)

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On a Proposal to Amend the ABA Constitution to Add this as a fundamental ABA purpose:

To defend the right to life of all innocent human beings, including all those conceived but not yet born.

For consideration at the August 6 and 7, 2018 Annual Meeting

The undersigned proposes that the American Bar Association Constitution, Article 1, Section 1.2 - Purposes - be amended by inserting the following language (between the quotation marks) after the first semicolon: “to defend the right to life of all innocent human beings, including all those conceived but not yet born;”.

Article 1 of the ABA Constitution is entitled “Name and Purposes.” Section 1.2 is entitled “Purposes.” Once amended, section 1.2 would read in full as follows:

The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government; to defend the right to life of all innocent human beings, including all those conceived but not yet born; to advance the science of jurisprudence; to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the profession and of the public. [The new language is in bold for the purpose of highlighting.]

Once again, God willing, I will move for the adoption of this proposal at the House of Delegates in Chicago in August 2018. I made the same motion before the House of Delegates the last seventeen years in a row. My hope continues that some day our culture of death will be overcome. We lawyers must not turn a blind eye to our children being poisoned to death and torn apart in our midst. I may be crying in the wilderness, but the cry – and the thirst for justice it represents - will never die.
If adopted, the proposal would require the American Bar Association to stand up for the God-given right to life of all innocent human beings, a right that must be protected in the man-made law of all just societies. As Alexander Hamilton wrote, “[t]he first and primary end of human laws, is to maintain and regulate ... absolute rights of individuals. ... The sacred rights of mankind are ... written ... by the hand of the divinity itself, and can never be erased or obscured by mortal power.”

In none of the meetings of the House of Delegates where this proposal was considered was there an actual vote on the proposal. The first ten times, after the presentation of the proposal, the Standing Committee on Constitution and Bylaws reported to the House that the proposal is inconsistent with another purpose of the ABA – to uphold and defend the Constitution of the United States - and therefore the proposal was “out of order.” Each time the Committee made that bold assertion without explaining why it is so (despite my explicit written request to the Committee in each of the last several years to explain in writing why this position is taken). And in each of those ten meetings, then a motion was made that the House postpone indefinitely action on my proposal. In 2010, Robert L. Weinberg from Washington, D.C., who disagrees with this proposal, nevertheless tried to get the House to vote directly on the proposal, but his motion was rejected. Bob made the same effort thrice more, in 2013, 2015, and 2017. In 2017, the chair of the House called for a headcount of the votes for and against the typical motion to postpone indefinitely a vote on the proposal itself, since she could not tell from the voice vote whether the motion carried. The motion to postpone indefinitely action on the proposal won in the headcount by a vote of 279 to 178. Of course, this vote tells us nothing about whether there would be any votes in favor of the proposal itself, if it were ever to come to a vote.

In 2011, the Committee chairperson reported to the House that the Committee took no position on the merits of the proposal that the ABA defend the right to life of all innocent human beings, including those conceived but not yet born, but stated that the Committee disagreed that this subject should be addressed in the purposes section of the ABA constitution, since the constitution does not adopt policy “beyond the basics”; and as a result, clearly by arrangement with the Committee, another member of the House rose to move that the proposal be postponed indefinitely, and this was overwhelmingly approved by voice vote, with maybe only about five or so “nays” as far as I could tell.

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2 Of course, even if the proposal were voted upon and rejected, it could continue to be made year after year, into the future.
3 In 2001 by a non-committee member of the House, and in each time thereafter by the Committee representative himself or herself until 2016, when the motion to postpone indefinitely was made by a member of the ABA Board of Governors.

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In 2012, the Committee chairperson said that the proposal is inconsistent with other purposes of the Association and should be rejected, but he did not state why he concluded that the proposal is inconsistent with other purposes of the Association and he did not specifically mention any of the inconsistent purposes. Then someone else moved, not that the proposal be rejected as suggested by the Chairperson, but rather that the proposal be postponed indefinitely. In the voice vote then taken, I’d say about to delegates opposed the motion, some quite vociferously. By overwhelming voice vote, the proposal was postponed indefinitely.

In 2013, Bob Weinberg opposed the motion to postpone indefinitely, arguing for a vote on the proposal itself, and another delegate, who also seemed to be opposed to the proposal, rose to say he agreed it should be voted on, and stated that the ABA can take positions on “moral issues,” and said the proposal is not inconsistent with upholding and defending the Constitution of the United States - such supposed inconsistency being the reason given for postponing action on the proposal year after year after year. That year there were many “nayes” on the vote to postpone indefinitely - probably because more delegates wanted to vote the proposal down directly - but upon the voice vote that the ayes had it, and the proposal was again postponed indefinitely on the extraordinarily odd contention that defending the right to life of all innocent human beings is inconsistent with upholding and defending the Constitution of the United States. What a perverse Constitution we must have!

In 2014, the Chair of the Standing Committee on Constitution and Bylaws said the proposal is “out of order and inappropriate” and a non-committee member of the House moved to postpone the proposal indefinitely. Although a House member rose to “bark at the moon,” seeking a vote on the proposal instead of postponing it; postponed it was, with maybe ten voice votes against. In 2015, three speakers raised the red herrings that the proposal asks the House to address not a legal issue, but rather a medical, theological, or a philosophical issue; or simply an issue of legal privacy, as reasons to postpone the issue indefinitely; or in Bob’s case, to reject it on its merits. In 2016, the chair of the Standing Committee again asserted the proposal is inconsistent with ABA purposes to uphold and defend the Constitution of the United States and representative government, and said the proposal should be proposed as a ABA policy position only, and a member of the ABA Board of Governors moved that the proposal be postponed indefinitely.4

4 If the proposal to defend the right to life of all innocent human beings is inconsistent with the ABA purposes (1) to uphold and defend the Constitution of the United States, and (2) to uphold and defend representative government, as the ABA Standing Committee on Constitution and Bylaws has repeatedly claimed, why does it make any sense to downgrade the proposal and make it as simply a proposed policy position of the ABA, instead of an ABA constitutional provision? If defending the right to life of all innocent human beings is inconsistent with the ABA purposes of upholding and defending the Constitution of the United States and upholding and defending representative government, as the Standing Committee keeps claiming, then how can the proposal possibly be appropriate as an ABA policy post a national issue? Shouldn’t the proposal be postponed indefinitely as a proposed policy position also if the Committee is right? So why should we seek its approval as a mere policy proposal? Of course, the Committee is wrong about this claimed inconsistency, and this is explained later in this report.

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In 2001 the vote on the motion to postpone action indefinitely was 209 to 39, but you will never find the precise vote in the record of proceedings of that meeting, because even though the vote was displayed electronically on a large screen in the front of the room, the precise vote itself was not recorded. In 2002 through 2016 the vote on the motion to postpone indefinitely was taken by voice vote. In 2002 through 2015, with the noted exception of 2013, many uncontested voices intoned “yes,” and perhaps a hand full of people said “no,” except 2005, when I thought I heard maybe ten “no’s.”

I want to see the House pass this proposal, but I realize passage now would take a miracle. This is driven home in each when new members of the House who have never been members before stand up in order to be introduced to the assemblage. Each year there are fewer than twenty new members who have never been members before. And the House several years ago defeated a term limits proposal. It would seem, then, that the House of Delegates is a pretty closed club with lots of long-term members. In addition to looking for that miracle, I am also hoping that the consciences of a few of these members will be pricked enough that they will be willing to “submit a salmon slip” and stand up in the House and speak out for the right to life of the innocents in the face of embarrassment and possible ostracism. I would say perhaps the most amazing thing about the last seventeen years is that never once has any member of the House of Delegates submitted a salmon slip and stood up before the House to acknowledge the ABA must make it its mission to defend the right to life of all innocent human beings. Not once. Not a single person, ever.

Even if I have no chance short of a miracle for passage of the proposal, if we can just “get the ball rolling” with a little bit of courage from members who agree, who knows? The ABA House of Delegates is a speck, but an important speck in the process. Maybe before too many more years baby-killing-in-the-womb (or upon emergence from the womb) will go the way of slavery. It could happen.

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Although the ABA has an annual budget substantially in excess of $100 million, the House of Delegates is not willing to commit the relatively minor sum it would take in order to bring transparency and accountability to the actions of the House by having every member’s vote electronically recorded when it deals with the most important matters, such as amendments to the ABA constitution or bylaws, and the adaption, amendment, or rescission of ABA policy positions. In 2001, I presented to the ABA House of Delegates a proposal to bring that transparency and accountability to the House and to have the results posted for a year on the ABA website. It failed miserably, with only about ten of the 500 or so in attendance voting in favor (based upon my guestimate at the time of the voice vote). Transparency in actions of the House of Delegates should be pressed for every year until it is reached, but for now at least I leave that to others. In 2009 the chairperson of the House mentioned in his remarks that he, too, thinks the House should have electronic voting. And it would not take much money to bring accountability to the House of Delegates. At a CLE program in the Virgin Islands several years ago, hand-held voting devices were given to the attendees to make part of the programming interactive, so it couldn’t be a money issue. Even if the individual votes, tied to specific members, are permanently recorded as part of the process. It is amazing in this day and age that the ABA House of Delegates is utterly opaque. The House intentionally refuses to put in place systems to reveal the votes of its members on the many important issues upon which it takes positions. No doubt the members of the House demand transparency of others in other contexts. The opaque nature of the House is indefensible. Amazing, really.
"My section [bar association, committee, etc.] does not want its representative to vote on this kind of social issue" is not a legitimate position to take, is it? The House of Delegates addresses these kinds of issues dealing with human rights and legislative proposals every annual meeting. The current ABA policy manual includes ABA policies: (1) supporting legislation on the federal and state level to finance abortion services for indigent women (adopted August 1978); (2) supporting state and federal legislation which protects the right of a woman to choose to terminate a pregnancy before fetal viability, or thereafter, if necessary to protect the life or health of the woman; and (3) opposing state or federal legislation which restricts this right. (adopted August, 1992). Other related and likely still current ABA policies are listed toward the end of this report.

The representative of your section, etc., must be ready to address fundamentally important legal issues if your section, etc., is to be fully represented in the House. If you are not up to taking on this mantle as a fully functioning delegate to the House, shouldn’t you resign your position? Please, stand up and be counted. If you don’t, won’t you regret it in the end, when you look back on your life seeking evidence of courage? I write as I do in this paragraph because I cannot believe that only ten members of the House, or fewer, recognize the obvious truth of my argument. So, once again, on to the meat of the issue:

Feminism - here meaning the conviction that women's government-enforced rights and privileges have been neglected in the past and now need augmentation - begs the question, how far should women’s “rights” go? If you are a mother with a child in your womb, and if bearing your child to term or keeping your child after birth would be embarrassing, inconvenient, career-killing, poverty-causing, husband-limiting, depressing, or physically more than normally risky, do you have the right to kill your child as a legally-approved exit from motherhood, as long as you do it before your child fully emerges from the protection of your body?

Or does your child, by her mere humanity, have a sacrosanct right to live, and continue to develop and grow in liberty and pursue happiness as she comes to know it? The answer: Human life, including that of our littlest ones, is sacred. This realization was one of the greatest advances of Christianity over the paganism that condoned exposing unto death the unwanted child. Abortion in our society is quicker than death, and if bearing your child to term or keeping your child after birth would be embarrassing, inconvenient, career-killing, poverty-causing, husband-limiting, depressing, or physically more than normally risky, do you have the right to kill your child as a legally-approved exit from motherhood, as long as you do it before your child fully emerges from the protection of your body?

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We should know that human life is sacred and to be defended against all competing claims of “right.” Our nation's declaration of birth - the Declaration of Independence of July 4, 1776 - set forth the raison d'etre for the United States of America as a separate nation. The Declaration asserted that it is self-evident that all men are endowed by their Creator with the unalienable right to life; and that governments are instituted among men to secure the rights to life, liberty, and the pursuit of happiness. This insistence upon governmental protection of the right to life of man was one of the greatest advances of Christianity over the paganism that condoned exposing unto death the unwanted child. Abortion in our society is quicker than death, or fewer, recognize the obvious truth of my argument. So, once again, on to the meat of the issue:

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all innocent human beings must be a fundamental function of any legitimate government.

The Creator referenced in the Declaration of Independence chose to have each new child begin life within his or her mother. The child in the womb has her own unique set of DNA. She is a separate human being - not simply part of her mother. On April 23 and 24, 1981 a United States Senate Judiciary subcommittee held hearings on the question: When does life begin? The internationally known group of geneticists and biologists had the same conclusion - life begins at conception.

The stories one hears about mothers on their way to have a child in the womb poisoned to death or ripped apart by an abortionist, suddenly having a change of heart when they see another mother walking by holding and cuddling her baby, or seeing a poster of a baby with the words "Abortion kills," are heart-warming, but they also underscore how the general discussion of the abortion problem in the media depersonalizes the separate human being held by God’s design in the vessel of her mother. That’s another, separate human being in there - one who has the right to life, liberty, and the pursuit of happiness, just as we do, no matter how deeply we stick our heads in the sand.

Shouldn’t we recognize the zygote, the embryo, the fetus in the womb of a human mother as another human being - one who has rights? I recommend you check out the website for the journal First Things and click through to “Condic” in the authors search box. You’ll find several articles by Maureen L. Condic, an associate professor of neurobiology and anatomy, and adjunct professor of pediatrics, at the University of Utah. She points out (in her May 2003 article, “Life: Defining the Beginning by the End”) that the common arguments about when human life begins are only of three general types: arguments from form, arguments from ability, and arguments from preference, and that these arguments are all highly subjective, amounting to arguments that the new organism growing in the womb is not a human being worthy of protection in law because it is tiny, or because it is not a “person,” or because it is early in its development.

Dr. Condic rightly rejects the use of these three flawed arguments about when life begins. Instead, she cogently argues that we should determine when the new human organism begins, because that is the true beginning of the human being. She points out that one must distinguish between mere living cells that are not organized into an organism, and living organisms. Dr. Condic points out that "[o]rganisms are living beings composed of parts that have separate but mutually dependent functions. While organisms are made of living cells, living cells themselves do not necessarily constitute an organism. The critical difference between a collection of cells and a living organism is the ability of an organism to act in a coordinated manner for the continued health and maintenance of the body as a whole. ... Unlike other definitions, understanding human life to be an intrinsic property of human organisms does not require subjective judgments regarding ‘quality of life’ or relative worth. A definition based on the organismal nature of human beings acknowledges that individuals with differing
appearance, ability, and ‘desirability’ are, nonetheless, equally human. … Once the nature of human beings as organisms has been abandoned as the basis for assigning legal personhood, it is difficult to propose an alternative definition that would not be used to deny humanity to virtually anyone.” The zygotes, the embryos, the fetuses in the wombs of human mothers are all human organisms; that is to say, human beings.6

But can any of us, with what we know about the child’s unique set of DNA beginning at conception, even pretend now that this is not true? The possibility of twinning does not diminish the recognition that upon conception there is brand new, separate, unique human life in the mother’s body – a new person or persons. The mother is responsible for taking care of that child, but she does not own the child – God does. Slavery made the mistake of thinking that one human being can own another. We now know that no man should be permitted under man’s law to own another. But how can one justify killing another innocent human being if one does not own him? The inconvenience and burden of the other’s life on one’s own is not enough. The burden of the dependent relation does not end at the birth canal. How far should the right to kill those dependent upon us go? Should the standard evolve from the complete dependence of the womb to the excessive dependence of severe mental retardation and severe physical handicaps?

Just because the child is held and nourished within her mother does not give her mother the right to kill her. To the contrary, the mother with a child in the womb has a special responsibility to protect and care for her child. The generally recognized principle that parents must take care of their children once they are born applies as well to the children while they are growing and developing in the womb. I am not judging here the status of the soul of those who have had abortions or who commit abortions. I leave that (and the judging of my own soul) to God. But what we must judge as a people is无辜者 ave so intrinsically evil, and do such harm to others who are innocent of wrongdoing (such as killing them), that the State, any decent State, must prohibit those actions from being inflicted on their victims. Obviously, the baby in the womb is the victim of abortion.

I do not want to offend the women who have been bamboozled by our abortion culture, but is not abortion the ultimate hate crime - the turning of legendary motherly love to the hatred of, and the killing of, one’s own child? Perhaps it is indifference to the child rather than hatred of the child, but this may be worse in its own way, as they say the opposite of love is not hate, but apathy.

6 In her May 23, 2013 testimony before the Committee on the Judiciary of the U. S. House of Representatives on H.R. 1797, which would require a 20 week fetus to be protected from pain, Dr. Condic noted that “it is entirely uncontested that a fetus experiences pain in some capacity, from as early as 8 weeks of development.” She further noted, “Imposing pain on any pain-capable living creature is cruelty. And ignoring the pain experienced by another human individual for any reason is barbaric.” Dr. Condic went on to note, “Given that fetuses are members of the human species - human beings like us - they deserve the benefit of the doubt regarding their experience of pain and protection from cruelty under the law.” [Italics in original.]
Motherly love was known through the centuries until recently as the gold standard of love – unselfish and without limit – the willingness to give one’s very life for one’s child. Remember the question from Isaiah 49:14-15, attesting to this love. Motherly love is the foundation for a culture of life. Abortion is the foundation for our culture of death. Speaking of being bamboozled, recall the serpent in the Garden of Eden, enticing Eve to eat the forbidden fruit on the promise that she would become like God. Now mothers are enticed into abortion with the lie that they can become like men, and needn’t be burdened with a child in the womb or that child after birth. Eat the fruit of hatred of the life of your child and abandonment of your child, and freedom is yours. A Faustian bargain if ever there were one.

The United States of America fails in its fundamental mission if it refuses to secure for the weakest and most vulnerable innocent people amongst us the rights to life, liberty, and the pursuit of happiness. The ABA fails in its mission if it fails to stand up for the rights of the powerless. If we deny the right to life for children in the womb because they are developmentally immature (and therefore, in the eyes of some, not “persons”), then we not only tragically deny these children their rights - we open the door to infanticide and the killing of other weak and infirm people. There is a crisis in the United States over the loss of our moral roots. The ABA, which claims to be the voice of the legal profession, and to be an advocate of the protection of fundamental rights, should become a strong voice for all the weak and vulnerable innocents who so desperately need champions now.

We would do well also to realize that the Constitution of the United States - and the Supreme Court’s interpretation of it - is not the fundamental source of human rights within the United States. Our rights to life, liberty, and the pursuit of happiness do not arise out of our own “social contract” - the Constitution. To the contrary, as the Declaration of Independence asserts, these rights are endowed upon us by our Creator. The rights of the child are a burden to the mother, but fundamental rights of others are a burden we must bear.

At the 2001 Annual Meeting, the Chair of the Standing Committee on Constitution and Bylaws reported that the Committee “voted to recommend to the House that the proposal be considered out of order, in that it is inconsistent with the first purpose clause of Association’s Constitution, which is ‘...To uphold and defend the Constitution of the United States and maintain representative government.’” The same claim was made in subsequent years, until 2011, when the Committee took no position “on the merits of the proposal,” but asserted the proposed language does not merit inclusion in the purposes section of the ABA constitution.” Then in 2012 the Committee

It is good that the Committee’s position in the first ten years and then each year after 2011, implicitly admitted that the children being killed in their mother’s wombs are in fact innocent human beings, not just blobs of tissue that are part of the mother’s body. That realization is step number one.

...
said the proposal should be rejected due to unexplained inconsistencies with other Association purposes.

Although the Committee changed its position in 2011, it went back to the earlier position in later years, so I hereafter explain again why defending the right to life of all innocent human beings, including all those conceived but not yet born, is consistent with supporting and defending the Constitution of the United States. Later in this report I explain why the language I propose does belong in the purposes section of the ABA constitution, which positioning has also been opposed by the Standing Committee on Constitution and Bylaws.

So, the inconsistency contention has no merit. First the obvious: Nowhere does the actual language of the United States Constitution specify that the States may not defend the right to life of each and every innocent human being within their respective jurisdictions (including all those conceived but not yet born). So the claim that the defense of such life is inconsistent with defending and upholding the Constitution is on its face highly suspect. If the inconsistency argument does not rest on the actual language of the Constitution, let us go beyond the actual language of the Constitution and try to articulate the argument. The inconsistency argument could be so stated:

1. **Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Casey** prohibit each State from defending the right to life of each and all innocent human beings conceived but not yet born, within the State’s jurisdiction.

2. The Supreme Court has determined that the Constitution’s penumbra of privacy rights attendant to the pregnant mothers is what prohibits the States from defending the right to life of each and all those conceived but not yet born.

3. Therefore, it is the Constitution itself that prohibits the defense by the States of the right to life of all those conceived but not yet born.

4. Therefore, advocating the defense of the right to life of all those conceived but not yet born is inconsistent with upholding and defending the Constitution since the Constitution prohibits that defense.

But it cannot be reasonably be said (1) that the holdings of **Roe v. Wade and Doe v. Bolton**, as modified by **Planned Parenthood v. Casey**, are the Constitution itself - and (2) that if one opposes Roe, Doe, and Planned Parenthood, one is opposing the Constitution itself - and failing to uphold and defend it. The lack of identity of particular Supreme Court interpretations of the Constitution with the Constitution itself should be

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8 Like St. Thomas Aquinas, I construct the argument against my position. I have repeatedly asked the Standing Committee on Constitution and Bylaws to articulate the reason for its — to me, bizarre — position that taking a stance defending the right to life of all innocent human beings including all those conceived but not yet born is somehow inconsistent with upholding and defending the Constitution of the United States, but the Committee refuses to articulate the reasons for its position — either orally or in writing.
rather self-evident. No doubt you (the members of the House) are aware that legal conclusions underlying many Supreme Court decisions - including those interpreting the Constitution - have been rejected by later Supreme Court decisions although the relevant language of the Constitution has not changed in the interim. Thus, generally, contending that opposition to a particular Supreme Court interpretation of the Constitution constitutes opposition to the Constitution itself is stretching language and logic to the breaking point.

Now, maybe a persuasive argument could be made that although some Supreme Court interpretations of the Constitution are subject to later change, some are so indisputably correct that in some real sense the interpretation could be said to be the Constitution itself. If the Supreme Court rationale for Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Casey were so rock-solid and accepted by American society in general as the proper articulation of a virtually undisputed fundamental individual right grounded in the Constitution, one could argue that in effect these Supreme Court decisions are equivalent to the Constitution; but that is certainly not the case with Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Casey. (And note that Planned Parenthood itself modified fundamental holdings of Roe and Doe.)

The truth is quite to the contrary of the position of the Standing Committee on Constitution and Bylaws. The reality is that the rationale underlying these two Supreme Court decisions deserves no support from an organization pledged to uphold and defend the Constitution of United States.9 This is because the underlying rationale for the decisions is bogus, even if one accepts the concept of the privacy rights penumbra. The Supreme Court's opinion in Roe v. Wade takes the position that neither Texas nor any other State may legislatively determine that human life begins at conception, since (the Court asserted) there is uncertainty over the legitimacy of that claim - that human life does not begin at conception. But this claimed uncertainty is a figment of the Supreme Court's imagination. There is no real uncertainty over the point at which each human life begins - we all have our own unique set of 46 chromosomes. This set is forged at the moment of conception. The new child (or, perhaps, eventually, the new twins) is new human life - residing within the child's mother, but not simply a part of her.

Based on the faulty contention that the child in the womb cannot properly be legislated determined to be a human being, the Supreme Court denigrated the child to the status of potential life," stripping the child of her rightful status under the law as a human being. The Court then set up a false dichotomy of competing rights: the mother's "right to privacy" right to kill the non-human blob in her womb verses the

9 As one wise observer has noted, "Roe v. Wade has deformed a great nation. The so-called right to abortion has pitted mothers against their children and women against men. It has sown violence and discord at the heart of the most intimate human relationships. It has aggravated the derogation of the father's role in an increasingly fatherless society. It has portrayed the greatest of gifts – a child – as a competitor, an intrusion, and an inconvenience. The rights of women are not a privilege granted by a sovereign. They are every human being's entitlement by virtue of his humanity. The right to life does not depend, and must not be declared to be contingent, on the pleasure of anyone else, not even a parent or a sovereign."
Finally, the proposal (and all already articulated purposes in ABA Constitution Section 1.2) presupposes the ABA defense of the right to life of the innocents will be undertaken by lawful means. Suppose the ABA as an organization were to advocate a change through lawful means in the language of the United States Constitution (or in a Supreme Court interpretation of the Constitution). Would this mean the ABA had abandoned its purpose to uphold and defend the Constitution? Of course not. We have an obligation to address constitutional issues that need addressing. We honor the Constitution by doing so. So, even if I were advocating change in the language of the Constitution by lawful means, my proposal would not conflict with the ABA purpose to uphold and defend the Constitution.

In 2011 and at other times, the Committee on Constitution and Bylaws has suggested that what I advocate is a policy position for the ABA, not a purpose of the ABA, and therefore my proposal should be rejected on the ground that it does not belong in Section 1.2 of the ABA Constitution. I disagree with this contention also. After all, what is a purpose? A purpose is simply a fundamental policy. The innocent human beings in the wombs of their mothers (many of whom have become mortal enemies of their country to renew our commitment to the basic principles of the Declaration of Independence - that every innocent human being has the right to life, liberty, and the pursuit of happiness. And it is not just the innocents in the womb who cry out for champions. We are sliding down the slippery slope of disregard for the sanctity of human life for many outside the womb as well - the old, the infirm, and the disabled. If we do not wake up and stand up for what is right, soon many of these innocents will have to be justifying why their lives should be spared - why we should be spending money and effort on their inconvenience and bothersome lives. The intentional killing of perhaps 1.2 million innocent human beings by abortion in the United States each year in recent years (and even more before) is such.

10 Nor does basing a supposed constitutional right to abortion upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (... nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws...), as advocated by Justice Ginsburg and three other Justices in the Ginsburg dissent in Gonzales v. Carhart, 550 U.S. 124, 172 (2007) make any more sense. The child in the womb is still a human being. As a child, and her right to life trumps the mother’s interest in having her killed, whether based on a supposed right to privacy or upon the Equal Protection Clause. See also, Erika Bachiochi, Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights, Harvard Journal of Law & Public Policy, vol. 34, no. 3, Summer 2011.
an affront to justice that the ABA should make defending the rights of those (and other) innocent beings one of its fundamental policies – one of its very purposes.

Remember the argument over the propriety of amending the U.S. Constitution with the Bill of Rights shortly after the approval of the Constitution itself? There were those who argued that it is unnecessary and inappropriate to articulate in the Constitution these rights of the people and of the States against intrusion by the federal government, since the federal government was permitted to exercise only those powers granted to it in the Constitution anyway. But those rights articulated in those first ten amendments were considered so fundamental that they should be explicitly set forth in the Constitution itself.

Well, our country has abandoned its fundamental argument for its own formation when it denies to some innocents the inalienable God-given right to life itself, allowing others with the sanction of law to kill off innocents. This is a fundamental perversion of what the United States should be. The ABA should make the correction of this deviation one of its bedrock, fundamental policies – that is, one of its very purposes of being. The ABA goes on and on nowadays about its support of “the rule of law,” but where is that support when it comes to children in the womb? Where are their lawyers defending their rights? Where is the defense and pursuit of justice here?

The Committee claimed that the subject of the proposal is not fundamental enough - or is not of the right character - to be included in the purposes section of the ABA constitution. But compare a stance against stripping the right to life from millions of innocents to the purposes that are in the ABA constitution. Defending the right to life of innocents when it is being denied by our “law” is much more fundamental than even the upholding and defending of our hallowed U.S. Constitution and representative government. The ABA purpose I propose goes to the very heart of what an association of American lawyers should be all about. We are supposed to be the upholders of the law. We are supposed to champion those whose rights are being disrespected. Incredibly, a fundamental disrespect for a category of persons’ rights has been incorporated as a fundamental tenant of our American “law.” A stand against this cries out for inclusion in the purposes section of the ABA constitution.

Matters of much lower import and importance to our law and our role as lawyers are already included in the articulation of ABA purposes. My proposal is more fundamental than the ABA constitution existing purposes to “advance the science of jurisprudence”, “promote the uniformity of legislation and of judicial decisions”, “uphold the honor of the profession of law”, and to “encourage cordial intercourse among members of the American bar.” The Committee is wrong when it says that my proposal does not belong in the purposes section of the ABA constitution.

At the House of Delegates in August 2001, the speaker who advocated postponing the proposal indefinitely said that the proposal “changes fundamentally the purpose of the American Bar Association and the Constitution and Bylaws, and has ramifications...
over a wide array of policy that the Association has adopted and implemented. I have reviewed the ABA Policy and Procedures Handbook and note here policy positions taken by the ABA that are, or may be regarded as, inconsistent with the proposal being made hereby.

The ABA Policy and Procedures Handbook lists hundreds of standing policies adopted by the ABA over the years, although action was taken at the 2001 meeting to “archive” some policies over ten years old, taking them off the list of current policy positions. Way back in 1978, the ABA adopted a policy, still in the 2013-2014 Handbook, supporting federal and state legislation to “finance abortion services for indigent women.” In 1991, the ABA adopted a policy supporting legislation to promote “full counseling and referrals on all medical options” in federally funded family planning clinics. In 1992, the ABA adopted a policy, still in the Handbook, opposing federal legislation restricting abortions prior to viability and thereafter if the abortion is “necessary to protect the life or health of the woman ....” And in 1994, the ABA adopted a policy recommending that the United States, at the Fourth World Conference on Women in Beijing, China, in 1995, “actively support the inclusion in the Platform for Action of [effective] measures to accelerate the removal of the remaining obstacles to the realization of women’s basic rights.” At the annual meeting in 2001 the ABA adopted a policy provision opposing the Mexico City Policy, which prohibits overseas funding by the United States of nongovernmental organizations that provide abortion-related health or medical services. The ABA House of Delegates has also fairly recently adopted a policy implicitly approving government-funded killing of innocent human beings in their embryonic stage for stem cell and other research work.

If the proposal is adopted, inconsistent policies would be revoked by implication. Legal protection for all innocent human life is essential to a properly ordered society. Advocacy of such protection should be fundamental ABA policy.

In John F. Kennedy’s 1961 inaugural address he rightly said, “The rights of man come not from the generosity of the state, but from the hand of God.” Professor Robert P. George of Princeton University gave an address at Georgetown University the day after President Obama’s initial presidential inauguration. In urging his listeners to pray for an end to legal abortion in the United States, Professor George said, “We must ask God’s forgiveness for our great national sin of abandoning the unborn to the crime of abortion and implore His guidance and assistance in recalling the nation to its founding ideals of liberty and justice for all.”

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PROPOSAL: Amends §6.2(a)(1) of the Association’s Constitution to provide the U.S. Virgin Islands with a State Delegate, who pursuant to the existing language of §9.2, would automatically serve as a member of the Nominating Committee.

Amends §6.2(a)(1) of the Association’s Constitution to read as follows:

§6.2 Composition. (a) The House of Delegates, which is designed to be representative of the legal profession of the United States, is composed of the following members of the Association:
(1) The State Delegates, one for each state and the United States Virgin Islands, who also serve as chairs of the delegate groups from the respective states.

(Legislative draft - Additions underlined; deletions struck-through)

§6.2 Composition. (a) The House of Delegates, which is designed to be representative of the legal profession of the United States, is composed of the following members of the Association:
(1) The State Delegates, one for each state and the United States Virgin Islands, who also serve as chairs of the delegate groups from the respective states.

(SPONSORS: Anthony M. Ciolli (Principal Sponsor), Tom Bolt, Adriane J. Dudley, Dana M. Hrelic and Manuel A. Quilichini)
Article 9 of the ABA Constitution provides the means for nomination for elected officers of the Association and for elected members of the Board of Governors. Nominations may only be made in two ways: by the Nominating Committee, pursuant to Section 9.2, or by petition to the House of Delegates, pursuant to the provisions of Section 9.3. As a practical matter, virtually all nominations are made by the Nominating Committee, and nomination by the Nominating Committee is tantamount to the election to office by the House of Delegates.

Of the 69 members of the Nominating Committee, 52 are State Delegates, who represent the 50 States, the District of Columbia, and Puerto Rico. Nine members represent sections and divisions (seven selected by the Section Officers Conference, with the other two members elected, respectively, by the Young Lawyers Division and the Judicial Division). In recognition of the importance of assuring that membership on the Nominating Committee reflects membership in the profession as a whole, eight members of the Nominating Committee are Goal III members at-large selected from at-large nominations; however, the Goal III members are limited to those who are women, minorities, LGBT, or have a disability.

The U.S. Virgin Islands, despite having approximately 1,100 attorneys—only a couple of hundred less than small states such as North Dakota, and Wyoming—is not represented by a State Delegate, and therefore lacks representation on the Nominating Committee. This exclusion of lawyers from the U.S. Virgin Islands from the electoral process is inconsistent with the Association’s policy of inclusion, particularly Goal III, which states that it is the objective of the Association to “promote full and equal participation in the association, our profession, and the justice system by all persons.” In fact, it is inconsistent with the Association’s long-standing policy, first adopted in 1992, urging that the United States Constitution be amended to permit citizens in American territories to vote in national elections. It is also contrary to the governance policies of other national legal organizations—including the National Bar Association, the Federal Bar Association, and the Conference of Chief Justices—as well as other national professional organizations like the American Medical Association, none of whom exclude their dues-paying members from governance opportunities solely due to which part of the United States they call home.

This amendment, if adopted, would amend Section 6.2 of the ABA Constitution to provide the U.S. Virgin Islands with a State Delegate, who pursuant to the existing language of Section 9.2 would automatically serve as a member of the Nominating Committee. Because the amendment only changes the definition of State Delegate to include the U.S. Virgin Islands, but does not change the definition of state found in Section 2.2, its adoption would not place the U.S. Virgin Islands in a district for the Board of Governors.


Article 9 of the ABA Constitution provides the means for nomination for elected officers of the Association and for elected members of the Board of Governors. Nominations may only be made in two ways: by the Nominating Committee, pursuant to Section 9.2, or by petition to the House of Delegates, pursuant to the provisions of Section 9.3. As a practical matter, virtually all nominations are made by the Nominating Committee, and nomination by the Nominating Committee is tantamount to the election to office by the House of Delegates.

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Every member of the American Bar Association ought to have a true voice in the election of the officers of the Association. This proposal would accomplish this objective for the U.S. Virgin Islands, whose attorneys have a long history of active involvement in the ABA.

Respectfully submitted,

Anthony M. Ciolliri
Tom Bolt
Adriane J. Dudley
Dana M. Hrelic
Manuel A. Quilichini
PROPOSAL: Amends § 6.7(e) of the Association’s Constitution to increase the number of Senior Lawyers Division delegates in the House of Delegates from two to four.

Amends § 6.7(e) of the Association’s Constitution to read as follows:

At the annual meeting in 1990, the Senior Lawyers Division shall elect one delegate to the House in the manner prescribed by its bylaws for a term of one Association year. At the annual meeting in 1990 and in each succeeding third year, the Senior Lawyers Division shall elect one delegate to the House in the manner prescribed by its bylaws for a term of three Association years.

In 1991 and in each succeeding Association third year, the Senior Lawyers Division shall elect one delegate to the House for a term of three Association years. At the annual meeting in 2019 and in each succeeding Association third year, the Senior Lawyers Division shall elect one additional delegate to the House for a term of three Association years. In 2020 and in each succeeding Association third year, the Senior Lawyers Division shall elect one additional delegate to the House for a term of three Association years.

(Legislative Draft – Additions underlined; deletions struck-through)

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In 1991 and in each succeeding Association third year, the Senior Lawyers Division shall elect one delegate to the House for a term of three Association years. At the annual meeting in 2019 and in each succeeding Association third year, the Senior Lawyers Division shall elect one additional delegate to the House for a term of three Association years. In 2020 and in each succeeding Association third year, the Senior Lawyers Division shall elect one additional delegate to the House for a term of three Association years.
The Senior Lawyers Division requests an amendment to section 6.7(e) of the Constitution to increase the number of delegates from two to four based on its increase from approximately 3,500 to approximately 64,000, when it converted to an auto-enrolled division.

At its February 2016, meeting the Board of Governors approved the transition of the Senior Lawyers Division from a dues-based Division (with approximately 3,500 members) to a Division in which all Association members who have reached 62 years of age or who have been licensed to practice law for 37 years or more are automatically enrolled in the Senior Lawyers Division without charge. This change was implemented in Spring 2016 with the mailing to all members of dues statements for the ensuing Association year beginning September 1, 2016. As a result, the membership of the Division grew from approximately 3,500 to approximately 63,000, one of the largest of the Association's Sections and Divisions.

Section 6.6 of the Association's Constitution and Bylaws defines each Section's entitlement to representation in the House of Delegates, determined by the number of members each Section has: a minimum of two delegates, one additional delegate for a Section with more than 20,000 members and one additional for a Section with more than 45,000 members.

Section 6.7 of the Constitution and Bylaws defines the entitlement of Divisions and Conferences to representation in the House of Delegates. The Law Student Division has three delegates; the Young Lawyers Division has four delegates. At present, §6.7(e) entitles the Senior Lawyers Division to just two delegates.

The officers and Council of the Division have embarked on programs to integrate and invigorate the Division's extensive new membership by programs intended to involve members in ABA activities with a view to helping turn around the membership loss that the Association has experienced for many years. Senior Lawyer Division members are by definition those who have stayed, who for whatever reasons have found their memberships sufficiently useful and beneficial to have remained paying members late in their careers. It does nothing to encourage their membership retention when their Division - Senior Lawyers - remains demonstrably under-represented in the House of Delegates. The cost to the Association will be minimal, the benefit significant.

Thank you for your consideration of this matter. We are pleased to answer any questions.

Most Respectfully,

John Hardin Young
Seth Rosner
Ruth Kleinfeld

Thank you for your consideration of this matter. We are pleased to answer any questions.

Most Respectfully,

John Hardin Young
Seth Rosner
Ruth Kleinfeld
SPONSORS: Dana M. Hrelic (Principal Sponsor), Tommy Preston, J. Logan Murphy, Casey Kannenberg, Daiquiri Steele, Mark Nichols, Andrew Schpak, Lacy Durham, Stefan Paly, Anna Romanskaya, Shenique Moss, Erica Grinde and Edward Rawl1

PROPOSAL: Amends §7.3 of the Association’s Constitution to reconcile the eligibility requirements for a young lawyer member-at-large on the ABA Board of Governors with the definition of young lawyer in the ABA Young Lawyers Division Bylaws.

Amends §7.3 of the Association’s Constitution to read as follows:

§7.3 Eligibility and Term. While selected from different constituencies within the Association, every member of the Board of Governors owes a fiduciary duty to act solely in the best interests of the Association as a whole. To be eligible for election to the Board of Governors from a district, a person must be accredited to the district for which elected. To be eligible for election as a young lawyer member-at-large, a person must be admitted to practice in his or her first bar within the past five years or be 36 years old or less at the beginning of the term. To be eligible for election as a Goal III member-at-large, a person must be a minority, woman, or self-identify either as LGBT or as having a disability. The judicial member-at-large must be an active member of the judiciary. To be eligible for election as a law student member-at-large, a person must be a law student at the time of election. The term of an elected member of the Board is three Association years, with the exception of the law student member-at-large whose term is one Association year, beginning with the adjournment of the annual meeting during which the member is elected. An elected member of the Board may not be elected to a second consecutive full term.

(Protagraphic Draft - additions underlined; deletions struck-through):

§7.3 Eligibility and Term. While selected from different constituencies within the Association, every member of the Board of Governors owes a fiduciary duty to act solely in the best interests of the Association as a whole. To be eligible for election to the Board of Governors from a district, a person must be accredited to the district for which elected. To be eligible for election as a young lawyer member-at-large, a person must be admitted to practice in his or her first bar within the past five years or be less than 36 years old or less at the beginning of the term. To be eligible for election as a Goal III member-at-large, a person must be a minority, woman, or self-identify either as LGBT or as having a disability. The judicial member-at-large must be an active member of the judiciary. To be eligible for election as a law student member-at-large, a person must be a law student at the time of election. The term of an elected member of the Board is three Association years, with the exception of the law student member-at-large whose term is one Association year, beginning with the adjournment of the annual meeting during which the member is elected. An elected member of the Board may not be elected to a second consecutive full term.

1 These sponsors consist of the entire Executive Board of the ABA Young Lawyers Division.
This amendment reconciles the eligibility requirements for a young lawyer member-at-large on the ABA Board of Governors found in §7.3 of the ABA Constitution with the definition of young lawyer found in the ABA Young Lawyers Division Bylaws. As presently written, §7.3 of the ABA Constitution requires that a young lawyer member-at-large “be less than 36 years old at the beginning of the term,” with a term “beginning with the adjournment of the annual meeting during which the member is elected.”

Article 2.1 of the ABA YLD Bylaws defines a young lawyer as “a lawyer who has been admitted to practice in his or her first bar within the past five years, or is less than thirty-six years old.” However, § 2.2 of the ABA YLD Bylaws further provides that

A young lawyer’s membership begins on the first day of September following the annual meeting. A young lawyer’s membership continues, and the Member is a “young lawyer,” until and through the last day of August in any fiscal year for at least part of which the Member is a young lawyer under section 2.1.

Thus, the ABA YLD Bylaws provide that individuals who turn 36 years old during the ABA fiscal year remain young lawyers for the entirety of the ABA fiscal year.

The language currently used in §7.3 of the ABA Constitution, although intended to track the definition of young lawyer found in the ABA YLD Bylaws, unintentionally creates a doughnut hole that excludes a small number of young lawyers from service on the Board of Governors through no fault of their own. For example, pursuant to §§ 2.1 and 2.2 of the ABA YLD Bylaws, an individual born on August 1, 1982, is a young lawyer through August 31, 2018. However, because that individual would be 36 years old when the ABA Annual Meeting adjourns on August 7, 2018, she could not serve as the young lawyer member-at-large for the 2018-21 term, even though she is still a young lawyer under the ABA YLD Bylaws at the time the term begins. Notably, the young lawyer member-at-large position on the Board of Governors is the only position that this individual could not fill, since the language in the portions of the ABA Constitution providing for the ABA YLD representatives to the Nominating Committee and the House of Delegates do not utilize language that creates such a doughnut hole.

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The language currently used in §7.3 of the ABA Constitution, although intended to track the definition of young lawyer found in the ABA YLD Bylaws, unintentionally creates a doughnut hole that excludes a small number of young lawyers from service on the Board of Governors through no fault of their own. For example, pursuant to §§ 2.1 and 2.2 of the ABA YLD Bylaws, an individual born on August 1, 1982, is a young lawyer through August 31, 2018. However, because that individual would be 36 years old when the ABA Annual Meeting adjourns on August 7, 2018, she could not serve as the young lawyer member-at-large for the 2018-21 term, even though she is still a young lawyer under the ABA YLD Bylaws at the time the term begins. Notably, the young lawyer member-at-large position on the Board of Governors is the only position that this individual could not fill, since the language in the portions of the ABA Constitution providing for the ABA YLD representatives to the Nominating Committee and the House of Delegates do not utilize language that creates such a doughnut hole.

The proposed amendment simply replaces the “be less than 36 years old at the beginning of the term” language in §7.3 of the ABA Constitution with the similar phrase “be 36 years old or less”. This minor change in the language eliminates the doughnut hole, and ensures that everyone who is a young lawyer under the ABA YLD Bylaws is eligible to serve as a young lawyer member-at-large on the ABA Board of Governors.
PROPOSAL: Amends §29.6 of the Association’s Bylaws to clearly state that the Association’s financial statements are audited and not the Treasurer’s report, and that the Association’s annual financial statements shall be submitted for examination and audit by a certified public accountant designated by the Board of Governors upon recommendation of the Audit Committee.

Amends §29.6 of the Association’s Bylaws to read as follows:

§29.6 Treasurer.

The Treasurer shall supervise the safekeeping of the funds and investments of the Association, and shall report periodically on the financial condition of the Association to the House of Delegates and Board of Governors. The Association’s financial statements shall be submitted for examination and audit by a certified public accountant designated by the Board of Governors upon recommendation of the Audit Committee.

(Legislative Draft – Additions underlined; deletions struck-through)

The Treasurer shall supervise the safekeeping of the funds and investments of the Association, and shall report periodically on the financial condition of the Association to the House of Delegates and Board of Governors. The Treasurer’s annual report Association’s financial statements shall be submitted for examination and audit by a certified public accountant designated by the Board of Governors upon recommendation of the Audit Committee.
The current Bylaw requires that the Treasurer’s annual report be audited by a Certified Public Accountant. A review of the Association’s archives revealed that this specific language was adopted in 1987. However, language relating to the examination and audit of the Treasurer’s report was found in the Association’s Bylaws dating back to 1880. While the Treasurer does provide an annual report on ABA finances, that report is not audited. The Association’s financial statements are audited. Furthermore, the Treasurer’s report cannot be audited because the Accounting Professional Standards stipulate that only financial statements can be audited. For example, even though Securities & Exchange Commission regulations require all public companies to provide a Management Discussion and Analysis (MD&A) along with their financial statements, that MD&A is not audited. The Treasurer’s report is very similar to a public company MD&A. As such, the Audit Committee recommends that §29.6 of the Constitution and Bylaws be amended as outlined.

Thank you for your consideration of this matter. I would be pleased to answer any questions. I may be reached at allan.tanenbaum@equicorppartners.com.
Amends §31.7 of the Association’s Bylaws to read as follows:

§31.7 Designation, Jurisdiction, and Special Tenures of Standing Committees. The designation, jurisdiction, and special tenures of standing committees are as follows:

Audit. (a) The Standing Committee on Audit consists of seven members including the Treasurer, who is a member ex-officio with a vote. Three members of the Committee shall be Association members who are not members of the Board of Governors. Three members of the Committee, other than the Treasurer, shall be members of the Board of Governors representing each of the three Association years of the term on the Board. At the Annual Meeting in 2005 and each succeeding third year, one of these members shall be appointed. At the Annual Meeting in 2006 and each succeeding third year, one of these members shall be appointed. At the annual meeting in 2007 and each succeeding third year, one of these members shall be appointed. Members other than the Treasurer shall be appointed by the Board of Governors upon recommendation of the President. The President shall annually designate a chair. All members should be financially knowledgeable and have no relationship that may interfere with the exercise of their independence with respect to the Association and its management.

(b) The Audit Committee shall:

(1) recommend the selection, retention, and compensation of the Association’s independent auditors for approval by the Board of Governors;

(2) ascertain that the Association’s auditors are independent from the Association and its management and are ultimately accountable to the Board of Governors;

(3) review for the Association and all organizations required to be consolidated with the Association under generally accepted accounting principles (a) the results of the annual external audits of all financial statements and records; (b) the reports of independent auditors on the applicable financial statements; (c) any matters required to be communicated to the Committee by the independent auditors under generally accepted auditing standards and the disclosure requirements of the Independence Standards Board; (d) the system of internal controls; (e) the independent auditors’ letter of recommendations; (f) the Association management’s responses to the letter of recommendations; and (g) after reviewing all of these items to its satisfaction, the Audit Committee shall recommend to the Board of Governors.

Amends §31.7 of the Association’s Bylaws to read as follows:

§31.7 Designation, Jurisdiction, and Special Tenures of Standing Committees. The designation, jurisdiction, and special tenures of standing committees are as follows:

Audit. (a) The Standing Committee on Audit consists of seven members including the Treasurer, who is a member ex-officio with a vote. Three members of the Committee shall be Association members who are not members of the Board of Governors. Three members of the Committee, other than the Treasurer, shall be members of the Board of Governors representing each of the three Association years of the term on the Board. At the Annual Meeting in 2005 and each succeeding third year, one of these members shall be appointed. At the Annual Meeting in 2006 and each succeeding third year, one of these members shall be appointed. At the annual meeting in 2007 and each succeeding third year, one of these members shall be appointed. Members other than the Treasurer shall be appointed by the Board of Governors upon recommendation of the President. The President shall annually designate a chair. All members should be financially knowledgeable and have no relationship that may interfere with the exercise of their independence with respect to the Association and its management.

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(3) review for the Association and all organizations required to be consolidated with the Association under generally accepted accounting principles (a) the results of the annual external audits of all financial statements and records; (b) the reports of independent auditors on the applicable financial statements; (c) any matters required to be communicated to the Committee by the independent auditors under generally accepted auditing standards and the disclosure requirements of the Independence Standards Board; (d) the system of internal controls; (e) the independent auditors’ letter of recommendations; and (g) after reviewing all of these items to its satisfaction, the Audit Committee shall recommend to the Board of Governors.
that the Board of Governors accept the Association’s audited financial statements.

(4) review the internal audit function of the Association including (a) the independence and authority of its reporting obligations; (b) the proposed internal audit plan for each fiscal year; and (c) all reports issued by the internal audit department; and

(5) receive, investigate when necessary, and cause response to be made to inquiries or complaints by any member or employee of the Association concerning financial operations of the Association.

(6) assist the Board of Governors in fulfilling its oversight responsibility relating to: (i) the integrity of the Association’s financial statements and financial reporting process and the effectiveness of the Association’s system of internal accounting and financial controls; (ii) the evaluation of management’s processes to identify, assess and manage the Association’s enterprise risk issues; (iii) the administration of the Association’s Business Conduct Standards, compliance process and activities through the Association’s Ethics Office; and (iv) such other matters as may be delegated to it by the Board of Governors from time to time.

(Legislative Draft – Additions underlined; deletions struck-through)

§31.7 Designation, Jurisdiction, and Special Tenures of Standing Committees. The designation, jurisdiction, and special tenures of standing committees are as follows:

Audit. (a) The Standing Committee on Audit consists of seven members including the Treasurer, who is a member ex-officio with a vote. Three members of the Committee shall be Association members who are not members of the Board of Governors. Three members of the Committee, other than the Treasurer, shall be members of the Board of Governors representing each of the three Association years of the term on the Board. At the Annual Meeting in 2005 and each succeeding third year, one of these members shall be appointed. At the Annual Meeting in 2006 and each succeeding third year, one of these members shall be appointed. At the annual meeting in 2007 and each succeeding third year, one of these members shall be appointed. Members other than the Treasurer shall be appointed by the Board of Governors upon recommendation of the President. The President shall annually designate a chair. All members should be financially knowledgeable and have no relationship that may interfere with the exercise of their independence with respect to the Association and its management.

(b) The Audit Committee shall:

(1) recommend the selection, retention, and compensation of the Association’s independent auditors for approval by the Board of Governors;

(4) review the internal audit function of the Association including (a) the independence and authority of its reporting obligations; (b) the proposed internal audit plan for each fiscal year; and (c) all reports issued by the internal audit department; and

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(Legislative Draft – Additions underlined; deletions struck-through)
(2) ascertain that the Association’s auditors are independent from the Association and its management and are ultimately accountable to the Board of Governors;

(3) review for the Association and all organizations required to be consolidated with the Association under generally accepted accounting principles (a) the results of the annual external audits of all financial statements and records; (b) the reports of independent auditors on the applicable financial statements; (c) any matters required to be communicated to the Committee by the independent auditors under generally accepted auditing standards and the disclosure requirements of the Independence Standards Board; (d) the system of internal controls; (e) the independent auditors’ letter of recommendations; and (f) the Association management’s responses to the letter of recommendations; and (g) after reviewing all of these items to its satisfaction, the Audit Committee shall recommend to the Board of Governors that the Board of Governors accept the Association’s audited financial statements;

(4) review the internal audit function of the Association including (a) the independence and authority of its reporting obligations; (b) the proposed internal audit plan for each fiscal year; and (c) all reports issued by the internal audit department; and

(5) receive, investigate when necessary, and cause response to be made to inquiries or complaints by any member or employee of the Association concerning financial operations of the Association; and

(6) assist the Board of Governors in fulfilling its oversight responsibility relating to: (i) the integrity of the Association’s financial statements and financial reporting process and the effectiveness of the Association’s system of internal accounting and financial controls; (ii) the evaluation of management’s processes to identify, assess and manage the Association’s enterprise risk issues; (iii) the administration of the Association’s Business Conduct Standards, compliance process and activities through the Association’s Ethics Office; and (iv) such other matters as may be delegated to it by the Board of Governors from time to time.
The Audit Committee seeks to make the first proposed addition to further clarify the process with regard to review and acceptance of the Association’s financial statements.

The second addition is being proposed to ensure that the Association’s Bylaws reflect the Committee’s duties, as assigned by the Board of Governors, in the most complete and accurate manner possible. The Audit Committee’s currently authorized responsibilities, as outlined above, are primarily limited to oversight of matters related to the Financial operations of the Association. However, the need for additional oversight of internal controls, risk management, and staff/member conduct as it may implicate or impact such matters has required the Audit Committee to perform functions outside of its originally defined scope. Although the Audit Committee has been acting in this unofficially “expanded” capacity for many years, specific authority to do so has not been formally reflected in the Constitution and Bylaws of the Association. Consequently, the Audit Committee is proposing the above Bylaw change.

Thank you for your consideration of this matter. I would be pleased to answer any questions. I may be reached at allan.tanenbaum@equicorppartners.com.
SPONSORS: Lucian T. Pera (Principal Sponsor), Frank X. Neuner, Renu Brennan, Frank Chavez, Ghunise Coaxum, Dawn Evans, Scott Kozlov and Harry Truman Moore

PROPOSAL: Amends Section 31.7 of the Association’s Bylaws to change the name of the Standing Committee on Client Protection to the Standing Committee on Public Protection in the Provision of Legal Services and to amend its jurisdictional statement.

Amends Section 31.7 of the Association’s Bylaws to read as follows:

Public Protection in the Provision of Legal Services. The Standing Committee on Public Protection in the Provision of Legal Services, which consists of seven members, shall: (1) promote and enhance mechanisms to protect the public interest in the provision of legal services, including programs to reimburse financial loss caused by lawyers' misappropriation of client funds and other causes of client loss, as deemed appropriate; (2) promote and enhance mechanisms for the alternative dispute resolution of lawyer-client fee and non-fee related disputes; (3) promote and enhance mechanisms to address the unauthorized practice of law; and (4) identify and comment on emerging issues in the regulation of the practice of law and the provision of legal services, in coordination with other ABA entities and, where advisable, refer appropriate matters to other Association entities and the House of Delegates.

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Client Protection Public Protection in the Provision of Legal Services. The Standing Committee on Client Protection Public Protection in the Provision of Legal Services, which consists of seven members, shall: (1) promote and enhance client protection mechanisms to protect the public interest in the provision of legal services, including programs to reimburse financial loss caused by lawyers' misappropriation of client funds and other causes of client loss, as deemed appropriate; (2) promote and enhance mechanisms for the alternative dispute resolution of lawyer-client fee and non-fee related disputes; (3) promote and enhance mechanisms for the mediation of client-lawyer disputes; (4) promote and enhance mechanisms to address the unauthorized practice of law, identify and comment on emerging issues in the regulation of the unauthorized practice of law, in coordination with other ABA entities and, where advisable, refer appropriate matters to other Association entities and the House of Delegates; and (4) (5) identify and comment on emerging issues in the regulation of the practice of law and the provision of legal services, including the unauthorized practice of law, in coordination with other ABA entities and, where advisable, refer appropriate matters to other Association entities and the House of Delegates.

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Amends Section 31.7 of the Association’s Bylaws to read as follows:

Public Protection in the Provision of Legal Services. The Standing Committee on Public Protection in the Provision of Legal Services, which consists of seven members, shall: (1) promote and enhance mechanisms to protect the public interest in the provision of legal services, including programs to reimburse financial loss caused by lawyers' misappropriation of client funds and other causes of client loss, as deemed appropriate; (2) promote and enhance mechanisms for the alternative dispute resolution of lawyer-client fee and non-fee related disputes; (3) promote and enhance mechanisms to address the unauthorized practice of law; and (4) identify and comment on emerging issues in the regulation of the practice of law and the provision of legal services, in coordination with other ABA entities and, where advisable, refer appropriate matters to other Association entities and the House of Delegates.

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Client Protection Public Protection in the Provision of Legal Services. The Standing Committee on Client Protection Public Protection in the Provision of Legal Services, which consists of seven members, shall: (1) promote and enhance client protection mechanisms to protect the public interest in the provision of legal services, including programs to reimburse financial loss caused by lawyers' misappropriation of client funds and other causes of client loss, as deemed appropriate; (2) promote and enhance mechanisms for the alternative dispute resolution of lawyer-client fee and non-fee related disputes; (3) promote and enhance mechanisms for the mediation of client-lawyer disputes; (4) promote and enhance mechanisms to address the unauthorized practice of law, identify and comment on emerging issues in the regulation of the unauthorized practice of law, in coordination with other ABA entities and, where advisable, refer appropriate matters to other Association entities and the House of Delegates; and (4) (5) identify and comment on emerging issues in the regulation of the practice of law and the provision of legal services, including the unauthorized practice of law, in coordination with other ABA entities and, where advisable, refer appropriate matters to other Association entities and the House of Delegates.
The Standing Committee on Client Protection (the “Committee”) was created in 1984 to supersede previous committees on client security funds and unauthorized practice of law. Upon its creation, the Committee’s mandate included the enhancement of mechanisms to ensure the reimbursement of financial loss caused by lawyers’ misappropriation of client funds; the promotion of public interests in the delivery of legal services by individuals not licensed in a jurisdiction; and, the responsibility to identify and comment on emerging issues in the regulation of the practice of law, in coordination with other ABA entities.

The Committee’s jurisdictional statement was amended in 2004 to reflect its expanded focus on aspects of the client-lawyer relationship beyond policies to address the reimbursement of financial losses to include “other areas that encompass protection of the public and the client.” Specifically, the amendments included two separate mandates to “promote and enhance mechanisms for the arbitration of client-lawyer disputes” and “promote and enhance mechanisms for the mediation of client-lawyer disputes.” Since the 2004 amendments, jurisdictions have expanded the availability of alternative dispute mechanisms in their efforts to resolve client-lawyer disputes, and when possible, preserve the client-lawyer relationship. The Virginia State Bar Fee Dispute Resolution Program, for example, offers either binding arbitration or mediation to resolve fee disputes. Amending the Committee’s jurisdictional statement to encompass the promotion of all types of alternative dispute resolution will better reflect the scope of available options to resolve client-lawyer disputes, and possibly preserve the client-lawyer relationship.

The 2004 amendments to the Committee’s jurisdictional statement also included a mandate to “identify and comment on emerging concerns in the regulation” of the unlicensed practice of law and the multijurisdictional practice of law, and “where advisable” refer matters to other Association entities. Much has changed in the delivery of legal services since the 2004 amendments were adopted. Advancements in technology, the need to create better access to legal services, and the expansion of delivery models beyond the traditional client-lawyer relationship have spawned the adoption of the ABA Model Regulatory Objectives for the Provision of Legal Services (“Model Regulatory Objectives”).

Co-sponsored by the Committee, the Model Regulatory Objectives were developed by the Commission on the Future of Legal Services (the “Commission”) “to serve as a framework for the development of standards in response to a changing legal profession and legal services landscape” and serve as a guide for supreme courts and bar authorities when assessing “their existing

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3 Id at 2.


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3 Id at 2.

regulatory framework and any other regulations they may choose to develop concerning non-
traditional legal service providers (emphasis added).”6 Chief among the listed objectives is the
“protection of the public.”7 The Committee’s proposed amendments to its jurisdictional statement
reinforces the Committee’s focus on identifying and commenting on non-traditional legal services
to ensure that mechanisms to protect consumers of these services are in place.

While the Committee continues to identify and comment on emerging issues in the
regulation of the unlicensed practice of law, the Committee has expanded its expertise and
influence regarding UPL enforcement to include increased educational initiatives and outreach. In
addition, recent Court decisions have raised questions about the constitutionality of state licensing
enforcement structures.8 Today, jurisdictions are looking to the Committee for increased
assistance as the jurisdictions evaluate their enforcement structures to ensure compliance within
these newly defined parameters.

The adoption of the Model Regulatory Objectives, the changing landscape of legal service
delivery models, and potential restrictions on enforcement against the unauthorized practice of law
requires the Committee to clearly state its role in protecting the public by promoting the
enhancement of mechanisms to prevent against the unauthorized practice of law and its duty to
monitor and comment on the regulation of the practice of law by those licensed to practice law or
otherwise authorized to deliver legal services.

The Committee’s proposed changes to its name and jurisdictional statement are not
intended to alter the Committee’s mission, but to provide clarity for the scope of the Committee’s
work and to better reflect its purpose as the only ABA entity with the protection of the public
interest in the provision of legal services as its primary mandate.

Thank you for your consideration. If you have any questions, please contact Committee
Counsel or any member of the Committee.

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6 Id.
7 Id.

Amends the Bylaws to discontinue the Standing Committee on Medical Professional Liability at the conclusion of the 2018 Annual Meeting and that its work be subsumed by the Tort Trial and Insurance Practice Section.

Amend §31.7 to delete the paragraph headed Medical Professional Liability.

Medical Professional Liability. The Standing Committee on Medical Professional Liability consists of not more than nine members. The Committee’s responsibilities shall be:

(a) To review pending and future proposals relating to medical professional liability in light of existing ABA policies;
(b) To identify policy areas, if any, as to which new policy is needed; and
(c) To serve as a focal point for activity within the ABA on issues relating to medical professional liability.
Scope’s 2016 Annual meeting agenda included a regular and routine review of the Standing Committee on Medical Professional Liability (“Standing Committee”).

As a result of that review, Scope preliminarily determined that the Standing Committee should discontinue at the conclusion of the 2017 Annual Meeting and the work of the Standing Committee should be subsumed as appropriate. Scope invited representatives of the Standing Committee to appear at its 2017 Midyear Meeting to discuss this recommendation.

During Scope’s 2017 Midyear Meeting, Scope met with representatives and staff of the Standing Committee. As a result of that review, Scope agreed with the Standing Committee that it should remain for an additional year so if any medical malpractice issues arise with the new 115th Congress and Administration, they could be addressed by the Standing Committee which could also use the time, if it chose to do so, to bring forward any other policy recommendations if felt necessary in this area. Therefore, Scope agreed its recommendation to discontinue should become effective at the conclusion of the 2018 Annual Meeting and that the work and staffing responsibilities would be transferred to the Tort Trial & Insurance Practice Section (TIPS), unless the Standing Committee could identify a more appropriate Section.

Scope invited the Standing Committee and TIPS to share their written comments with the entire Scope Committee. After reviewing responses received from both the Standing Committee and TIPS and working with them, an agreed resolution was developed in support of the Scope recommendations.

Therefore, Scope’s final recommendations are: 1) the Standing Committee discontinue at the conclusion of the 2018 Annual Meeting; and 2) the work and staffing responsibilities of the Standing Committee be transferred to the TIPS.

If approved, Scope, the Standing Committee, and TIPS have agreed to continue to work together to make this a successful transition. Scope believes this proposal allows the ABA to continue its work and interest in this area with interested practitioners while enhancing the sustainability of the ABA.

Respectfully submitted,

Thomas M. Fitzpatrick, Chair
Committee on Scope and Correlation of Work March 2018

PROPOSAL: Amends §31.7 of the Association’s Bylaws to change the name of the Standing Committee on Professional Discipline to the Standing Committee on Professional Regulation and to revise its jurisdictional statement.

Amends §31.7 of the Association’s Bylaws to read as follows:

§31.7 Designation, Jurisdiction, and Special Tenures of Standing Committees. The designation, jurisdiction, and special tenures of standing committees are as follows:

Professional Regulation. The Standing Committee on Professional Regulation consists of 9 members. The Committee is responsible for identifying emerging issues in professional regulation and discipline, and for developing, promoting, coordinating, and strengthening professional disciplinary and regulatory programs and procedures. The Committee shall develop and promote Association policies and activities relating to professional regulation and discipline, such as model rules for disciplinary enforcement and standards for the imposition of sanctions. The Committee is also responsible for maintaining the ABA National Lawyer Regulatory Data Bank.

Professional Discipline Regulation. The Standing Committee on Professional Discipline Regulation consists of 9 members. The Committee is responsible for identifying emerging issues in professional regulation and discipline, and for developing, promoting, coordinating, and strengthening professional disciplinary and regulatory programs and procedures, throughout the nation. The Committee shall develop and promote Association policies and activities relating to professional regulation and discipline, such as model rules for disciplinary enforcement and standards for the imposition of sanctions. The Committee is also responsible for maintaining the ABA National Lawyer Regulatory Data Bank.

(Legislative Draft – Additions underlined, deletions struck-through)
The Discipline Committee seeks these changes to its name and jurisdictional statement so that what it is and what it does are optimally reflected in the Association’s Bylaws. The Committee believes that its current name and the multiplicity of references in its jurisdictional statement to “disciplinary enforcement” incompletely describe the totality of the nature and scope of its work, expertise, and resources, and that clarification is necessary. The work of the Committee has long extended beyond just lawyer and judicial disciplinary enforcement to encompass post bar admission regulatory issues affecting the profession.

Enhanced clarity is particularly important at this time, because the ABA, state supreme courts, and other regulators face a barrage of new and different regulatory challenges due to technology, globalization, and heightened pressures to address the crisis in access to legal services. Now, more than ever, state supreme courts and regulators in countries where U.S. lawyers practice are grappling with whether and how to appropriately regulate (or not) lawyers and judges, as well as other legal service providers. This includes determining whether and how state-based judicial regulation can extend to legal service providers who are not lawyers (individuals and entities), and whether and how to further regulate lawyers in the context of anti-money laundering and terrorist financing efforts. These are broader regulatory questions for which the courts, the profession, and the public look to this Standing Committee for continued leadership.

The Discipline Committee is the only entity in the ABA that has had professional regulation as its sole, longstanding focus and area of expertise. The Committee has taken great care to ensure that its work and expertise in professional regulation as whole, and not just disciplinary enforcement, keeps pace with national and global developments that affect, and will continue to impact, the legal profession and members of this Association. Since its creation, the Discipline Committee, on the ABA’s behalf, has significantly shaped and continues to shape the regulatory landscape for lawyers and judges in ways that state supreme courts, the Conference of Chief Justices, disciplinary counsel, the public, and lawyer regulators embrace and rely upon. It does so through its development of national models and policies, as well as its programs and other initiatives.

For example, in addition to its responsibility for the Model Rules for Lawyer and Judicial Disciplinary Enforcement and other disciplinary policies, the Committee is studying and will develop appropriate regulatory policy proposals using the Reports of the ABA Commission on the Future of Legal Services and the National Task Force on Lawyer Well-Being as guideposts. The Committee is developing proposed policy relating to Proactive Management-Based Regulation (PMBR), which are programs to help keep lawyers out of the disciplinary process. The Committee has presented three one-of-a-kind Workshops for regulators on this issue. From those Committee sponsored events, two state supreme courts have adopted PMBR programs. The Conference of Chief Justices is monitoring the Committee’s work in this area.

Other historical illustrations of the Committee’s broader regulatory work include its helping to shape, and cosponsoring or supporting, most of the Resolutions of the ABA Commission on Ethics 2020. The Committee has sponsored a Resolution relating to regulatory provisions of the General Agreement on Trade in Services, and cosponsored the Commission on the Future of Legal Services’ ABA Model Regulatory Objectives for the Provision of Legal Services. The Conference of Chief Justices is monitoring the Committee’s work in this area. Other historical illustrations of the Committee’s broader regulatory work include its helping to shape, and cosponsoring or supporting, most of the Resolutions of the ABA Commission on Ethics 2020. The Committee has sponsored a Resolution relating to regulatory provisions of the General Agreement on Trade in Services, and cosponsored the Commission on the Future of Legal Services’ ABA Model Regulatory Objectives for the Provision of Legal Services. The
Committee also cosponsored the 2016 amendments to Model Rule of Professional Conduct 5.5 and the ABA Model Rule for Registration of In-House Counsel to address issues relating to practice authorization and accountability relating to foreign in-house counsel. Those policy changes addressed a situation unique to foreign in-house counsel who, because of their home countries’ laws, cannot be members of the bar while serving in that capacity for their employer.

Thank you for your consideration of this matter. Paula Frederick, Chair of the Committee, and I are happy to answer any questions. I may be reached at Lucian.Pera@arlaw.com. Paula may be contacted at PaulaF@gabar.org.
Amends §31.7 of the Association's Bylaws to revise the jurisdictional statement of the Standing Committee on Professionalism.

The designation, jurisdiction, and special tenures of standing committees are as follows:

**Professionalism:** The Standing Committee on Professionalism consisting of nine members shall preserve and promote within the entire legal community principles of professionalism, including integrity, civility, competence, fairness, independence, courage, respect for the legal system, and a devotion to public service. The Committee shall initiate and encourage professionalism programs, be responsible for the coordination of efforts in this area within the Association, and provide a central clearinghouse for the collection and dissemination of information on professionalism and lawyer advertising within the legal community. To accomplish these goals, the Committee shall:

(a) Encourage, make recommendations and provide assistance to ABA entities in the development and coordination of professionalism initiatives; 
(b) Encourage and provide assistance to the entire legal community, including state and local bar associations, the judiciary, and law schools in their efforts to improve professionalism and competence; 
(c) Educate members of the legal profession, the judiciary, the law school community, and the public about professionalism, competence, and advertising of legal services; and 
(d) Evaluate and report on trends and developments within the entire legal community impacting professionalism, competence, and advertising and recommend initiatives and policies to address them.

(Proposed draft – Additions underlined, deletions struck-through)

**Professionalism:** The Standing Committee on Professionalism consisting of nine members shall preserve and promote within the entire legal community principles of professionalism, including integrity, civility, competence, fairness, independence, courage, respect for the legal system, and a devotion to public service. The Committee shall initiate and encourage professionalism programs, be responsible for the coordination of efforts in this area within the Association, and provide a central clearinghouse for the collection and dissemination of information on professionalism and lawyer advertising within the legal community. To accomplish these goals, the Committee shall:

(a) Encourage, make recommendations and provide assistance to ABA entities in the development and coordination of professionalism initiatives; 
(b) Encourage and provide assistance to the entire legal community, including state and local bar associations, the judiciary, and the law schools and the legal community in their efforts to improve lawyer professionalism and competence; 
(c) Educate members of the legal profession, the judiciary, the law school community, and the public about professionalism, competence, and advertising of legal services; and 
(d) Evaluate and report on trends and developments within the entire legal community impacting professionalism, competence, and advertising and recommend initiatives and policies to address them.

(Proposed draft – Additions underlined, deletions struck-through)
(c) Educate members of the legal profession, the judiciary, the law school community, and the public about professionalism, competence, and advertising issues of legal services; and

(d) Evaluate and report on trends and developments within the entire legal community impacting lawyer professionalism, competence, and advertising and recommend initiatives and policies to address them.
The Standing Committee on Professionalism requests that Section 31.7 of the Constitution and Bylaws be amended to include language that is consistent throughout and to clarify that its mission to preserve and promote principles of professionalism encompasses all members of the legal community and is not limited to promoting professionalism solely among lawyers. This change is consistent with the Standing Committee’s charge as stated in the first paragraph and subparagraphs (b) and (c) of the current jurisdictional statement. However, subparagraphs (b) and (d) appear to limit the scope of the Professionalism Committee’s mandate by referencing only “lawyer professionalism.”

Since its inception, the Standing Committee’s work has been long directed to reach all constituencies of the legal community. The Standing Committee fulfills the objectives outlined in its mandate by regularly conducting, overseeing and directing various professionalism initiatives and activities that advance the highest ideals of the entire legal profession. For example, the Standing Committee develops and presents professionalism and civility educational programs addressed to law students, law schools, paralegals and the judiciary, as well as lawyers. Also, the Standing Committee works frequently with the Section of Legal Education and Admissions to the Bar and the Bar Services Division, and has assisted in developing policies to address professionalism issues impacting law students. For example, the Committee has worked on policies regarding law school curricula and externship programs, and character and fitness communities about bar applicants. As a result of the Committee’s efforts, the Association is recognized by the judiciary, the state and local bar associations, law schools and the legal education community as the national representative of the legal profession in the professionalism arena.

In today’s rapidly changing economy and the global legal marketplace, the mission and work of the Professionalism Committee is increasingly important. An essential component of the Committee’s mission is examining and redefining professionalism within the legal community in relevant ways as the practice of law evolves. The Committee as a centralized entity provides readily available information about professionalism to ABA members, state and local bar associations, law schools, judges and the entire legal community. Also, the Committee represents the Association’s commitment to improving professionalism within the legal community and helps to assure that the Association continues to lead the profession in its substantive commitment by developing programs and initiatives in support of ABA Goal II and consistent with its objective to “promote competence, ethical conduct and professionalism.”

The Standing Committee’s proposed amendments to its jurisdictional statement are not intended to alter the Committee’s mission, but to provide consistency and clarity. As the leading voice informing the Association’s national perspective on professionalism issues and the central clearinghouse within the ABA for the collection and dissemination of professionalism information within the entire legal community, it is important that the Committee’s jurisdictional statement more precisely reflect the reality and scope of all of its endeavors.

Thank you for your consideration. If you have any questions, please contact either Lucian Pera, Jayne Reardon, or Theresa Gronkiewicz.
SPONSOR: Michael Fleming (Principal Sponsor), Jaime Robyn Ackerman, Pedro Martin Allende, Caryl Ben Basat, Don Bivens, Lisa Jill Dickinson, Matthew R. Fisher, Ashley Hallene, Art R. Magedoff, Ranjit Narayanan and Daumier Xandrine

PROPOSAL: Amends §31.7 of the Association’s Bylaws to revise the jurisdictional statement of the Standing Committee on Technology and Information Systems.

Amends §31.7 of the Association’s Bylaws to read as follows:

Technology and Information Systems. The Standing Committee on Technology and Information Systems consists of eleven members with a stated interest and competence in technology and digital systems who are selected by the ABA President to provide guidance and oversight by interacting and exchanging ideas with Association senior staff responsible for the Association’s technology and related digital resources. Committee appointments are ideally made to represent a diversity of member types including a variety of legal practices, Association entity relationships, and personal diversity. The Committee is responsible for:

(a) providing member oversight for the Association’s activities that utilize technology and digital resources, including but not limited to member oversight of the following Association departments: Information Systems, Email Management, and Digital Engagement;

(b) reviewing and recommending changes to the plans and budgets of the Association’s strategic technology, email marketing, and digital engagement functions;

(c) providing member guidance for the implementation of structural improvements to the Association’s technological and digital systems; and

(d) establishing relationships with Association entities to further coordination and communication regarding Association technology efforts.

(Proposed – Additions underlined; deletions struck-through)

Technology and Information Systems. The Standing Committee on Technology and Information Systems consists of eleven members. The Committee shall:

(a) provide member oversight for the Association’s use of technology and information resources, the Legal Technology Resource Center, Information Systems, and the Association’s technology plan;

(b) coordinate and monitor the technological aspects of the Lawyers Communication Network’s programming;

(c) identify and develop technology-related member benefits;

(d) identify strategies by which technology can be applied to improve the efficiency and quality of legal services and the activities of the Association;

(e) provide member coordination for the implementation of structural improvements to the Association’s technological and information systems;

(f) promote member and public awareness of the Association’s internal and external technology and information projects and programs; and

(g) establish liaisons with Association entities and state, territorial and local bar associations to further coordination and communication in this area. with a stated interest and competence in technology and digital systems who are

PROPOSAL: Amends §31.7 of the Association’s Bylaws to revise the jurisdictional statement of the Standing Committee on Technology and Information Systems.

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(c) providing member guidance for the implementation of structural improvements to the Association’s technological and digital systems; and

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(c) identify and develop technology-related member benefits;

(d) identify strategies by which technology can be applied to improve the efficiency and quality of legal services and the activities of the Association;

(e) provide member coordination for the implementation of structural improvements to the Association’s technological and information systems;

(f) promote member and public awareness of the Association’s internal and external technology and information projects and programs; and

(g) establish liaisons with Association entities and state, territorial and local bar associations to further coordination and communication in this area. with a stated interest and competence in technology and digital systems who are
selected by the ABA President to provide guidance and oversight by interacting and exchanging ideas with Association senior staff responsible for the Association’s technology and related digital resources. Committee appointments are ideally made to represent a diversity of member types including a variety of legal practices, Association entity relationships, and personal diversity. The Committee is responsible for:

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(b) reviewing and recommending changes to the plans and budgets of the Association’s strategic technology, email marketing, and digital engagement functions;

(c) providing member guidance for the implementation of structural improvements to the Association’s technological and digital systems; and

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(b) reviewing and recommending changes to the plans and budgets of the Association’s strategic technology, email marketing, and digital engagement functions;

(c) providing member guidance for the implementation of structural improvements to the Association’s technological and digital systems; and

(d) establishing relationships with Association entities to further coordination and communication regarding Association technology efforts.
The Standing Committee on Technology and Information Systems ("SCOTIS") was originally founded in the late 1990s, and has acted continuously in service to the Association since that time. The Committee’s primary function derived from review of the Association’s technology resources used by staff and membership, which at the time of the committee’s initial charter was a function of the ABA Information Systems department.

The committee also had additional focus areas included in its mission statement, including oversight of the ABA’s Legal Technology Resources Center ("LTRC"). However, the committee’s oversight of LTRC ended once the LTRC became a part of the Law Practice Management Section. Thus, one aspect of the proposed revision to their SCOTIS mission statement is to remove the vestiges of this former relationship from the Mission Statement. On a similar note, the current mission statement assigns responsibilities to SCOTIS regarding a service called the Lawyers Communications Network, which appears to be a joint-venture from the mid-1970s that has made no known appearance since the early 2000s. We propose eliminating any reference to this service in our mission statement.

Further, significant changes to the ABA’s own technology strategy have evolved since the founding of the committee. While the Information Services department was once essentially the sole part of the ABA staff that dealt with technology issues, and technology was largely a function of the ABA’s enterprise IT (i.e., the computers and software used to run the business of the ABA), the ABA’s technology strategy is addressed differently today. The offering of technology services for members and staff of the ABA, as well as to the public, is a strategic aspect of the Association’s mission. The ABA website, its email and social media presence, and offerings of digital services of today, and more in the future, are no longer the sole purview of enterprise IT but rise to the highest levels of member and staff oversight. As a consequence, the IS Department is part of, but not the entirety, of how the Association manages its technology strategy.

In response to this changing environment, the Committee has already informally liaised with newly created ABA staff departments that have formed in recent years to address the concerns of member-focused technology. These include the Digital Engagement department that has taken the lead on the development of the new ABA website, as well as the Email Management department that was formed as a response to Director Rives’ project to review email practices of the Association that had come under increasing scrutiny. Further, the Committee has played an active role in representing the interests of members, as well as of the Association as a whole, with many initiatives that were not strictly "IT" – The website project, content searching, the email governance project, and the conversion to a new association membership management system are all examples of projects whose reach within the ABA staff was well beyond strictly IT, and SCOTIS was actively involved in all of these projects and contributes heavily to the work of the staff in each.

Two new departments of the ABA, which only came into existence in recent years, bear significant responsibilities for the ABA technology strategy – The Digital Engagement and Email Management departments now provide significant strategic guidance to the Association respecting their areas of expertise.
As a result, the Committee is of the opinion that it is desirable to revise the Mission Statement to clearly task SCOTIS to perform its function of member oversight of not merely the Information Services department, but as well the Digital Engagement and Email Management departments.

The proposed revision derived from a subcommittee formed by SCOTIS, comprised of the Chair and three appointed members (one from each of the three annual classes), to review and recommend a new mission statement. The Committee as a whole reviewed the subcommittee’s recommendations and in turn suggested further minor changes to the mission statement. The proposed Mission Statement in this Resolution was also approved to submit for consideration by the House by vote of the full Committee at its regular business meeting on February 2, 2018.

Respectfully submitted,

Michael F Fleming
Chair, Standing Committee on Technology and Information Systems

Respectfully submitted,

Michael F Fleming
Chair, Standing Committee on Technology and Information Systems

PROPOSAL: Amends various sections of the Association’s Constitution and Bylaws affected by the New Membership Model adopted by the Board of Governors

Amends §2.1 of the Association’s Constitution to read as follows:

§2.1 Definitions. In this Constitution, the Bylaws, and any rules of the House of Delegates the term: The designation, jurisdiction, and special tenures of standing committees are as follows:

§2.1(m) “Small Firm Practitioner” means a lawyer in private practice in a firm of 2-10 lawyers.

§2.1(o) “Solo and Small Firm Practitioners” collectively means those lawyers in private practice who are in firms of not more than ten lawyers.

(Legislative Draft – Additions underlined, deletions struck-through):

§2.1 Definitions. In this Constitution, the Bylaws, and any rules of the House of Delegates the term: The designation, jurisdiction, and special tenures of standing committees are as follows:

§2.1(m) “Small Firm Practitioner” means a lawyer in private practice in a firm of 2-5 lawyers.

§2.1(o) “Solo and Small Firm Practitioners” collectively means those lawyers in private practice who are in firms of less than six not more than ten lawyers.

Amends §3.4 of the Association’s Constitution to read as follows:

§3.4 Affiliated Professionals. Nothing in this Article prevents the establishment by bylaws of the class of affiliated professionals composed of nonmembers with whom affiliation is considered to be in the interest of the Association.

(Legislative Draft – Additions underlined, deletions struck-through):

§3.4 Affiliated Professionals. Nothing in this Article prevents the establishment by bylaws of the class of affiliated professionals composed of nonmembers with whom affiliation is considered to be in the interest of the Association.

Amends §3.4 of the Association’s Constitution to read as follows:

§3.4 Affiliated Professionals. Nothing in this Article prevents the establishment by bylaws of the class of affiliated professionals composed of nonmembers with whom affiliation is considered to be in the interest of the Association.
Adds §3.5 of the Association’s Constitution to read as follows:

§3.5 International Lawyer. Any person of good moral character in good standing at the bar of the legal profession of another country who is admitted to practice law but is not admitted to the bar of any state, territory, tribal nation, or possession of the United States. An international Lawyer member shall have the same rights and privileges as Member except as follows:

(a) may not participate in electing a Delegate-at-large
(b) may not participate in nominating a member of the Board or an officer of the Association, and may not serve as an officer of the Association;
(c) may not vote in Association-wide elections other than while serving as a delegate in the House; and
(d) may not sign a petition for a vote in an Association referendum.

(Legislative Draft – Additions underlined, deletions struck-through):

§3.5 International Lawyer. Any person of good moral character in good standing at the bar of the legal profession of another country who is admitted to practice law but is not admitted to the bar of any state, territory, tribal nation, or possession of the United States. An international Lawyer member shall have the same rights and privileges as Member except as follows:

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(b) may not participate in nominating a member of the Board or an officer of the Association, and may not serve as an officer of the Association;
(c) may not vote in Association-wide elections other than while serving as a delegate in the House; and
(d) may not sign a petition for a vote in an Association referendum.

Amends §6.6 of the Association’s Constitution to read as follows:

§6.6 Section Delegates. Each section shall be entitled to a minimum of two delegates. A section with more than 20,000 members and International Lawyer members, shall elect from its membership one additional delegate to the House. A section with more than 45,000 members and International Lawyer members, shall elect from its membership one additional delegate. All terms shall be staggered and in each succeeding third year each position shall then be elected for a term of three Association years. The term of a Section Delegate is three Association years, beginning with the adjournment of the annual meeting during which elected. A Section Delegate elected as an officer or member of the Board of Governors ceases to be a Section Delegate at the beginning of the term as officer or governor. If a vacancy occurs, the council of the section shall select a successor for the unexpired term. This section does not apply to divisions.

(Legislative Draft – Additions underlined, deletions struck-through):

§6.6 Section Delegates. Each section shall be entitled to a minimum of two delegates. A section with more than 20,000 members and International Lawyer members, shall elect from its membership one additional delegate to the House. A section with more than 45,000 members and International Lawyer members, shall elect from its membership one additional delegate. All terms shall be staggered and in each succeeding third year each position shall then be elected for a term of three Association years. The term of a Section Delegate is three Association years, beginning with the adjournment of the annual meeting during which elected. A Section Delegate elected as an officer or member of the Board of Governors ceases to be a Section Delegate at the beginning of the term as officer or governor. If a vacancy occurs, the council of the section shall select a successor for the unexpired term. This section does not apply to divisions.

Amends §6.6 of the Association’s Constitution to read as follows:

§6.6 Section Delegates. Each section shall be entitled to a minimum of two delegates. A section with more than 20,000 members shall elect from its membership one additional delegate to the House. A section with more than 45,000 members and International Lawyer members, shall elect from its membership one additional delegate. All terms shall be staggered and in each succeeding third year each position shall then be elected for a term of three Association years. The term of a Section Delegate is three Association years, beginning with the adjournment of the annual meeting during which elected. A Section Delegate elected as an officer or member of the Board of Governors ceases to be a Section Delegate at the beginning of the term as officer or governor. If a vacancy occurs, the council of the section shall select a successor for the unexpired term. This section does not apply to divisions.

(Legislative Draft – Additions underlined, deletions struck-through):

§6.6 Section Delegates. Each section shall be entitled to a minimum of two delegates. A section with more than 20,000 members and International Lawyer members, shall elect from its membership one additional delegate to the House. A section with more than 45,000 members and International Lawyer members, shall elect from its membership one additional delegate. All terms shall be staggered and in each succeeding third year each position shall then be elected for a term of three Association years. The term of a Section Delegate is three Association years, beginning with the adjournment of the annual meeting during which elected. A Section Delegate elected as an officer or member of the Board of Governors ceases to be a Section Delegate at the beginning of the term as officer or governor. If a vacancy occurs, the council of the section shall select a successor for the unexpired term. This section does not apply to divisions.
International Lawyer members, shall elect from its membership one additional delegate to the House. A section with more than 45,000 members and Non-U.S. Lawyer Associates International Lawyer members, shall elect from its membership one additional delegate. All terms shall be staggered and in each succeeding third year each position shall then be elected for a term of three Association years. The term of a Section Delegate is three Association years, beginning with the adjournment of the annual meeting during which elected. A Section Delegate elected as an officer or member of the Board of Governors ceases to be a Section Delegate at the beginning of the term as officer or governor. If a vacancy occurs, the council of the section shall select a successor for the unexpired term. This section does not apply to divisions.

Amends Article 21 of the Association’s Bylaws to read as follows:

Article 21. Members and Affiliated Professionals.

(Legislative Draft – Additions underlined, deletions struck-through):


Amends §21.3 of the Association’s Bylaws to read as follows:

§21.3 Retired Members. Lawyers who have voluntarily placed their law license on inactive, retired, or other such similar status indicating the intent to no longer practice law or serve as a judicial officer in all jurisdictions in which they are licensed, may retain the privileges of membership upon payment of the annual dues for Retired Members prescribed by the Board of Governors unless the lawyers would otherwise be ineligible for Association membership pursuant to Article 3 of the Association’s Constitution and Bylaws.

(Legislative Draft – Additions underlined, deletions struck-through):

§21.3 A person who has been a member and paid the equivalent of senior dues for the last 10 years may become a life member upon written notice to the Treasurer and the payment of the fee for life membership prescribed by the House of Delegates. Such a member has all the privileges of membership, i.e., membership fees shall be invested by the Treasurer and the income from the money so invested shall be used for the general purposes of the Association. Retired Members. Lawyers who have voluntarily placed their law license on inactive, retired, or other such similar status indicating the intent to no longer practice law or serve as a judicial officer in all jurisdictions in which they are licensed, may retain the privileges of membership upon payment of the annual dues for Retired Members prescribed by the Board of Governors unless the lawyers would otherwise be ineligible for Association membership pursuant to Article 3 of the Association’s Constitution and Bylaws.

International Lawyer members, shall elect from its membership one additional delegate to the House. A section with more than 45,000 members and Non-U.S. Lawyer Associates International Lawyer members, shall elect from its membership one additional delegate. All terms shall be staggered and in each succeeding third year each position shall then be elected for a term of three Association years. The term of a Section Delegate is three Association years, beginning with the adjournment of the annual meeting during which elected. A Section Delegate elected as an officer or member of the Board of Governors ceases to be a Section Delegate at the beginning of the term as officer or governor. If a vacancy occurs, the council of the section shall select a successor for the unexpired term. This section does not apply to divisions.

Amends Article 21 of the Association’s Bylaws to read as follows:

Article 21. Members and Affiliated Professionals.

(Legislative Draft – Additions underlined, deletions struck-through):


Amends §21.3 of the Association’s Bylaws to read as follows:

§21.3 Retired Members. Lawyers who have voluntarily placed their law license on inactive, retired, or other such similar status indicating the intent to no longer practice law or serve as a judicial officer in all jurisdictions in which they are licensed, may retain the privileges of membership upon payment of the annual dues for Retired Members prescribed by the Board of Governors unless the lawyers would otherwise be ineligible for Association membership pursuant to Article 3 of the Association’s Constitution and Bylaws.

(Legislative Draft – Additions underlined, deletions struck-through):

§21.3 A person who has been a member and paid the equivalent of senior dues for the last 10 years may become a life member upon written notice to the Treasurer and the payment of the fee for life membership prescribed by the House of Delegates. Such a member has all the privileges of membership, i.e., membership fees shall be invested by the Treasurer and the income from the money so invested shall be used for the general purposes of the Association. Retired Members. Lawyers who have voluntarily placed their law license on inactive, retired, or other such similar status indicating the intent to no longer practice law or serve as a judicial officer in all jurisdictions in which they are licensed, may retain the privileges of membership upon payment of the annual dues for Retired Members prescribed by the Board of Governors unless the lawyers would otherwise be ineligible for Association membership pursuant to Article 3 of the Association’s Constitution and Bylaws.
Amends §21.4 of the Association’s Bylaws to read as follows:

§21.4 Sustaining Members. A member may become a sustaining member upon payment of the annual dues for sustaining membership prescribed by the Board of Governors, which shall be in an amount greater than the highest rate adopted by the House of Delegates. If eligible, a sustaining member may revert to another membership classification.

(Legislative Draft – Additions underlined, deletions struck-through):

§21.4 Sustaining Members. A member may become a sustaining member upon payment of the annual dues for sustaining membership prescribed by the Board of Governors, which shall be in an amount greater than the highest rate adopted by the House of Delegates. If eligible, a sustaining member may revert to another membership classification.

Amends §21.6 of the Association’s Bylaws to read as follows:

§21.6 Special Members. (a) If a person who has reached age 75 and has been a member of the Association for at least 25 years so requests, that person shall retain the privileges of membership but need only pay an amount prescribed by the Board of Governors, which shall be in an amount less than the highest rate adopted by the House of Delegates.

(2) (b) Provided, however, that if a person who reached age 70 prior to September 1, 2004, and has been a member of the Association for 25 years so requests, that person shall retain the privileges of membership but need only pay an amount prescribed by the Board of Governors, which shall be in an amount less than the highest rate adopted by the House of Delegates.

(Legislative Draft – Additions underlined, deletions struck-through):

§21.6 Special Members. (a) If a person who has reached age 75 and has been a member of the Association for at least 25 years so requests, that person shall retain the privileges of membership but need only pay an amount prescribed by the Board of Governors, which shall be in an amount less than the highest rate adopted by the House of Delegates.

(2) (b) Provided, however, that if a person who reached age 70 prior to September 1, 2004, and has been a member of the Association for 25 years so requests, that person shall retain the privileges of membership but need only pay an amount prescribed by the Board of Governors, which shall be in an amount less than the highest rate adopted by the House of Delegates.

Amends §21.6 of the Association’s Bylaws to read as follows:

§21.6 Special Members. (a) If a person who has reached age 75 and has been a member of the Association for at least 25 years so requests, that person shall retain the privileges of membership but need only pay an amount prescribed by the Board of Governors, which shall be in an amount less than the highest rate adopted by the House of Delegates.

(2) (b) Provided, however, that if a person who reached age 70 prior to September 1, 2004, and has been a member of the Association for 25 years so requests, that person shall retain the privileges of membership but need only pay an amount prescribed by the Board of Governors, which shall be in an amount less than the highest rate adopted by the House of Delegates.

(Legislative Draft – Additions underlined, deletions struck-through):

§21.6 Special Members. (a) If a person who has reached age 75 and has been a member of the Association for at least 25 years so requests, that person shall retain the privileges of membership but need only pay an amount prescribed by the Board of Governors, which shall be in an amount less than the highest rate adopted by the House of Delegates.

(2) (b) Provided, however, that if a person who reached age 70 prior to September 1, 2004, and has been a member of the Association for 25 years so requests, that person shall retain the privileges of membership but need only pay an amount prescribed by the Board of Governors, which shall be in an amount less than the highest rate adopted by the House of Delegates.
Amends §21.7 of the Association’s Bylaws to read as follows:

§21.7 Student Members. (a) A law student who is otherwise ineligible for Association membership may apply for law student membership under rules prescribed by the Board of Governors.

(b) A law school graduate who is otherwise ineligible for Association membership because that person has not yet been admitted to the bar of a state, territory or possession may apply for law school graduate membership under rules prescribed by the Board of Governors in consultation with the Council of the Section of Legal Education and Admissions to the Bar and the Law Student Division. Dues for law school graduate members must be paid as prescribed by the Board of Governors.

(c) A student enrolled in college or university level educational studies and has an interest in the work of the American Bar Association may apply for membership under rules prescribed by the Board of Governors.

(d) All student members:
1. may not participate in electing a State Delegate or a Delegate-at-Large
2. may not participate in nominating a member of the Board or an officer of the Association, and may not serve as an officer of the Association;
3. may not vote in Association elections other than while serving as a delegate in the House;
4. may not sign a petition for or vote in an Association referendum; and
5. may participate in other activities of the Association as authorized by the House.

(e) Dues for Student Members must be paid as prescribed by the Board of Governors.

(Legislative Draft – Additions underlined, deletions struck-through):

§21.7 Student Members. Law Student and Law School Graduate Members. (a) A law student who is otherwise ineligible for Association membership may apply for law student membership under rules prescribed by the Board of Governors in consultation with the Council of the Section of Legal Education and Admissions to the Bar and the Law Student Division. Dues for law student members must be paid as prescribed by the Board of Governors.

(b) A law school graduate who is otherwise ineligible for Association membership because that person has not yet been admitted to the bar of a state, territory or possession may apply for law school graduate membership under rules prescribed by the Board of Governors in consultation with the Council of the Section of Legal Education and Admissions to the Bar and the Law Student Division. Dues for law school graduate members must be paid as prescribed by the Board of Governors.

(c) A student enrolled in college or university level educational studies and has an interest in the work of the American Bar Association may apply for membership under rules prescribed by the Board of Governors.

(d) Both law student members and law school graduate All student members:
1. may not participate in electing a State Delegate or a Delegate-at-Large
2. may not participate in nominating a member of the Board or an officer of the Association, and may not serve as an officer of the Association;
3. may not vote in Association elections other than while serving as a delegate in the House;
4. may not sign a petition for or vote in an Association referendum; and
5. may participate in other activities of the Association as authorized by the House.

(e) Dues for Student Members must be paid as prescribed by the Board of Governors.

(Legislative Draft – Additions underlined, deletions struck-through):

§21.7 Student Members. Law Student and Law School Graduate Members. (a) A law student who is otherwise ineligible for Association membership may apply for law student membership under rules prescribed by the Board of Governors in consultation with the Council of the Section of Legal Education and Admissions to the Bar and the Law Student Division. Dues for law student members must be paid as prescribed by the Board of Governors.

(b) A law school graduate who is otherwise ineligible for Association membership because that person has not yet been admitted to the bar of a state, territory or possession may apply for law school graduate membership under rules prescribed by the Board of Governors in consultation with the Council of the Section of Legal Education and Admissions to the Bar and the Law Student Division. Dues for law school graduate members must be paid as prescribed by the Board of Governors.

(c) A student enrolled in college or university level educational studies and has an interest in the work of the American Bar Association may apply for membership under rules prescribed by the Board of Governors.

(d) Both law student members and law school graduate All student members:
1. may not participate in electing a State Delegate or a Delegate-at-Large
2. may not participate in nominating a member of the Board or an officer of the Association, and may not serve as an officer of the Association;
3. may not vote in Association elections other than while serving as a delegate in the House;
4. may not sign a petition for or vote in an Association referendum; and
5. may participate in other activities of the Association as authorized by the House.

Amends §21.8 of the Association's Bylaws to read as follows:

§21.8 Scale of Dues. (a) Except as otherwise provided, a member of the Association must pay dues in the amount prescribed by the House of Delegates and in the manner prescribed by the Board of Governors. Dues include the member's annual subscription to the American Bar Association Journal in an amount set by the Board. In special circumstance, the Board may waive payment of a member's dues.

(b) After the fiscal year ending August 31, 2023, the Board of Governors may modify dues in an amount not to exceed the change in the Cost of Living. A change in the Cost of Living means the product, subject to the rounding up to the nearest dollar, of (a) the annual increase in the cost of living as reported by the Bureau of Labor Statistics for the preceding December times (b) the dues for the preceding fiscal year. The House of Delegates may override any such modification by vote of two-thirds of the delegates present and voting.

(Legislative Draft – Additions underlined, deletions struck-through):

§21.8 Scale of Dues. (a) Except as otherwise provided, a member of the Association must pay dues in the amount prescribed by the House of Delegates and in the manner prescribed by the Board of Governors. Dues include the member's annual subscription to the American Bar Association Journal in an amount set by the Board. In special circumstance, the Board may waive payment of a member's dues.

(b) After the fiscal year ending August 31, 2023, the Board of Governors may modify dues in an amount not to exceed the change in the Cost of Living. A change in the Cost of Living means the product, subject to the rounding up to the nearest dollar, of (a) the annual increase in the cost of living as reported by the Bureau of Labor Statistics for the preceding December times (b) the dues for the preceding fiscal year. The House of Delegates may override any such modification by vote of two-thirds of the delegates present and voting.

Amends §21.11 of the Association's Bylaws to read as follows:

§21.11 Affiliated Professional. Persons who are ineligible to be members or Student members of the Association may qualify as an Affiliated Professional member if they are not admitted to practice law in any jurisdiction, but have an interest in the work of the American Bar Association, have never been disbarred or suspended from the practice of law in any jurisdiction, are of good moral character, and satisfy such further eligibility requirements as may be approved by the Board:

Amends §21.11 of the Association's Bylaws to read as follows:

§21.11 Affiliated Professional. Persons who are ineligible to be members or Student members of the Association may qualify as an Affiliated Professional member if they are not admitted to practice law in any jurisdiction, but have an interest in the work of the American Bar Association, have never been disbarred or suspended from the practice of law in any jurisdiction, are of good moral character, and satisfy such further eligibility requirements as may be approved by the Board:
The privileges and dues of Affiliated Professionals shall be prescribed by the Board. However, they have no interest in the property of the Association and they may not vote, except as authorized by the House of Delegates.

(Legislative Draft – Additions underlined, deletions struck-through):

§21.11 Associates. Affiliated Professional. Persons who are ineligible to be members or law student members of the Association may qualify as an Affiliated Professional member associate if they are not admitted to practice law in any jurisdiction, but have an interest in the work of the American Bar Association, in one of the following classifications, have never been disbarred or suspended from the practice of law in any jurisdiction, are of good moral character, and satisfy such further eligibility requirements as may be approved by the Board:
(a) General Associates. Individuals who are not admitted to practice law in any jurisdiction, but have an interest in the work of the American Bar Association.
(b) Non-U.S. Lawyer Associates. Members of the legal profession of another country who are admitted to practice law but are not admitted to the bar of any state, territory, or possession of the United States.
(c) Student Associates. Individuals enrolled in college or university level post-secondary educational studies and have an interest in the work of the American Bar Association.

The privileges and dues of affiliated Professional members shall be prescribed by the Board. However, they have no interest in the property of the Association and they may not vote, except as authorized by the House of Delegates.

Amends §30.5 of the Association’s Bylaws to read as follows:

§30.5 Officers and Council. A section shall have a chair. It may also have a chair-elect and such other officers as its bylaws may provide. It shall also have a council consisting of the officers and such other members as it bylaws may provide. Notwithstanding any provisions of this section, non-members may serve on the Council of the Section of Legal Education and Admissions to the Bar as its bylaws may provide, and non-U.S. lawyer associates may serve on the Council or as a section leader as its bylaws may provide.

(Legislative Draft – Additions underlined, deletions struck-through):

§30.5 Officers and Council. A section shall have a chair. It may also have a chair-elect and such other officers as its bylaws may provide. It shall also have a council consisting of the officers and such other members as it bylaws may provide. Notwithstanding any provisions of this section, non-members may serve on the Council of the Section of Legal Education and Admissions to the Bar as its bylaws may provide, non-U.S lawyer associates may serve on the Council and in the leadership of the Section of International Law, the Section of Business Law, the Section of Litigation, the Section of Antitrust Law, the Section of Environment, Energy and Resources, and the Section of Labor and Employment Law as their respective bylaws may provide, and non-U.S. lawyer associates may serve on the Council of the Law Practice Division as its bylaws may.
provide, and associate members may serve on the Council and in the leadership of the Section of Dispute Resolution as its bylaws may provide. International Lawyers and Affiliated Professionals may serve on the Council or as a section leader as its bylaws may provide.

Amends §32.1 of the Association’s Bylaws to read as follows:

§32.1 Forums. (a) The House of Delegates may, by a majority vote, create a forum to carry out, in a specific field, a responsibility that is principally to educate its members in that field, is within the purposes of the Association, and is not otherwise served within the Association. The forum shall also investigate and study the matters within its responsibilities.

(b) During each Association year, a forum shall hold one or more educational meetings, open to any member of the Association.

(c) A forum is unlimited in number and indefinite in duration. Any member of the Association may be a member. Each forum shall adopt bylaws not inconsistent with the constitution and Bylaws. The bylaws become effective when approved by the House.

(d) Each forum shall have a governing committee selected in accordance with that forum’s bylaws. International Lawyers and Affiliated Professionals may serve on the governing committee of a forum as its bylaws may provide.

(e) In carrying out its responsibilities under the section, a forum shall coordinate its activities with those of each section or other commit of the Association that is concerned with a matter that is also within the forum’s responsibilities.

(f) To cover its expenses, a forum may impose such dues as the Board of Governors approves.

(g) The House may discontinue or change the name of a forum. The House shall discontinue a forum if, for any Association year, its expenditures exceed the dues received and advance provision has not been made to cover the excess.

(Legislative Draft – Additions underlined, deletions struck-through):

§32.1 Forums. (a) The House of Delegates may, by a majority vote, create a forum to carry out, in a specific field, a responsibility that is principally to educate its members in that field, is within the purposes of the Association, and is not otherwise served within the Association. The forum shall also investigate and study the matters within its responsibilities.

(b) During each Association year, a forum shall hold one or more educational meetings, open to any member of the Association.

(c) A forum is unlimited in number and indefinite in duration. Any member of the Association may be a member. Each forum shall adopt bylaws not inconsistent with the constitution and Bylaws. The bylaws become effective when approved by the House.

(d) Each forum shall have a governing committee selected in accordance with that forum’s bylaws. Non-U.S. Lawyer Associates International Lawyers and Affiliated Professionals may serve on the governing committee of the Forum.

Amends §32.1 of the Association’s Bylaws to read as follows:

§32.1 Forums. (a) The House of Delegates may, by a majority vote, create a forum to carry out, in a specific field, a responsibility that is principally to educate its members in that field, is within the purposes of the Association, and is not otherwise served within the Association. The forum shall also investigate and study the matters within its responsibilities.

(b) During each Association year, a forum shall hold one or more educational meetings, open to any member of the Association.

(c) A forum is unlimited in number and indefinite in duration. Any member of the Association may be a member. Each forum shall adopt bylaws not inconsistent with the constitution and Bylaws. The bylaws become effective when approved by the House.

(d) Each forum shall have a governing committee selected in accordance with that forum’s bylaws. Non-U.S. Lawyer Associates International Lawyers and Affiliated Professionals may serve on the governing committee of the Forum.
(e) In carrying out its responsibilities under the section, a forum shall coordinate its activities with those of each section or other commit of the Association that is concerned with a matter that is also within the forum’s responsibilities.

(f) To cover its expenses, a forum may impose such dues as the Board of Governors approves.

(g) The House may discontinue or change the name of a forum. The House shall discontinue a forum if, for any Association year, its expenditures exceed the dues received and advance provision has not been made to cover the excess.
The Standing Committee on Membership requests that the proposed Constitution and Bylaw changes be made to align the ABA’s membership structure, categories and defined terms with the new membership model. The Membership Committee believes these changes are an important step towards a more simplified, transparent, and understandable membership structure.

Respectfully submitted,

Tracy Giles
Chair, Standing Committee on Membership
August, 2018
The Standing Committee on Constitution and Bylaws is directed by the Association’s Bylaws to study and make appropriate recommendations on all proposals to amend the Association’s Constitution and Bylaws, except for certain specified proposals that are submitted by the Committee on Scope and Correlation of Work.

Since its last report at the 2017 Annual Meeting, the Committee has received twelve proposals to amend the Association’s Constitution and Bylaws and House Rules of Procedure. The Committee met during the Midyear Meeting on February 3, 2018, in Vancouver, BC, Canada, and on April 25, 2018, via telephone conference call, and herewith makes its recommendations on the proposed amendments as follows:

Proposal 1

The Committee considered a proposal to amend §1.2 of the Constitution to include the following language as one of the purposes of the Association: “to defend the right to life of all innocent human beings, including all those conceived but not yet born.” The Committee voted to recommend to the House that the proposal is out of order in that it is inconsistent with the purposes of the Association’s Constitution and that it not be approved.

Proposal 2

The Committee considered a proposal to amend §6.2(a)(1) of the Constitution to provide the U.S. Virgin Islands with a State Delegate, who pursuant to the existing language of §9.2 would automatically serve as a member of the Nominating Committee. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.

Proposal 3

The Committee considered a proposal to amend §6.7(e) of the Constitution to allow the Senior Lawyers Division to increase the number of delegates in the House of Delegates from two to four. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.

Proposal 4

The Committee considered a proposal to amend §7.3 of the Constitution to reconcile the eligibility requirements for a young lawyer member-at-large on the ABA Board of Governors with the definition of young lawyer found in the ABA Young Lawyers Division Bylaws. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.

Proposal 5

The Committee considered a proposal to amend §29.6 of the Bylaws to clearly state that the Association’s financial statements are audited and not the Treasurer’s report and that the Association’s annual financial statements shall be submitted for examination and audit by a certified public accountant designated by the Board of Governors upon recommendation of the Audit Committee. The Committee recommended that the proposal be approved.

Proposal 6

The Committee considered a proposal to amend §31.7 of the Bylaws to more completely and accurately reflect the Standing Committee on Audit’s duties as they have been assigned by the Board of Governors. The Committee recommended that the proposal be approved.

Proposal 7

The Committee considered a proposal to amend §31.7 of the Bylaws to more completely and accurately reflect the Standing Committee on Audit’s duties as they have been assigned by the Board of Governors. The Committee recommended that the proposal be approved.

Proposal 8

The Committee considered a proposal to amend §31.7 of the Bylaws to more completely and accurately reflect the Standing Committee on Audit’s duties as they have been assigned by the Board of Governors. The Committee recommended that the proposal be approved.

Proposal 9

The Committee considered a proposal to amend §31.7 of the Bylaws to more completely and accurately reflect the Standing Committee on Audit’s duties as they have been assigned by the Board of Governors. The Committee recommended that the proposal be approved.

Proposal 10

The Committee considered a proposal to amend §31.7 of the Bylaws to more completely and accurately reflect the Standing Committee on Audit’s duties as they have been assigned by the Board of Governors. The Committee recommended that the proposal be approved.

Proposal 11

The Committee considered a proposal to amend §31.7 of the Bylaws to more completely and accurately reflect the Standing Committee on Audit’s duties as they have been assigned by the Board of Governors. The Committee recommended that the proposal be approved.

Proposal 12

The Committee considered a proposal to amend §31.7 of the Bylaws to more completely and accurately reflect the Standing Committee on Audit’s duties as they have been assigned by the Board of Governors. The Committee recommended that the proposal be approved.
Proposal 7
The Committee considered a proposal to amend §31.7 of the Bylaws to change the name of the Standing Committee on Client Protection to the Standing Committee on Public Protection in the Provision of Legal Services and to amend its jurisdictional statement. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.

Proposal 8
The Committee considered a proposal to amend §31.7 of the Bylaws to discontinue the Standing Committee on Medical Professional Liability at the conclusion of the 2018 Annual Meeting and that its work be subsumed by the Tort Trial and Insurance Practice Section. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.

Proposal 9
The Committee considered a proposal to amend §31.7 of the Bylaws to change the name of the Standing Committee on Professional Discipline to the Standing Committee on Professional Regulation and to amend its jurisdictional statement. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.

Proposal 10
The Committee considered a proposal to amend §31.7 of the Bylaws to revise the jurisdictional statement of the Standing Committee on Professionalism. The Committee recommended that the proposal be approved.

Proposal 11
The Committee considered a proposal to amend §31.7 of the Bylaws to revise the jurisdictional statement of the Standing Committee on Technology and Information Systems. The Committee recommended that the proposal be approved.

Proposal 12
The Committee considered a "placeholder" proposal of various amendments to the Constitution and Bylaws that may be necessary if the New Membership Model is adopted by the Board of Governors and the House of Delegates. The Committee approved the proposals as to form. However, the Committee took no position on the substance of the proposal and asked that if substantive amendments were made to the current proposal, the Committee reserved the right to reconsider its recommendation.

Respectfully submitted,
Carlos A. Rodriguez-Vidal, Chair
Honorable John Preston Bailey
Sidney Butcher
M. Joe Crosthwait, Jr.
Janet Green-Marbley
Eileen M. Letts
Michael Haywood Reed
Mary L. Smith, Board of Governors Liaison

Respectfully submitted,
Carlos A. Rodriguez-Vidal, Chair
Honorable John Preston Bailey
Sidney Butcher
M. Joe Crosthwait, Jr.
Janet Green-Marbley
Eileen M. Letts
Michael Haywood Reed
Mary L. Smith, Board of Governors Liaison
RESOLVED, That the American Bar Association urges bar associations, law schools and other stakeholders to develop and increase educational initiatives, clinics, and other experiential courses through which law students provide legal assistance to pre-trial detainees, immigration detainees, and incarcerated individuals reentering society.
This Resolution urges law schools, bar associations, and other stakeholders in criminal justice reform to develop means of assisting detained and incarcerated individuals for reentry into the community. In 2004, the American Bar Association’s Justice Kennedy Commission Report called upon law schools to “establish clinics in which students may gain both understanding and experience in representing those who have committed crimes and are imprisoned as a result.” The ABA must continue to develop ways to address this ongoing gap in access to justice for incarcerated individuals. This Resolution helps to fill that gap and its implementation will advance the Commission’s calling.

A number of rationales support this Resolution. One is that it advances justice by pushing for greater legal assistance to one of the neediest segments of society. In turn, the creation of more pro bono opportunities enhances experiential education for law students without impacting its cost. Another factor is the scarcity of knowledge about existing programs and their impacts. More research and critical study in this area are necessary and key for firms, lawyers, and law schools looking to design curricula and clinics to serve this population. Beyond, the Resolution is consistent with existing ABA policies, standards, and rules, and supports the ABA’s mission to provide pro bono public service.

**Practical Skills-Training with Society’s Most Indigent, Least Educated**

Legal education’s growing focus on experiential education and practice-readiness supports these proposals as sensible and just. In the course of serving a population that is massively underrepresented, law students are afforded the opportunity to practice their skills and professionalism. The development of more educational initiatives, clinics, and other experiential courses promises greater legal assistance where it is needed most.

The focus on prisoners, immigrants, and those reentering society is warranted since these groups suffer an array of disadvantages, including indigence and lack of education, skills, and training. One study found that over 70 percent of all inmates in U.S. prisons and jails cannot read above the fourth-grade level, and another study in 2006 noted that more than 80% of those charged with felonies are indigent. The situation has grown worse since the 1994 Omnibus Crime Bill, which denied Pell Grant funding to prisoners and destroyed their ability to obtain higher education while in prison. Poor literacy directly limits one’s ability to access justice, and “[i]n any of those who cannot locate pro-bono counsel able and willing to represent them will simply forgo pursuing legal remedies because they are intimidated by the system. Those who consider representing themselves may feel overwhelmed at the prospect of navigating the court system and give up pursuing legitimate civil actions because of the procedural difficulty of doing

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2 Robert R. Kuehn, Pricing Clinical Legal Education, 92 DENV. U.L. REV. 1 (2014) (“A school’s curriculum can be structured to give every I.D. student a clinical experience without having to charge students more in tuition.”).

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so."5 The process is even more challenging for immigrants who face language barriers and an enormous, unmet need in legal aid.6

There are racial dimensions to the problems as well, since a disproportionate number of ethnic minorities are entangled in the criminal justice system from arrests to prisoners to those reentering society. As one clinical professor notes, “There is now, and has always been, a double standard when it comes to the criminal justice in the United States. The system is stacked against you if you are a person of color or are poor, and is doubly unjust if you are both a person of color and poor.”7

When individuals exit prison to reenter society, there are insurmountable obstacles to integrating successfully. Prospects for employment are low and employers often avoid hiring individuals with a criminal record. In addition, finding housing is a major hurdle for most who cannot realistically compete on the market for housing. Beyond are a myriad of collateral consequences, including restrictions, regulations, and forfeitures of social benefits, privileges, licensure and other opportunities. The growing use of monetary sanctions also reduces prospects for successful reentry efforts by saddling felons with Legal Financial Obligations that can result in perpetual financial servitude.8 For such individuals, effective legal representation is only the remotest of possibilities.

Immigrants to this country, whether young or old, seeking asylum or work opportunities, confront a bewildering array of laws and legal procedures requiring assistance and representation. They can secure legal representation in immigration proceedings, but “at no expense to the Government”.9 High quality, affordable legal services are the most important need for this population.10 There is wide disparity in the success rate of those who have lawyers and those who proceed pro se.11

15 An asylum seeker is five times more likely to win a case if they have legal counsel, according to the Public Counsel’s Immigrant's Rights Project. Samantha Balaban, Without a Lawyer, Asylum-Seekers Struggle with Confusing Legal Processes, NPR Radio, Feb. 25, 2018, https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes
Law schools situated in proximity to large jails, prisons, and detention facilities are best positioned to achieve the greatest legal impact. The ability to communicate with a client personally facilitates all aspects of rendering legal aid. This reality makes states like Texas, California, New York, Pennsylvania, and Florida prime locales since they have many law schools to service their state’s massive incarceration operations.

Law schools developing curricula to address these gaps are also well-positioned to help educate immigrants, detainees and ex-prisoners and their communities. Many law schools have instituted Street Law and Know Your Rights programs, which focus on providing legal education to communities. These programs offer a promising way of complementing experiential curricula by helping educate the public identify the most salient legal issues facing prisoners and immigrants.

Education programs targeting individuals returning home from prison, the individuals’ families and friends, and other stakeholders are an immense benefit to the communities that absorb the bulk of individuals returning from incarceration. These communities tend to be lower-class and under-resourced, and such public education programming pushes to ensure communities have a working knowledge of the laws and policies that impact detainees, ex-prisoners, and immigrants in the quest for successful entry into society.

Understanding the Curricular Status Quo

Gaps in research and scholarship hinder the current understanding of efforts to provide legal assistance to incarcerated and reentering individuals. According to a study in 2004, only thirty-three of the approximately 252 U.S. law schools operated clinics to serve approximately 2.3 million people incarcerated in immigration detention centers, jails, prisons, and other facilities. The legal services performed by these clinics are varied and include civil and constitutional conditions work, appellate criminal work, capital defense, and innocence claims. Several clinics have emerged since then, however, there are no comprehensive studies that account for these new clinics or any of the previously existing clinics no longer in operation.11

A similar dearth of prison law curricula exists in doctrinal courses. Despite this scarcity, the United States of America is home to world-leading prison rates and populations. In addition, there are few books or courses that reflect the enormity of this situation.14 The absence of prison

13 Taja-Nia Y. Henderson, Teaching the Carceral Crisis: An Ethical and Pedagogical Imperative, 15 U. Md. L.J. Race, Religion, Gender & Class 104 (2013) notes that in 2013 “The following law schools are among those offering clinical course programs with a specific focus on prison law and the rights of prisoners: Yale, Georgetown, University of California - Davis, William Mitchell, Northwestern, Akron, and Wisconsin. This list excludes capital punishment clinics, which are more widely available.”

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law courses in law school curricula is conspicuous by its absence since the stakes are so high, as
one professor notes:

To judge from this curriculum, the criminal justice process starts with the investigation of
a crime and ends with a determination of guilt. But for many if not most defendants, the
period from arrest to verdict (or plea) is only a preamble to an extended period under state
control, whether on probation or in custody. It is during the administration of punishment
that the state's criminal justice power is at its zenith, and at this point that the laws
constraining the exercise of that power become most crucial. Yet it is precisely at this point
that the curriculum in most law schools falls silent.15

A better understanding of the current prison law landscape is a key component for
creating collaborations between practitioners and law schools. Knowledge about the scope and
content of existing curricula will enable focus on geographical areas where the need is greatest.
Moreover, the content of existing efforts can be shared such that successful courses might be
modeled or replicated in other schools that are starting or supplementing a clinic.16 Data in this
area will enable efficient implementation of supporting policy and allow laws schools and
practitioners a clearer picture of the curricular terrain.

Prisoner Litigation: A Losing Bet

Legislative developments that significantly impede access to lawyers and courts illustrate
the urgent need for legal assistance among prisoners. The 1996 Prison Litigation Reform Act
(PLRA)17 stands as a major hurdle to an inmate’s ability to access courts to sue administration,
guards, or other staff. An inmate’s First and Fourth Amendment rights, among others, are
curtailed in comparison to the average citizen on the street, yet the PLRA has drastically
curtailed prisoners’ rights litigation. The legislation has led to a steep decline in the number of
court interventions in jails and prisons that, according to one researcher, has “undermined
prisoners’ ability to bring, settle, and win lawsuits.”18

A sample of the PLRA’s mandates indicates how onerous a deterrent this legislation is
for seeking redress in court. The law mandates that prisoners exhaust all state administrative
remedies before suing for damages. Moreover, both state and federal prisoners are barred from
bringing civil actions of “mental or emotional injury suffered while in custody, without a prior
showing of physical injury.”19 Another provision diminishes monetary incentives by severely
limiting attorneys’ fees that a plaintiff can recover: “No award of attorney’s fees in an action
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against the state or its officers or employees in any action for money damages against the
state or its officers or employees.”20

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17 Sharon Dolovich, Teaching Prison Law, 62 J. LEGAL EDUC. 218 (2012)
18 See e.g. Todd A. Berger & Joseph A. DiGenova, Overcoming Legal Barriers to Reentry: A Law School-Based
Approach to Providing Legal Services to the Reentry Community, 77 FED. PROBATION 3 (2013) (describing
collaboration between Rutgers University School of Law and U.S. District Court for the District of New Jersey.);
University of Baltimore School of Law, “Pretrial Justice Clinic Year-End Report, June 2017, home.ubalt.edu/id86mp66/PTJC/PTJC_Year_End_Report_June_2017.pdf (clinic report that describes its litigation
goals as a “challenge to pretrial detention practices and procedures that contribute to mass incarceration.”).
20 Margo Schlanger, The Just-Barely-Sustainable California Prisoners’ Rights Ecosystem, 64 ANNALS OF THE
AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 1, 1 (March 2016).
21 Dolovich, supra.
described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel."

Taken wholly, the legislation results in far fewer prisoners able to access the justice system, with little financial incentive for lawyers to represent prisoners.

The PLRA produced other negative impacts, including decreased attorney representation, case filings, and plaintiff-side outcomes in conditions claims such as 1983, Eighth Amendment, ADA, RLUIPA/RFRA, and other claims.24 The financial caps and procedural hurdles imposed by legislation render prisoners' rights cases undesirable, and underscore the value of clinical work in this area. Despite legislation that makes prisoner lawsuits against prisons and staff a somewhat lost cause for lawyers, for law students seeking to gain skills and fulfill pro bono duties, there are different dividends – with students in experiential learning courses gaining practical lessons in state and federal substantive and procedural law.

Reaffirming Association Policy, Standards, and Rules

The rationales for this Resolution support existing ABA policy, the ABA Standards and Rules of Procedure for Approval of Law Schools, The ABA Standards on Treatment of Prisoners, and the ABA Model Rules of Professional Conduct. The values and principles that guide this Resolution are consistent with a number of views that animate the ABA as a whole.

There is clear overlap in interest between ABA policy and this resolution. A number of formal resolutions demonstrate convergence, including Resolution 201B enacted at Midyear, 2000, urged bar associations, law schools and other organizations “to develop humanitarian residential placements for elderly offenders.”22 As housing is a critical factor for reentry, this policy and the Resolution’s goals overlap. With over 700,000 individuals returning from prison each year, housing is a critical component of successful reentry. Enacted in August 2004, Resolution 121C (Kennedy Commission), called for “programs to encourage and train lawyers to assist prisoners in applying for pardon, restoration of legal rights and privileges, relief from other collateral sanctions, and reduction of sentence.”23 The market for these services is even greater, since these issues are common for prisoners. Resolution 121D (Kennedy Commission), August 2004, urges “law schools to establish reentry clinics in which students assist individuals who have been imprisoned and are seeking to reestablish themselves in the community, regain legal rights, or remove collateral disabilities.”24 Finally, passed at Midyear 2007, Resolution 102A urged the development of “programs that encourage and train lawyers to assist victims of domestic violence with applying for pardon, restoration of legal rights and privileges, relief from other collateral sanctions, and reduction of sentence.”25 This Resolution and its implementation will support these efforts.

25 Id.

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The ABA’s posture toward collateral consequences and their impact on family law issues shows further overlap. Resolution 102F (Midyear 2010) calls for “initiatives that assist criminal defendants and prisoners in avoiding undue consequences of arrest and conviction on their custodial and parental rights.” Such initiatives should include: (c) establishing programs to provide criminal defendants and prisoners with no cost or low cost legal assistance on family law issues, including the avoidance of foster care through kinship care and guardianship arrangements. \footnote{26} Such prisoners and defendants are the intended beneficiaries of this Resolution.

Recent updates to the ABA Standards and Rules of Procedure for Approval of Law Schools show other ABA interests at stake. In particular, the ABA has implemented new experiential education requirements for law schools and the rule that all law students must take at least six units in “experiential courses.”\footnote{27} This push for greater practical experience for law students promises more opportunities to assist incarcerated and reentering individuals.

The Resolution explicitly supports the ABA Standards on Treatment of Prisoners, which affirms a prisoner’s right to access the judicial process. According to Standard 23-9.2, “Prisoners should be entitled to present any judicially cognizable issue, including: (i) challenges to the legality of their conviction, confinement, extradition, deportation, or removal; (ii) assertions of any rights protected by state or federal constitution, statute, administrative provision, treaty, or common law; (iii) civil legal problems, including those related to family law; and (iv) assertions of a defense to any action brought against them.”\footnote{28} Providing such legal assistance is one of the main points of this Resolution and its focus on prisoners.

The Resolution aligns with ABA Model Rules of Professional Conduct. Rule 6.1 outlines pro bono obligations for licensed attorneys, asserting “every lawyer has a professional responsibility to provide legal services to those unable to pay.”\footnote{29} The rule recommends 50 hours per year minimum for pro bono services.\footnote{30} Although the recommendation amounts to less than one hour a week in donated time, today, more than half of all licensed attorneys fail to meet this minimum.\footnote{31} This Resolution builds on the professional baseline that students and lawyers have a duty to provide pro bono service.

This Resolution further aligns with conduct promulgated in Rule 6.2, which sets out that a lawyer “shall not seek to avoid appointment by a tribunal to represent a person except for good

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\footnote{26} Id. \footnote{27} Id.


\footnote{29} Criminal Justice Section Standards: Legal Status of Prisoners, ABA, https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_prisoners_status.

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cause.”\textsuperscript{33} This provision supports the notion that lawyers have special duties to accept court appointments, including indigent clients.\textsuperscript{34} The comment to this rule punctuates the point by declaring: “All lawyers have a responsibility to assist in providing pro bono publico service. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients.”\textsuperscript{35} This Resolution’s focus on unpopular clients, including criminal defendants, prisoners, immigrants, and ex-prisoners returning to society, sits at the core of this rule’s intent, especially since most defendants, prisoners, and individuals returning from prison are indigent, as well.

Conclusion

This Resolution supports a number of existing ABA efforts to regulate lawyers, law schools, and the profession. As such, the ABA urges law schools and law practitioners to collaborate in developing curricula that provide legal assistance to those incarcerated and those reentering society.\textsuperscript{36} Although these groups are vastly underrepresented, there is little known about what the bar and law schools do together to address this gap in legal assistance. To be sure, the need is dire, for unlike other segments of society that face shortages of legal assistance, the stakes are at their highest when life or liberty is at stake. These issues are at the heart of this Resolution and make its passage all the more urgent.

Respectfully submitted,
Morris (Sandy) Weinberg, Jr.
Chair, Criminal Justice Section
August 2018

\textsuperscript{33} Model Rules of Prof’l Conduct r. 6.2 (Am. Bar Ass’n 1980).
\textsuperscript{34} Id.
\textsuperscript{35} Id.
1. **Summary of Resolution(s).**

   This resolution urges the ABA to encourage bar associations and law schools to increase curricular offerings to provide pro bono services to detained and incarcerated people, both citizens and immigrants.

2. **Approval by Submitting Entity.**

   This resolution was approved by the Criminal Justice Council at the Spring Meeting in Tampa, FL, in April 2018.

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?**

   2000 MY 102B, 2004 AY 121C, 2004 AY 121D, 2007 MY 102A, and 2010 MY 102F all call for increased bar association and law school activity in the service of people in prison and those reentering society. This would update the context for the previous calls and support their implementation.37

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.**

   Encouragement of pilot and permanent programs at law schools, and at legal services programs and bar associations that utilize law students and pro bono assistance.

8. **Cost to the Association.** (Both direct and indirect costs)
   
   None. Educational efforts can be accomplished through regular meeting programming, and through email and website postings.

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

10. **Referrals.**
    
    Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

    - Commission on Veteran’s Legal Services
    - Legal Aid & Indigent Defense
    - Commission on Disability Rights
    - Special Committee on Hispanic Legal Rights & Responsibilities
    - Commission on Homelessness and Poverty
    - Center for Human Rights
    - Commission on Immigration
    - Racial & Ethnic Diversity
    - Racial & Ethnic Justice
    - Commission on Youth at Risk
    - Young Lawyer’s Division
    - Civil Rights and Social Justice
    - Government and Public Sector Lawyers
    - International Law
    - Federal Trial Judges
    - State Trial Judges
    - Law Practice Division
    - Science & Technology
    - Health Law
    - Litigation
    - Solo, Small Firm and General Practice Division
    - Section of Legal Education and Admissions to the Bar
    - Law Student Division
    - Center for Professional Responsibility
    - Standing Committee on Pro Bono and Public Service
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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

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Cell: 305-333-5444  
E: nsrlaw@sonnett.com
EXECUTIVE SUMMARY

1. Summary of the Resolution
This resolution urges the ABA to encourage bar associations and law schools to increase curricular offerings to provide pro bono services to detained and incarcerated people, both citizens and immigrants.

2. Summary of the Issue that the Resolution Addresses
This Resolution addresses the gap in access to justice for prisoners, detainees, and immigrants, and encourages law schools and legal services programs to fill the gap through experiential opportunities for law students.

3. Please Explain How the Proposed Policy Position Will Address the Issue
Additional and expanded programs at law schools and legal services programs will not only provide law students with experiential learning opportunities, but fill a pronounced legal need for a segment of society that is underserved by lawyers.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
None Identified.

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None Identified.
RESOLVED, That the American Bar Association urges Louisiana and Oregon to require unanimous juries to determine guilt in felony criminal cases and reject the use of non-unanimous juries where currently allowed in felony cases.
Introduction

Forty-eight states and the federal system currently afford full Sixth Amendment protections to criminal defendants. Louisiana and Oregon are outliers. They are the only two states that allow non-unanimous juries in their criminal cases. While the motive and means for the change from a unanimous to a non-unanimous system may have differed in Oregon and Louisiana, the range of resulting injustices are consistent in both states.

Under current United States Supreme Court Sixth Amendment jurisprudence, criminal cases heard in federal courts require a unanimous vote in order for a defendant to be convicted. This resolution and supporting report promotes the full incorporation of the Sixth Amendment jury trial right via the Fourteenth Amendment and thus opposes the use of non-unanimous jury trials in state, criminal cases.

Background

When the Framers adopted the trial guarantee, they did so with a unanimous jury in mind. The Supreme Court of the United States has consistently recognized this. In 1930, the Supreme Court was called upon to resolve the question of whether the constitution allowed a jury of eleven to rule after one of the twelve seated jurors became incapacitated and the defendant agreed to a waiver. During its discussion, the Court did not mince words in expressing its disapproval of a vote by a non-unanimous jury: If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed.

1 This article is limited to an evaluation of instances where twelve-person juries are allowed to cast a judgment with fewer than twelve individuals voting in favor of a finding of guilt in non-capital, felony, criminal cases. This article does not address civil jury practices or juries in misdemeanor or capital cases.

2 "While no agency or body in the state tracks non-unanimous convictions, a study by Oregon’s Office of Public Defense Services in 2009 offered some insight. It found that more than 40 percent of the 662 convictions it surveyed from 2007 and 2008 were non-unanimous." Shane DuQuon Kavanaugh, Campaign to Repeal Oregon’s Unusual Non-Unanimous Jury System Begins, The Oregonian, Jan. 10, 2018, available at http://www.oregonlive.com/portland/index.ssf/2018/01/campaign_to_repeal_oregons_snu.html (last visited 02/23/18).

3 "As introduced by James Madison in the House, the Amendment relating to jury trial in criminal cases would have provided that: 'The trial of all crimes...shall be by an impartial jury of freeholders...of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites..." Williams v. Florida, 399 U.S. 78, 94 (1970).
with, and the trial committed to the court alone. It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and we think it ought not to be tolerated.4

Until its 1972 Apodaca v. Oregon ruling, the view of the Court prevailed that a unanimous verdict was an essential element of a Sixth Amendment jury trial.5 Apodaca legalized a vote by a less-than-unanimous jury. In Apodaca, the Supreme Court declared that as few as ten jurors did not amount to an unconstitutional practice. Despite definite infirmities, Apodaca remains a precedent.

The Apodaca case resulted from challenges brought by two people convicted by non-unanimous juries (11 to 1 & 10 to 2) in Oregon. Those Oregon defendants raised Sixth and Fourteenth Amendment challenges. The Apodaca court failed to entertain any meaningful discussion of group decision making. Instead, the court focused its attention on the process. It devoted some of its attention to the history of unanimity in this country and on the function of a jury, which it said was to guard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. The Apodaca court reasoned that a jury consisting of a group of lay persons representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation was good enough to satisfy constitutional muster. In the end, the court determined that there was no difference between a vote of ten, eleven or twelve.

Apodaca is a plurality decision, which means that a majority agreement of the court never existed.6 Despite this, Louisiana and Oregon courts have deemed


6 See Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972) was decided the same day as Apodaca and held that a conviction by a 9-3 verdict in certain noncapital cases did not violate the due process clause for failure to satisfy the reasonable-doubt standard; see also Williams v. Florida, 399 U.S. 78 (1970) (allowed for a six member jury and held that the Sixth Amendment did not require a vote of twelve); Ballew v. Georgia, 435 U.S. 223 (1978) (declared a five-member jury to be a violation of the Sixth and Fourteenth Amendments).

w a 4-1-4 decision. Both of the groups of four Justices determined the rule should be the same for federal and state trials. Justice Powell differed. Justice Powell believed there to be a distinction between state and federal standards governing the right to a jury trial. In his view, the Sixth Amendment required a unanimous verdict, while the 14th Amendment did not incorporate that requirement. Justice Powell was the swing vote so his position became the law. The opinion held that there was no constitutional right to a unanimous verdict – based on the opinion of only one Justice.


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8 Apodaca was a 4-1-4 decision. Both of the groups of four Justices determined the rule should be the same for federal and state trials. Justice Powell differed. Justice Powell believed there to be a distinction between state and federal standards governing the right to a jury trial. In his view, the Sixth Amendment required a unanimous verdict, while the 14th Amendment did not incorporate that requirement. Justice Powell was the swing vote so his position became the law. The opinion held that there was no constitutional right to a unanimous verdict – based on the opinion of only one Justice.

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Apodaca a precedent and many now refuse to consider the merits of challenges to the non-unanimous jury system.7

Promotes Discrimination by Undermining Batson v. Kentucky

Louisiana and Oregon’s non-unanimous jury laws create a legal means of discriminating when it comes to jury practices. When it decided Batson v. Kentucky8 in 1986, the Supreme Court outlawed discrimination in jury selection by preventing prosecutors from using race as a reason not to select someone for jury service. The non-unanimous jury laws in Oregon and Louisiana allow a prosecutor to accomplish through a seated jury what the law prevents during the jury selection process. This is so because the vote of one or two of the jurors can be ignored when votes are cast, having the same effect of just excluding one or two jurors during the selection process.

Ignores research

Since that 1972 Apodaca ruling, much more is known about group thinking. While the research does not show that unanimous juries are flawless or that non-unanimous juries always fail, the research does show that unanimous verdicts are more reliable, more careful and more thorough because a rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury.9


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Problems with Non-Unanimous Juries:

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Contributes to Wrongful Convictions

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Louisiana is second in the rate of wrongful convictions in the nation. There is reason to believe that Louisiana’s non-unanimous jury system is a contributor. In 2017, the Innocence Project- New Orleans reported that eleven of twenty-five Louisiana exonerations resulted from trials where non-unanimous juries were used.

Promotes Racism, Oppression & Undermines Public Trust

Louisiana and Oregon both initially required unanimous juries in all felony cases, as the other 48 states do today. Both made the change to a non-unanimous system for clear and demonstrable racist purposes. In Louisiana, the law was changed after Reconstruction with the express intent of achieving a system of white supremacy. In 1803, when Louisiana became a territory, unanimous verdicts were required. From its creation until the end of Reconstruction and the withdrawal of federal troops, Louisiana required unanimous jury verdicts. Non-unanimous verdicts first were introduced in 1880, after slavery ended, when, through newly enacted codal provisions, defendants could be convicted by vote of only nine of twelve jurors. Non-unanimous verdicts made its way to the Constitution of 1898 by way of article 116 where state officials, announced: "We need a system better adapted to the peculiar conditions existing in our State.” At this convention of all white males, these words were spoken in reflection: “Our mission was...to establish the supremacy of the white race...” Louisiana citizens were not afforded the opportunity to vote to adopt the 1898 Constitution.

At the time of the 1898 Convention, 44% of the registered voters in Louisiana were African American. The change from unanimity was to: (1) obtain quick convictions that would facilitate the use of free prisoner labor (by means of Louisiana’s convict leasing system) as a replacement for the recent loss of free slave labor. In 2014, Oregon changed its status from the last state in the union without an organization dedicated to actively investigating wrongful convictions in criminal cases. Data collection is a predicable challenge of such a new organization. As of the date of this report, the Oregon Innocence Project could not yet provide data explaining how many of their sixteen exonerations resulted from the use of non-unanimous juries.

official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, pp. 76 (1898); La. Const. art. 116 (1898).

Official Journal, supra, at 374-375.


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Official Journal, supra, at 374-375.

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labor; and, (2) ensure African American jurors would not use their voting power to block convictions of other African Americans. History confirms such illicit intentions:

[The end of segregation] prompted the State to try new devices to keep the white citizens in control. The Louisiana Legislature created a committee which became known as the ‘Segregation Committee’ to seek means of accomplishing this goal....[T]his committee...helped to organize...the Association of Citizens Councils, which thereafter acted in close cooperation with the legislative committee to preserve white supremacy. The legislative committee and the Citizens Councils set up programs, which parish voting registrars were required to attend, to instruct the registrars on how to promote white political control.\(^{13}\)

When the 1898 law was revisited at the 1973 Constitutional Convention, the law was changed to require the vote of at least ten of twelve. As in 1898, “efficiency” was a stated reason. Some have mistakenly concluded that this sanitized the racial history surrounding the law. In truth, race was not completely removed from the discussion at the 1973 Convention. There was a warning that “ugly, poor, illiterate and mostly minority groups” would be impacted, as well as concerns expressed about the system undermining the reasonable doubt standard. This system survived—not because it was studied and deemed to be in the best interests of justice—but, because of a process that mutes the voices of some and amplifies the voices of others. As one scholar observed: “the constitution of 1974 was written...by a wide and self-interested assortment of assessors, sheriffs, legislators, judges, lackeys and anyone who could get elected or appointed.”\(^{16}\)

\(^{13}\) In the post-Civil War South, “recognition of freed slaves as full humans appeared to most white southerners not as an extension of liberty but as a violation of it, and as a challenge to the legitimacy of their definition of what it was to be white.” Douglas A. Blackmon, Slavery By Another Name 41 (2008): “The notion that farms could be operated in some manner other than with groups of black laborers compelled by a landowner or his overseer to work as many as twenty hours a day was antithetical to most whites.” Id. at 26.


Oregon’s racial history is not much more pleasant than Louisiana’s. Oregon is the only non-slave state admitted to the union with an exclusionary clause prohibiting African Americans from residing or owning property there. Oregon’s law arose in the early 1930s when the “Klu Klux Klan was very popular around the state with a lot of…political power.”17 Oregon’s switch to a non-unanimous jury system occurred in 1934 in direct response to a single case where it was believed that a single hold-out juror prevented a second degree murder conviction (causing a manslaughter conviction).18 The murdered victim was Protestant and the defendant was a Jewish man suspected of mob ties.19 In short, anti-immigrant and anti-Jewish sentiments underlined Oregon’s switch to a non-unanimous jury system, as introduced there by a Louisianian familiar with that state’s system.20

Unlike Louisiana, Oregon’s system originated by a constitutional vote of the people. A 1933 Oregon voter pamphlet explicitly said the vote to change from a unanimous system to a non-unanimous system was “to prevent one or two...from controlling the verdict and causing disagreement.”21

In a December 2016 opinion, an Oregon Circuit Court concluded that Oregon’s law discriminates against minorities after observing that “race and ethnicity was a motivating factor in the passage of...[Oregon’s non-unanimous jury law], and that the measure was intended, at least in part, to dampen the influence of racial, ethnic and religious minorities on Oregon juries.”22

**Contributes to Mass Incarcerations & Adversely Impact Voting Rights**

Oregon’s notorious high incarceration rate, with its disproportionate impact on communities of color, is exacerbated by the non-unanimous jury law. By its intent, the jury provision makes felony convictions easier and drives  

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17 Conrad Wilson, *Even When Juries Can’t Agree, Convictions Are Still Possible In Oregon*, OPB.org, Dec. 12, 2016, available at http://claytontullos.com/wp-content/uploads/2014/11/Non-Unanimous-Jury-Trials-in-Oregon-Published.pdf (last visited 02/19/18). It should be noted that the KKK was introduced in Oregon by a man who moved there from Louisiana.
20 Id. at 3-4 (2016).
not just convictions but plea bargains. In turn, this has consequences for voting rights and for the fundamental concept of representative democracy.

The Louisiana Constitution bars anyone from voting while “under an order of imprisonment for conviction of a felony.” Louisiana law defines “order of imprisonment” as a “sentence of confinement, whether or not suspended, whether or not the subject of the order has been placed on probation, with or without supervision, and whether or not the subject of the order has been paroled.” In other words, even those who never spent a day in prison are denied the right to vote while on probation—and many in Louisiana have sentences consisting solely of probation.

In September 2017, Louisiana had 39,220 probationers and 30,929 parolees, or roughly 70,000 people not incarcerated but ineligible to vote. Of those, roughly 60% of parolees and 50% of probationers were defined as African American, in a state with an African American population of approximately 31%. Louisiana’s restrictive felon re-enfranchisement laws therefore disproportionately disenfranchise African American voters.

Historical records support the assertion that the non-unanimous jury provision of the Louisiana Constitution, whether intended or not, did increase felony convictions of African American men. Because a collateral consequence is the reduction of voting power among that same population, the non-unanimous jury must be seen as part of a larger voting rights issue with racial overtones.

In Oregon, unlike Louisiana, voting rights are restored upon release from incarceration. While non-unanimous juries in Oregon increase the incarceration rate by making convictions easier, the impact on the rights of Oregonians to vote is not as severe as in Louisiana, where the franchise is more broadly denied.

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\[\text{Article I, Section 10(A).}\]

\[\text{La. R.S. 18.2 (8).}\]

\[\text{See Louisiana Department of Public Safety and Corrections, Fact Sheet, Sept. 20, 2017, available at http://www.doc.la.gov/media/1/Briefing%20Book/Oct%2017/prob.and.par демо.оct.27.pdf (last visited 02/19/18).}\]

\[\text{http://www.thedivocat.com/baton_rouge/news/courts/article_16680e03-32b1-11e8-8770-33e6a23256dc.html}\]

\[\text{Black people make up roughly one-third of the population in Louisiana, but they comprise two-thirds of state prisoners and three-fourths of inmates serving life without parole. Louisiana leads the nation by far in these life sentences, nearly all of them the result of jury verdicts. The newspaper’s analysis found that 40 percent of trial convictions came over the objections of one or two holdouts. When the defendant was black, the proportion went up to 43 percent, versus 33 percent for white defendants. In three-quarters of the 909 cases in the newspaper’s database, the defendant was black.}\]

\[\text{See Or. Rev. Stat. 137; 281.}\]

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Marginalizes Women and People of Color

Women were not included in regular jury service until recently. In Oregon, on the heels of gaining the right to vote in 1912,\textsuperscript{28} woman suffrage turned to focusing on exercising the rights of citizenship including the right to sit on juries. Legislation in Oregon did not grant women the right to sit on juries until 1921.\textsuperscript{29} It was not until 1975 that the Supreme Court held in \textit{Taylor v. Louisiana}\textsuperscript{30} that it was unlawful to exclude women as a class from jury service in Louisiana. Yet the non-unanimous jury laws in Oregon and Louisiana allow the voice and vote of a woman (or person of color) to be effectively eliminated if they disagree with the white male juror majority. This undermines the goals of diversity and equity inherent in the Sixth Amendment legal doctrine that juror diversity promotes justice.

Numerous legal scholars have reviewed the effects of race and sex on jury trials and concluded that race and sex of judges, victims, and defendants can affect trial outcomes.\textsuperscript{31} The process of selecting juries and the exclusion of individuals based on race, sex, and other personal characteristics also has been studied in detail.\textsuperscript{32} Statistics on the sex and race of jurors are not regularly reported in a consistent manner. Selecting a jury that is representative of one’s peers either by state or county population composition or registered voter lists have not yielded representative juries in terms of sex, race, age or other personal characteristics.\textsuperscript{33}

\textsuperscript{28} See Kimberly J. Jensen, \textit{Neither Head nor Tail to the Campaign}: Esther Pohl Lovejoy and the Oregon Woman Suffrage Victory of 1912., 108 OR. HIST. Q. 350 (2007).


Even when women and non-white individuals are included in the pool of potential jurors, through the jury selection process, and participate in a jury verdict, the non-unanimous jury system allows the majority one last way to silence the voice of minority representation by discounting the voice of these women and non-white jurors completely.

Results in Differing Standards Between States & The Federal Government

Louisiana and Oregon’s non-unanimous jury laws result in different Sixth Amendment standards between federal courts (which require unanimous verdicts in criminal cases), and the other forty-eight states’ criminal courts (which require unanimous verdicts) on the one hand, and the Louisiana and Oregon state courts (which allow non-unanimous juries), on the other. This makes consistency impossible and can undermine confidence in state criminal courts, make convictions easier by design, and the rights of defendants thereby less protected.

Non-Unanimous Juries are at Odds With ABA Standards

In 1972 when Apodaca was decided, the 1968 ABA standard allowed for non-unanimous verdicts. In 1976, the ABA changed its standard to affirm that a jury verdict in criminal trials should be unanimous. In 2005, this was reiterated by the ABA in its Principles for Juries & Jury Trials. The ABA’s official position, consistent with the scientific evidence, is that non-unanimous verdicts reduce the reliability of jury determinations, silence minority viewpoints, erode confidence in the criminal justice system, and do not significantly contribute to a reduction in hung juries and retrials. Further details are set forth in the next section of this report.

Existing ABA Resolutions and/or Standards

In 1972, when Apodaca was decided, Standard 1.1 of the 1968 Criminal Justice Standards provided, in pertinent part:

1.1 Right to jury trial.

Defendants in all criminal cases should have the right to be tried by a jury of twelve whose verdict must be unanimous, except that where not barred by applicable constitutional provisions, the right to jury trial may be limited in one or more of the following ways:


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In Batson v. Kentucky, the Court addressed peremptory challenges based on race that systematically removed African American jurors from a petit jury. Edmonson v. Leesville Concrete Co. extended Batson’s applicability to jury selection in civil cases. See Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991). However, Batson and Edmonson have been unable to live up to the promise of their respective holdings.

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In the Commentary to the 1968 Criminal Justice Standard 1.1, the Advisory Committee reviewed current thinking on jury unanimity and “concluded that the minimum standards should recognize the propriety of less than unanimous verdicts, as now permitted in six states.” The 1968 Standards for Criminal Justice, Trial by Jury, was but one volume – volume 15 - of the seventeen volumes that comprised the ABA’s Project on Standards for Criminal Justice.

In 1976, another ABA commission, the Commission on Standards of Judicial Administration, published its final draft of the Standards Relating to Trial Courts (hereinafter “1976 Judicial Standards”). Standard 2.10 stated, in pertinent part, “The verdict of the jury (in criminal cases) should be unanimous.” In the Commentary to its 1976 Judicial Standard 2.10, the Commission acknowledged that this was an enlargement of the scope of the jury trial right stated in the 1968 Criminal Justice Standard 1.1, but concluded, “If the question of jury trial in criminal cases is considered from a long range viewpoint, placing the present exigencies of the trial courts in proper perspective, these qualifications [in 1968 Standard 1.1] appear to be both unnecessary and unwarranted by our legal traditions.” The 1976 Judicial Standards were adopted at the ABA’s Midyear Meeting in February 1976. In the course of their adoption, the ABA also authorized amendment to the 1968 Criminal Justice Standards to conform to the 1976 Judicial Standards, specifically affirming that, “[i]n criminal cases, the verdict of the jury should be unanimous.” Any support that the ABA’s 1968 Trial Court Standards had lent to a position that permitted non-unanimous verdicts had thus ended, by 1976.

When the 1978 edition of Volume 15 of the Standards for Criminal Justice (hereinafter “1978 Criminal Justice Standards”) was published, its Introduction stated: “Incorporating the ABA Standards of Judicial Administration, this updated standard [15-1.1] has been changed by deletion of ... (1) recogni[tion] [of] the propriety of nonunanimous jury verdicts.” 1978 Criminal Justice Standards, Introduction at 15.4

Most recently, in 2004, the ABA established the American Jury Project. The result of which was the promulgation of nineteen core jury trial principles that defined the ABA’s “fundamental aspirations for the management of the jury system.” Principle 4.B provides that “[a] unanimous decision should be required in all criminal cases heard by a jury.”
Conclusion

Despite plurality permission from the Supreme Court to accept the non-unanimous vote of selected jurors, forty-eight states chose to afford full Sixth Amendment protections to felony defendants. That’s not because unanimity is a neglected topic. Over the years, a number of states have considered abandoning their unanimity requirements. In every instance, after much study and deliberation, change has been rejected and a unanimous verdict system was maintained. The Louisiana State Bar Association has done its part by adopting policy on June 9, 2016, urging the Louisiana legislature to adopt legislation amending Article 1, Section 17 of the Louisiana Constitution, "to require all juries in criminal cases to render a unanimous verdict.” Justice dictates that Louisiana and Oregon restore Sixth Amendment rights to their residents and, in so doing, return to a unanimous jury system in non-capital, criminal cases. Let’s stand with our Louisiana colleagues and support our Oregon fellow members of the bar by insisting on unanimous verdicts in all felony cases rendered by the American justice system.

Respectfully submitted,

Morris (Sandy) Weinberg, Jr.
Chair, Criminal Justice Section
August 2018


36 “In a remarkable move, Oregon’s powerful district attorneys group appears to now not only side with reform advocates but wants to assume a primary role in reversing the law — which could reduce the number of convictions won by prosecutors and increase the number of hung juries.” Shane Dixon Kavanaugh, Campaign to Repeal Oregon’s Unusual Non–Unanimous Jury System Begins, The Oregonian, Jan. 10, 2018, available at http://www.oregonlive.com/portland/index.ssf/2018/01/campaign_to_repeal_oregons_unu.html (last visited 02/23/18).
1. Summary of Resolution(s).

The resolution urges Louisiana and Oregon to require unanimous juries to determine guilt in felony criminal cases and reject the use of non-unanimous juries where currently allowed in felony cases.

2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Council at the Spring Meeting in Tampa, FL, in April 2018.

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

Yes. A resolution urging the use of unanimous verdicts in Federal criminal courts was enacted in August 1974. In February 1976, the House enacted the Commission on Standards of Judicial Administration's Standards Relating to Trial Courts; Standard 2.10 stated, "The verdict of the jury [in criminal cases] should be unanimous." The 1978 Criminal Justice Standards affirmed unanimous jury verdicts. In 2004, the ABA established the American Jury Project, the result of which was the promulgation of nineteen core jury trial principles that defined the ABA's "fundamental aspirations for the management of the jury system." Principle 4.B provides that "[a] unanimous decision should be required in all criminal cases heard by a jury."

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

See response to #3, above. This resolution is consistent with long-standing ABA policy.

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 Louisiana legislature adopted legislation in 2018 to amend Article 1, Section 17 of the Louisiana Constitution, “to require all juries in criminal cases to render a unanimous verdict.” The proposed amendment will go before Louisiana voters on November 6, 2018.

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

This policy will be used as a basis of advocacy in those few states where a non-unanimous verdict is permitted in felony criminal cases.

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

No cost to the Association.

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

Not applicable

10. **Referrals.** Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

- Commission on Veteran’s Legal Services
- Legal Aid & Indigent Defense
- Commission on Disability Rights
- Special Committee on Hispanic Legal Rights & Responsibilities
- Commission on Homelessness and Poverty
- Center for Human Rights
- Commission on Immigration
- Racial & Ethnic Diversity
- Racial & Ethnic Justice
- Commission on Youth at Risk
- Young Lawyers Division
- Civil Rights and Social Justice
- Government and Public Sector Lawyers
- International Law
- Federal Trial Judges
- State Trial Judges
- Law Practice Division
- Science & Technology
- Health Law
- Litigation
- National Conference of Bar Presidents

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- Government and Public Sector Lawyers
- International Law
- Federal Trial Judges
- State Trial Judges
- Law Practice Division
- Science & Technology
- Health Law
- Litigation
- National Conference of Bar Presidents
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges Louisiana and Oregon to require unanimous juries to determine guilt in felony criminal cases and reject the use of non-unanimous juries where currently allowed in felony cases.

2. Summary of the Issue that the Resolution Addresses

Louisiana and Oregon currently allow felony conviction by a less than unanimous jury. The resolution would require unanimous juries for all felonies in both states, thus affording defendants accused of felonies their Sixth Amendment Right to a jury trial as applied to the states by the Fourteenth Amendment.

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

The proposed policy continues longstanding adherence to the principle that a jury verdict should be unanimous.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified.

None.
RESOLUTION

RESOLVED, That the American Bar Association amends Rules 7.1 through 7.5 and Comments of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck through):

1. [Underlined text]
2. [Struck-through text]
3. [Underlined text]
4. [Struck-through text]
Model Rule 7.1: Communications Concerning A Lawyer's Services

(August 2018)

[1] This Rule governs all communications about a lawyer’s services, including advertising, permitted by Rule 7.2. Whatever means are used to make known a lawyer’s services, statements about them must be truthful.

[2] Truthful statements that are misleading truthful statements are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer’s communication requires that person to take further action when, in fact, no action is required.

[3] It is misleading for a communication to provide information about a lawyer’s fee without indicating the client’s responsibilities for costs, if any. If the client may be responsible for costs in the absence of a recovery, a communication may not indicate that the lawyer’s fee is contingent on obtaining a recovery unless the communication also discloses that the client may be responsible for court costs and expenses of litigation. See Rule 1.5(c).

[4] An advertisement A communication that truthfully reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. Similarly, an unsubstantiated claim about a lawyer’s or law firm’s services or fees, or an unsubstantiated comparison of the lawyer’s or law firm’s services or fees with the services or fees of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

Rules 7.1 through 7.5 and Comments of the ABA Model Rules of Professional Conduct (August 2018)
It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

A lawyer may:

1) pay the reasonable costs of advertisements or communications permitted by this Rule;

A lawyer's services may be advertised by a public or charitable legal aid organization or by a trade name if it is not false or misleading. A lawyer may communicate information regarding the lawyer's services through written, recorded or electronic communication, including public any media.

A firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

Rule 7.2: Advertising Communications Concerning a Lawyer's Services: Specific Rules

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise communicate information regarding the lawyer's services through written, recorded or electronic communication, including public any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person who is not an employee or lawyer in the same law firm for recommending the lawyer's services except that a lawyer may:

1) pay the reasonable costs of advertisements or communications permitted by this Rule;

A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement; and

(5) give nominal gifts that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.

c. A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

d. Any communication made under pursuant to this Rule must shall include the name and office address contact information of at least one lawyer or law firm responsible for its content.

Comment

[H] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation by also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public’s need to know about legal services can be fulfilled in part through advertising.

This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.
[1] [2] This Rule permits public dissemination of information concerning a lawyer’s or law firm’s name, or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer’s fees are determined, including prices for specific services and payment and credit arrangements; a lawyer’s foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer and against “undignified” advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against solicitation through a real-time electronic exchange initiated by the lawyer.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[2] [5] Except as permitted under paragraphs (b)(1)-(b)(4)(5), lawyers are not permitted to pay others for recommending the lawyer’s services, or for stimulating professional work or business for the lawyer, against “undignified” advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against solicitation through a real-time electronic exchange initiated by the lawyer.

[2] [5] Except as permitted under paragraphs (b)(1)-(b)(4)(5), lawyers are not permitted to pay others for recommending the lawyer’s services, or for stimulating professional work or business for the lawyer, against “undignified” advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against solicitation through a real-time electronic exchange initiated by the lawyer.

[3] Paragraph (b)(1) however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorships fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespeople and website designers.

[4] Paragraph (b)(5) permits nominal gifts as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.
Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of “recommendation”). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan, or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. **Such Qualified referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as acting reasonably to assure that the activities of the plan or service are compatible with the lawyer’s professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group lawyer referral service were misleading to the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3. A lawyer who accepts assignments or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer’s professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group lawyer referral service were misleading to the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.
A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer’s professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (a) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.
This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

Model Rule 7.3: Solicitation of Clients

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b)(c) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in person, telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the person contacted is with a:

1. is a lawyer; or
2. person who has a family, close personal, or prior business or professional relationship with the lawyer; or
3. person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.

(b)(c) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

1. the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
2. the solicitation involves coercion, duress or harassment.

Every written, recorded or by electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.
(d)(e) Notwithstanding the prohibitions in this Rule paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone live person-to-person contact to solicit enroll memberships or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or the law firm’s pecuniary gain. A lawyer’s communication is typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic internet searches.

[2] “Live person-to-person contact” means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications such as Skype or FaceTime, where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. There is a potential for abuse overreaching exists when a solicitation involves a lawyer, seeking pecuniary gain, direct in-person, live telephone or real-time electronic contact solicits a person by a lawyer with someone known to be in need of legal services. This forms of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate fully all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately. An immediate response. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for abuse overreaching inherent in live person-to-person contact contact in-person, live telephone or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information, to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws, governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person direct in-person, telephone or real-time electronic persuasion that may overwhelm a person’s judgment.
The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly, as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of live person-to-person direct in-person live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices overnighting against a former client, or a person with whom the lawyer has a close relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse overnighting when the person contacted is a lawyer or is known to be an experienced user of the type of legal services involved for business purposes. For instance, an 'experienced user' of legal services for business matters may include those who hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who hire lawyers for lease or contract issues; and other people who retain lawyers for business transactions or formations. Consequently, the general prohibition in Rule 7.3(a) is not applicable in those situations. Also, Paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

But even permitted forms of solicitation can be abused. Thus, any solicitation that contains false or misleading information which is false or misleading within the meaning of Rule 7.1, that which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or that which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(3)(c) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b). Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of

[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly, as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of live person-to-person direct in-person live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in abusive practices overnighting against a former client, or a person with whom the lawyer has a close relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse overnighting when the person contacted is a lawyer or is known to be an experienced user of the type of legal services involved for business purposes. For instance, an 'experienced user' of legal services for business matters may include those who hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who hire lawyers for lease or contract issues; and other people who retain lawyers for business transactions or formations. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, Paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation that contains false or misleading information which is false or misleading within the meaning of Rule 7.1, that which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or that which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(3)(c) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b). Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of
informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] The requirement in Rule 7.3(c) that certain communications be marked “Advertising Material” does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[9] Paragraph (d)(e) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit enrol members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d)(e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b)(c). See 8.4(a).

Rule 7.4 Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation.
(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

1. the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

2. the name of the certifying organization is clearly identified in the communication.

Comment

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable.

In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Rule 7.5 Firm Names And Letterheads (Deleted in 2018.)

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm’s identity or by a trade name such as the “ABC Legal Clinic.” A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, “Smith and Jones,” for that title suggests that they are practicing law together in a firm.
LAWYER ADVERTISING RULES FOR THE 21st CENTURY

I. Introduction

The American Bar Association is the leader in promulgating rules for regulating the professional conduct of lawyers. For decades, American jurisdictions have adopted provisions consistent with the Model Rules of Professional Conduct, relying on the ABA’s expertise, knowledge, and guidance. In lawyer advertising, however, a dizzying number of state variations exist. This breathtaking variety makes compliance by lawyers who seek to represent clients in multiple jurisdictions unnecessarily complex, and burdens bar regulators with enforcing prohibitions on practices that are not truly harmful to the public.¹ This patchwork of advertising rules runs counter to three trends that call for simplicity and uniformity in the regulation of lawyer advertising.

First, lawyers in the 21st century increasingly practice across state and international borders. Clients often need services in multiple jurisdictions. Competition from inside and outside the profession in these expanded markets is fierce. The current web of complex, contradictory, and detailed advertising rules impedes lawyers’ efforts to expand their practices and thwart clients’ interests in securing the services they need. The proposed rules will free lawyers and clients from these constraints without compromising client protection.

Second, the use of social media and the Internet—including blogging, instant messaging, and more—is ubiquitous now.² Advancing technologies can make lawyer advertising easy, inexpensive, and effective for connecting lawyers and clients. Lawyers can use innovative methods to inform the public about the availability of legal services. Clients can use the new technologies to find lawyers. The proposed amendments will facilitate these connections between lawyers and clients, without compromising protection of the public.

Finally, trends in First Amendment and antitrust law suggest that burdensome and unnecessary restrictions on the dissemination of accurate information about legal services may be unlawful. The Supreme Court announced almost forty years ago that lawyer advertising is commercial speech protected by the First Amendment. Advertising

¹ Center for Professional Responsibility Jurisdictional Rules Comparison Charts, available at: https://www.americanbar.org/groups/professional_responsibility/policyrule_charts.html.

² See Association of Professional Responsibility Lawyers 2015 Report of the Regulation of Lawyer Advertising Committee (2015) [hereafter APRL 2015 Report], available at: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015/report.pdf at 18-19 (According to a Pew Research Center 2014 Social Media Update, for the 81% of American Adults who use the Internet: 56% of online adults now use two or more social media sites; 71% are on Facebook; 70% engage in daily use; 56% of all online adults 65 and older use Facebook; 23% use Twitter; 26% use Instagram; 49% engage in daily use; 53% of online young adults (18-29) use Instagram; and 28% use LinkedIn.”).
that is false, misleading and deceptive may be restricted, but many other limitations have been struck down.\textsuperscript{3}

Antitrust law may also be a concern. For nearly 20 years, the Federal Trade Commission (FTC) has actively opposed lawyer regulation where the FTC believed it would, for example, restrict consumer access to factually accurate information regarding the availability of lawyer services. The FTC has reminded regulators in Alabama, Arizona, Florida, Indiana, Louisiana, New Jersey, New Mexico, New York, Ohio, Tennessee, and Texas that overly broad advertising restrictions may reduce competition, violate federal antitrust laws, and impermissibly restrict truthful information about legal services.\textsuperscript{4}

The Standing Committee on Ethics and Professional Responsibility (SCEPR) is proposing amendments to ABA Model Rules 7.1 – 7.5 that respond to these trends. It is hoped the U.S. jurisdictions will follow the ABA’s lead to eliminate compliance confusion and promote consistency in lawyer advertising rules. As amended, the rules will provide lawyers and regulators nationwide with models that continue to protect clients from false and misleading advertising, but free lawyers to use expanding and innovative technologies to communicate the availability of legal services and enable bar regulators to focus on truly harmful conduct. The amended rules will also increase consumer access to accurate information about the availability of legal services and, thereby, expand access to legal services.

II. Brief Summary of the Changes

The principal amendments:

- Combine provisions on false and misleading communications into Rule 7.1 and its Comments.
- Consolidate specific provisions on advertising into Rule 7.2, including requirements for use of the term “certified specialist”.
- Permit nominal “thank you” gifts under certain conditions as an exception to the general prohibition against paying for recommendations.
- Define solicitation as “a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer

\textsuperscript{2} For developments in First Amendment law on lawyer advertising, see APRIL June 2015 Report, supra note 2, at 7-18.

\textsuperscript{3} The recent decision in North Carolina State Board of Dental Examiners v. F.T.C., 135 S. Ct. 1101 (2015) may be a warning. The Court found that the Board of Dental Examiners exclusion of non-dentists from providing teeth whitening services was anti-competitive and an unfair method of competition in violation of the Federal Trade Commission Act. The Court determined that a controlling number of the board members were “active market participants” (i.e., dentists), and there was no state entity supervision of the decisions of the non-sovereign board. Many lawyer regulatory entities are monitoring the application of this precedent as the same analysis might be applicable to lawyers. See also, ABA Center for Professional Responsibility, FTC Letters Regarding Lawyer Advertising (2015), http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/FTC_lawyerAd.html.

\textsuperscript{4} For developments in First Amendment law on lawyer advertising, see APRIL June 2015 Report, supra note 2, at 7-18.

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knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

- Prohibit live, person-to-person solicitation for pecuniary gain with certain exceptions.
- Eliminate the labeling requirement for targeted mailings but continue to prohibit targeted mailings that are misleading, involve coercion, duress or harassment, or that involve a target of the solicitation who has made known to the lawyer a desire not to be solicited.

III. Discussion of the Proposed Amendments

A. Rule 7.1: Communications Concerning a Lawyer’s Services

Rule 7.1 remains unchanged; however, additional guidance is inserted in Comment [2] to explain that truthful information may be misleading if consumers are led to believe that they must act when, in fact, no action is required. New Comment [3] provides that communications that contain information about a lawyer’s fee must also include information about the client’s responsibility for costs to avoid being labeled as a misleading communication.

In Comment [4], SCEPR recommends replacing “advertising” with “communication” to make the Comment consistent with the title and scope of the Rule. SCEPR expands the guidance in Comment [4] by explaining that an “unsubstantiated claim” may also be misleading. SCEPR also recommends in Comment [5] that lawyers review Rule 8.4(c) for additional guidance.

Comments [6] through [9] have been added by incorporating the black letter concepts from current Rule 7.5. Current Rule 7.5(a) restates and incorporates Rule 7.1, and then provides examples of misleading statements. SCEPR has concluded that Rule 7.1, with the guidance of new Comments [6] through [9], better addresses the issues.

B. Rule 7.2: Communications Concerning a Lawyer’s Services: Specific Rules

Specific Advertising Rules: Specific rules for advertising are consolidated in Rule 7.2, similar to the current structure of Rule 1.8, which provides for specific conflict situations.

SCEPR recommends amendments to Rule 7.2(a) parallel to its recommendations for changes to Comments to Rule 7.1, specifically replacing the term “advertising” with “communication” and replacing the identification of specific methods of communication with a general statement that any media may be used.

Gifts for Recommendations: Rule 7.2(b) continues the existing prohibition against giving “anything of value” to someone for recommending a lawyer. New subparagraph (b)(5), however, contains an exception to the general prohibition. This subparagraph
permits lawyers to give a nominal gift to thank the person who recommended the lawyer to the client. The new provision states that such a nominal gift is permissible only where it is not expected or received as payment for the recommendation. The new words, "compensate" and "promise" emphasize these limitations: the thank you gift cannot be promised in advance and must be no more than a token item, i.e. not "compensation."

SCEPR's amendments to Rule 7.2(b) allow lawyers to give something "of value" to employees or lawyers in the same firm. As to lawyers, this new language in Rule 7.2(b) simply reflects the common and legitimate practice of rewarding lawyers in the same firm for generating business. This is not a change; it is a clarification of existing rules. As to employees, SCEPR has concluded that lawyers ought to be permitted to give nominal gifts to non-lawyers, e.g. paralegals who may refer friends or family members to a firm, marketing personnel and others. Rule 5.4 continues to protect against any improper fee sharing. Rule 7.3 protects against solicitation by, for example, so-called "runners," which are also prohibited by other rules, e.g. Rule 8.4(a).

SCEPR recommends deleting the second sentence Rule 7.2(b)(2) because it is redundant. Comment [6] has the same language.

Specialization: Provisions of Rule 7.4 regarding certification are moved to Rule 7.2(c) and Comments. SCEPR acknowledges suggestions offered by the Standing Committee on Specialization, which shaped revisions to Rule 7.4. Based on these and other recommendations, the prohibition against claiming certification as a specialist is moved to new subdivision (c) of Rule 7.2 as a specific requirement. Amendments also clarify which entities qualify to certify or accredit lawyers. The remaining provisions of Rule 7.4 are moved to Comments [9] through [11] of Rule 7.2. Finally, Comment [9] adds guidance on the circumstances under which a lawyer might properly claim specialization by adding the phrase "based on the lawyer's experience, specialized training or education."

Contact Information: In provision 7.2(d) (formerly subdivision (c)) the term "office address" is changed to "contact information" to address technological advances on how a lawyer may be contacted and how advertising information may be presented. Examples of contact information are added in new Comment [12]. All "communications" about a lawyer's services must include the firm name (or lawyer's name) and some contact information (street address, telephone number, email, or website address).

Changes to the Comments: Statements in Comments [1] and [3] justifying lawyer advertising are deleted. Advertising is constitutionally protected speech and needs no additional justification. These Comments provide no additional guidance to lawyers.

New Comment [2] explains that the term "recommendations" does not include directories or other group advertising in which lawyers are listed by practice area.

New language in Comment [3] clarifies that lawyers who advertise on television and radio may compensate "station employees or spokespersons" as reasonable costs for advertising. These costs are well in line with other ordinary costs associated with
advertising that are listed in the Comment, i.e. “employees, agents and vendors who are engaged to provide marketing or client development services.”

New Comment [4] explains what is considered nominal, including ordinary social hospitality. It also clarifies that a gift may not be given based on an agreement to receive recommendations or to make future recommendations. These small and token gifts are not likely to result in the harms addressed by the rule: that recommendation sources might interfere with the independent professional judgment of the lawyer, interject themselves into the lawyer-client relationship, or engage in prohibited solicitation to gain more recommendations for which they might be paid.

Comment [6] continues to address lawyer referral services, which remain limited to qualified entities approved by an appropriate regulatory authority. Description of the ABA Model Supreme Court Rules Governing Lawyer Referral Services is omitted from Comment [6] as superfluous.

The last sentence in Comment [7] is deleted because it is identical to the second sentence in Comment [7] (“Legal services plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules.”) (Emphasis added.).

C. Rule 7.3: Solicitation of Clients

The black letter of the current Rules does not define “solicitation;” the definition is contained in Comment [1]. For clarity, a definition is added as new paragraph (a). The definition of solicitation is adapted from Virginia’s definition. A solicitation is:

- a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

Paragraph (b) continues to prohibit direct, in-person solicitation for pecuniary gain, but clarifies that the prohibition applies solely to live person-to-person contact. Comment [2] provides examples of prohibited solicitation including in-person, face-to-face, telephone, and real-time visual or auditory person-to-person communication such as Skype or FaceTime or other face-to-face communications. Language added to Comment [2] clarifies that a prohibited solicitation does not include chat rooms, text messages, or any other written communications to which recipients would not feel undue pressure to respond.

The Rule no longer prohibits real-time electronic solicitation because real-time electronic communication includes texts and Tweets. These forms of communication are more like a written communication, which allows the reader to pause before responding and creates less pressure to immediately respond or to respond at all, unlike a direct interpersonal encounter.

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Exceptions to live person-to-person solicitation are slightly broadened in Rule 7.3(b)(2). Persons with whom a lawyer has a business relationship—in addition to or separate from a professional relationship—may be solicited because the potential for overreaching by the lawyer is reduced.

Exceptions to prohibited live person-to-person solicitation are slightly broadened in Rule 7.3(b)(3) to include “experienced users of the type of legal services involved for business matters.” Similarly, Comment [5] to Rule 7.3 is amended to explain that the potential for overreaching, which justifies the prohibition against in-person solicitation, is unlikely to occur when the solicitation is directed toward experienced users of the legal services in a business matter.

The amendments retain Rule 7.3(c)(1) and (2), which prohibit solicitation of any kind when a target has made known his or her desire not to be solicited, or the solicitation involves coercion, duress, or harassment. These restrictions apply to both live in-person and written solicitations. Comment [6] identifies examples of persons who may be most vulnerable to coercion or duress, such as the elderly, whose first language is not English, or the disabled.

After much discussion, SCEPR is recommending deletion of the requirement that targeted written solicitations be marked as “advertising material.” Agreeing with the recommendation of the Standing Committee on Professionalism and the Standing Committee on Professional Discipline’s suggestion to review both Oregon’s rules and Washington State’s proposed rules, which do not require such labeling, SCEPR has concluded that the requirement is no longer necessary to protect the public. Consumers have become accustomed to receiving advertising material via many methods of paper and electronic delivery. Advertising materials are unlikely to mislead consumers due to the nature of the communications. SCEPR was presented with no evidence that consumers are harmed by receiving unmarked mail solicitations from lawyers, even if the solicitations are opened by consumers. If the solicitation itself or its contents are misleading, that harm can and will be addressed by Rule 7.1’s prohibition against false and misleading advertising.

The statement that the rules do not prohibit communications about legal services authorized by law or by court order is moved from Comment [4] of Rule 7.2 to new paragraph (d) of Rule 7.3.

Amendments were made to Rule 7.3(e) to make the prohibition language consistent with the solicitation prohibition and to reflect the reality that prepaid and group legal service plans enroll members and sell subscriptions to wide range of groups. They do not engage in solicitation as defined by the Rules.

New Comment [8] to Rule 7.3 adds class action notices as an example of a communication that is authorized by law or court order.
IV. SCEPR’s Process and Timetable

The amendments were developed during two years of intensive study by SCEPR, after SCEPR received a proposal from the Association of Professional Responsibility Lawyers (APRL) in 2016. Throughout, SCEPR’s process has been transparent, open, and welcoming of comments, suggestions, revisions, and discussion from all quarters of the ABA and the profession. SCEPR’s work included the formation of a broad-based working group, posting drafts for comment on the website of the Center for Professional Responsibility, holding public forums at the Midyear Meetings in February 2017 and February 2018, conducting a webinar in March 2018, and engaging in extensive outreach seeking participation and feedback from ABA and state entities and individuals.6

A. Development of Proposals by the Association of Professional Responsibility Lawyers (APRL) – 2013 - 2016

In 2013, APRL created a Regulation of Lawyer Advertising Committee to analyze and study lawyer advertising rules. That committee studied the ABA Model Rules and various state approaches to regulating lawyer advertising and made recommendations aimed at bringing rationality and uniformity to the regulation of lawyer advertising and disciplinary enforcement. APRL’s committee consisted of former and current bar regulators, law school professors, authors of treatises on the law of lawyering, and lawyer-experts in the field of professional responsibility and legal ethics. Liaisons to the committee from the ABA Center for Professional Responsibility and the National Organization of Bar Counsel ("NOBC") provided valuable advice and comments.

The APRL committee obtained, with NOBC’s assistance, empirical data derived from a survey sent to bar regulators regarding the enforcement of current advertising rules. That committee received survey responses from 34 of 51 U.S. jurisdictions.

APRL’s 2014 survey of U.S. lawyer regulatory authorities showed:

- Complaints about lawyer advertising are rare;
- People who complain about lawyer advertising are predominantly other lawyers and not consumers;
- Most complaints are handled informally, even where there is a provable advertising rule violation;
- Few states engage in active monitoring of lawyer advertisements; and
- Many cases in which discipline has been imposed involve conduct that would constitute a violation of ABA Model Rule 8.4(c).

APRL's April 26, 2016 Supplemental Report can be accessed here:
https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/april_2016_supp.pdf

Written comments were received through the CPR website. SCEPR studied them all. Those comments are available here:
https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html.

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https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html.
APRL issued reports in June 2015 and April 2016 proposing amendments to Rules 7.1 through 7.5 to streamline the regulations while maintaining the enforceable standard of prohibiting false and misleading communications.

In September 2016 APRL requested that SCEPR consider its proposals for amendments to the Model Rules.

B. ABA Public Forum – February 2017

On February 3, 2017 SCEPR hosted a public forum at the ABA 2017 Midyear Meeting to receive comments about the APRL proposals. More than a dozen speakers testified, and written comments were collected from almost 20 groups and individuals.8

C. Working Group Meetings and Reports – 2017

In January 2017, SCEPR’s then chair Myles Lynk appointed a working group to review the APRL proposals. The working group, chaired by SCEPR member Wendy Yun Chang, included representatives from Center for Professional Responsibility (“CPR”) committees: Client Protection, Ethics and Professional Responsibility, Professional Discipline, Professionalism, and Specialization. Liaisons from the National Conference of Bar Presidents, the ABA Solo, Small Firm and General Practice Division, NOBC, and APRL were also appointed.

Chang provided SCEPR with two memoranda summarizing the various suggestions received for each advertising rule and, where applicable, identified recommendations from the working group.

D. SCEPR December 2017 Draft

After reviewing the Chang memoranda and other materials SCEPR drafted proposed amendments to Model Rules 7.1 through 7.5, and Model Rule 1.0 (terminology), which were presented to all ABA CPR Committees at the October 2017 Leadership Conference. SCEPR then further modified the proposed changes to the advertising rules based in part on the suggestions and comments of CPR Committees. In December 2017, SCEPR released for comment and circulated to ABA entities and outside groups a new Working Draft of proposed amendments to Model Rules 7.1-7.5.

8 Written submissions to SCEPR are available at: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modelrule7_1_7/comments.html.
E. ABA Public Forum – February 2018

In February 2018, the SCEPR hosted another public forum at the 2018 Midyear Meeting, to receive comments about the revised proposals. The proposed amendments were also posted on the ABA CPR website and circulated to state bar representatives, NOBC, and APRL. Thirteen speakers appeared. Twenty-seven written comments were submitted. SCEPR carefully considered all comments and further modified its proposals.

On March 28, 2018, SCEPR presented a free webinar to introduce and explain the Committee’s revised recommendations. More than 100 people registered for the forum, and many favorable comments were received.

V. The Background and History of Lawyer Advertising Rules Demonstrates Why the Proposed Rules are Timely and Necessary

A. 1908 – A Key Year in the Regulation of Lawyer Advertising

Prior to the ABA’s adoption of the Canons of Professional Ethics in 1908, legal advertising was virtually unregulated. The 1908 Canons changed this landscape; the Canons contained a total ban on attorney advertising. This prohibition stemmed partially from an explosion in the size of the legal profession that resulted in aggressive attorney advertising, which was thought to diminish ethical standards and undermine the public’s perception of lawyers. This ban on attorney advertising remained for approximately six decades, until the Supreme Court’s decision in 1977 in *Bates v. Arizona*.13

8 Speakers included George Clark, President of APRL; Mark Tuft, Chair, APRL Subcommittee on Advertising; Charlie Garcia and Will Hornsby, ABA Division for Legal Services; Bruce Johnson; Arthur Lachman; Karen Gould, Executive Director of the Virginia State Bar; Dan Lear, AVVO; Matthew Driggs; and Elijah Marchbanks.

10 All Comments can be found here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/public_hearing_transcript_complete.authcheckdam.pdf

11 An MP3 recording of the webinar can be accessed here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethicsandprofessional_responsibility/powerpoint.advertising.rules.mp3. A PowerPoint of the webinar is also available: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/webinar_advertising_powerpoint.authcheckdam.pdf


B. Attorney Advertising in the 20th Century

Bates established that lawyer advertising is commercial speech and entitled to First Amendment protection. But the Court also said that a state could prohibit false, deceptive, or misleading ads, and that other regulation may be permissible.

Three years later, in Central Hudson, the Supreme Court explained that regulations on commercial speech must "directly advance the [legitimate] state interest involved" and "[i]f the governmental interest could be served as well by a more limited restriction . . . the excessive restrictions cannot survive." In the years that followed, the Supreme Court applied the Central Hudson test to strike down a number of regulations on attorney-advertising. The Court reviewed issues such as the failure to adhere to a state "laundry list" of permitted content in direct mail advertisements, a newspaper advertisement's use of a picture of a Dalkon Shield intrauterine device in a state that prohibited all illustrations, and an attorney's letterhead that included his board certification in violation of prohibition against referencing expertise. The court's decisions in these cases reinforced the holding in Bates: a state may not constitutionally prohibit commercial speech unless the regulation advances a substantial state interest, and no less restrictive means exists to accomplish the state's goal.

C. Solicitation

Unlike advertising, in-person solicitation is subject to heightened scrutiny. In Ohralik v. Ohio State Bar Ass'n, the Supreme Court upheld an Ohio regulation prohibiting lawyers from in-person solicitation for pecuniary gain. The Court declared: "[T]he State—or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in-person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." The Court added: "It hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person." The Court concluded that a prophylactic ban is constitutional given the virtual impossibility of regulating in-person solicitation.
Ohralik’s blanket prohibition on in-person solicitation does not extend to targeted letters. The U.S. Supreme Court held in Shapero v. Kentucky Bar Ass’n,24 that a state may not prohibit a lawyer from sending truthful solicitation letters to persons identified as having legal problems. The Court concluded that targeted letters were comparable to print advertising, which can easily be ignored or discarded.

D. Commercial Speech in the Digital Age

The Bates-era cases preceded the advent of the Internet and social media, which have revolutionized attorney advertising and client solicitation. Attorneys are posting, blogging, and Tweeting at minimal cost. Their presence on websites, Facebook, LinkedIn, Twitter, and blogs increases exponentially each year. Attorneys are reaching out to a public that has also become social media savvy.

More recent cases, while relying on the commercial speech doctrine, exemplify digital age facts. A 2010 case involves a law firm’s challenge to New York’s 2006 revised advertising rules, which prohibited the use of “the irrelevant attention-getting techniques unrelated to attorney competence, such as style and advertising gimmicks, puffery, wisps of smoke, blue electrical currents, and special effects—and, the use of nicknames, monikers, mottos, or trade names implying an ability to obtain results in a matter.”25 The U.S. Court of Appeals for the Second Circuit found New York’s regulation to be unconstitutional as a categorical ban on commercial speech. The speech was not likely to be misleading.26 The court noted that prohibiting potentially misleading commercial speech might fail the Central Hudson test.27 The court concluded that even assuming that New York could justify its regulations under the first three prongs of the Central Hudson

24 486 U.S. 465 (1988). But see, Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995). The Supreme Court has upheld (in a 5 to 4 decision) a Florida Bar rule banning targeted direct mail solicitation to personal injury accident victims or their families for 30 days. The court found that the timing and intrusive nature of the targeted letters was an invasion of privacy; and, when coupled with the negative public perception of the legal profession, the Florida rule imposing a 30 day “cooling off” period materially advanced a significant government interest. This decision, however, does not support a prophylactic ban on targeted letters, only a restriction as to their timing. But see, Picard v. Curran, 119 F.3d 1150 (4th Cir. 1997), in which Maryland’s 30-day ban on direct mail in traffic and criminal defense cases was found unconstitutional, distinguishing Went for it, because criminal and traffic defendants need legal representation, time is of the essence, privacy concerns are different, and criminal defendants enjoy a 6th amendment right to counsel.

25 Alexander v. Cahill, 598 F.3d 79, 84-86 (2d Cir. 2010). The court commented, “Moreover, the sorts of gimmicks that this rule appears designed to reach—such as Alexander & Catalano’s wisps of smoke, blue electrical currents, and special effects—do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client’s house so quickly that they appear as blurs; and they do not actually provide legal assistance to space aliens. But given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe—purely as a matter of ‘common sense’—that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics. Indeed, some of these gimmicks, while seemingly irrelevant, may actually serve ‘important communicative functions: [they] attract [ ] the attention of the audience to the advertiser’s message, and [they] may also serve to impart information directly.’” (Citations omitted.).

26 Id. Alexander v. Cahill, 598 F.3d 79, at 96.

27 Id.
test, an absolute prohibition generally fails the prong requiring that the regulation be narrowly fashioned.\textsuperscript{29}

In 2011, the Fifth Circuit reached a similar conclusion, ruling that many of Louisiana’s 2009 revised attorney advertising regulations contained absolute prohibitions on commercial speech, rendering the regulations unconstitutional due to a failure to comply with the least restrictive means test in \textit{Central Hudson}.

The Fifth Circuit applied the \textit{Central Hudson} test to attorney advertising regulations.\textsuperscript{30} Although paying homage to a state’s substantial interest in ensuring the accuracy of information in the commercial marketplace and the ethical conduct of its licensed professionals, the Fifth Circuit relied on the Supreme Court’s decision in \textit{Zauderer} to conclude that the dignity of attorney advertising does not fit within the substantial interest criteria.\textsuperscript{31}

The mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.\textsuperscript{32}

Florida also revised its attorney advertising rules in light of the digital age evolution of attorney advertising and the commercial speech doctrine. Nonetheless, some of Florida’s rules and related guidelines have failed constitutional challenges. For example, in \textit{Rubenstein v. Florida Bar}, the Federal District Court for the Southern District of Florida declared Florida Bar’s prohibition on advertising of past results to be unconstitutional because the guidelines prohibited any such advertising on indoor and outdoor displays, television, or radio.\textsuperscript{33} The state’s underlying regulatory premise was that these “specific media . . . present too high a risk of being misleading.” This total ban on commercial speech again did not survive constitutional scrutiny.\textsuperscript{34}

Finally, in \textit{Searcy v. Florida Bar}, a federal court enjoined The Florida Bar from enforcing its rule requiring an attorney to be board certified before advertising expertise in an area of law.\textsuperscript{35} The Searcy law firm challenged the regulation as a blanket prohibition on the Supreme Court’s decision in \textit{Central Hudson}.\textsuperscript{29} Although paying homage to a state’s substantial interest in ensuring the accuracy of information in the commercial marketplace and the ethical conduct of its licensed professionals, the Fifth Circuit relied on the Supreme Court’s decision in \textit{Zauderer} to conclude that the dignity of attorney advertising does not fit within the substantial interest criteria.\textsuperscript{31}

In 2011, the Fifth Circuit reached a similar conclusion, ruling that many of Louisiana’s 2009 revised attorney advertising regulations contained absolute prohibitions on commercial speech, rendering the regulations unconstitutional due to a failure to comply with the least restrictive means test in \textit{Central Hudson}.

The Fifth Circuit applied the \textit{Central Hudson} test to attorney advertising regulations.\textsuperscript{30} Although paying homage to a state’s substantial interest in ensuring the accuracy of information in the commercial marketplace and the ethical conduct of its licensed professionals, the Fifth Circuit relied on the Supreme Court’s decision in \textit{Zauderer} to conclude that the dignity of attorney advertising does not fit within the substantial interest criteria.\textsuperscript{31}

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on commercial speech, arguing board certification is not available in all areas of practice, including the firm’s primary mass torts area of expertise.

VII. Conclusion

Trends in the profession, the current needs of clients, new technology, increased competition, and the history and law of lawyer advertising all demonstrate that the current patchwork of complex and burdensome lawyer advertising rules is outdated for the 21st Century. SCEPR’s proposed amendments improve Model Rules 7.1 through 7.5 by responding to these developments. Once amended, the Rules will better serve the bar and the public by expanding opportunities for lawyers to use modern technology to advertise their services, increasing the public’s access to accurate information about the availability of legal services, continue the prohibition against the use of false and misleading communications, and protect the public by focusing the resources of regulators on truly harmful conduct. The House of Delegates should proudly adopt these amendments.

Respectfully submitted,

Barbara S. Gillers, Chair
Chair, Standing Committee on Ethics and Professional Responsibility
August, 2018
1. Summary of Resolution. The SCEPR recommends amendments to Model Rules 7.1 through 7.5 and their related Comments. These amendments:

- Streamline and simplify the rules while adhering to constitutional limitations on restricting commercial speech, protecting the public, and permitting lawyers to use new technologies to inform consumers accurately and efficiently about the availability of legal services.

- Combine the provisions on false and misleading communications into Rule 7.1 and its Comments. The black letter of Rule 7.1 remains unchanged. Provisions of Rule 7.5, which largely relate to misleading communications, are moved into Comments to Rule 7.1.

- Consolidate specific rules for advertising into Rule 7.2, change “office address” to “contact information” (to accommodate technological advances) and delete unrelated or superfluous provisions. Provisions of Rule 7.4 regarding certification are moved to Rule 7.2(c) and its Comments. Lawyer referral services remain limited to qualified entities approved by an appropriate regulatory authority.

- Add a new subparagraph to Rule 7.2(b) as an exception to the general provision against paying for recommendations. The new provision would permit only nominal “thank you” gifts and contains other restrictions.

- Define solicitation as “a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.” Live person-to-person solicitation is prohibited. This includes in-person, face-to-face, telephone, and real-time visual or auditory person-to-person communication such as Skype or FaceTime.

- Broaden slightly the exceptions in Rule 7.3(b)(2) and (3) to permit live person-to-person solicitation of “experienced users of the type of legal services involved for business matters,” and of “persons with whom a lawyer has a business relationship.” Additional Comments offers guidance on the new terms.

- Eliminate the requirement to label targeted mailings as “Advertising”, but prohibit targeted mailings that are misleading, involve coercion, duress, or harassment, or where the target of the solicitation has made known to the lawyer a desire not to be solicited.

- Streamline and simplify the rules while adhering to constitutional limitations on restricting commercial speech, protecting the public, and permitting lawyers to use new technologies to inform consumers accurately and efficiently about the availability of legal services.

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2. Approval by Submitting Entity
The SCEPR approved this recommendation on April 11, 2018.

3. Has this or a similar Resolution been submitted to the House or Board previously?
Yes. All amendments to the ABA Model Rules of Professional Conduct must be approved by the House of Delegates.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?
Adoption of this resolution would result in amendments to the ABA Model Rules of Professional Conduct. Goal II of the Association—to improve our profession by promoting ethical conduct—would be advanced by the adoption of this resolution.

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

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
The Center for Professional Responsibility will publish amendments to the ABA Model Rules of Professional Conduct and Comments. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to successfully implement any policies that are adopted by the House of Delegates.

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

9. Disclosure of interest:
N/A.

10. Referrals.
In February 2017, SCEPR hosted a public forum when it received from the Association of Professional Responsibility Lawyers (APRL) a proposal to amend the lawyer advertising rules. Invitations to attend and comment were extended to ABA entities including:
Bar Activities and Services
Client Protection
Delivery of Legal Services
Election Law
Group and Prepaid Legal Services
Lawyers Referral and Information Services
Lawyers' Professional Liability
Legal Aid and Indigent Defendants
Pro Bono and Public Service
Professional Discipline
Professionalism
Public Education
Specialization
Technology and Information Services
Bioethics and the Law
Commission on Disability Rights
Commission on Domestic and Sexual Violence
Hispanic Legal Rights and Responsibilities
Commission on Homelessness and Poverty
Commission on Immigration
Commission on Law and Aging
Commission on Lawyer Assistance Programs
Center for Racial and Ethnic Diversity
Commission on Sexual Orientation and Gender Identity
Commission on Women in the Profession
Administrative Law and Regulatory Practice
Antitrust Law
Business Law Section
Civil Rights and Social Justice
Criminal Justice Section
Section of Dispute Resolution
Section of Environment, Energy and Resources
Section of Family Law
Government and Public Sector Lawyers Division
Health Law Section
Infrastructure and Regulated Industries Section
Intellectual Property Law
Section of International Law
Judicial Division
Labor and Employment Law
Law Practice Division
Law Student Division
Section of Litigation
Section of Public Contract Law
Real Property, Trust and Estate Law
Science and Technology Law

Bar Activities and Services
Client Protection
Delivery of Legal Services
Election Law
Group and Prepaid Legal Services
Lawyers Referral and Information Services
Lawyers' Professional Liability
Legal Aid and Indigent Defendants
Pro Bono and Public Service
Professional Discipline
Professionalism
Public Education
Specialization
Technology and Information Services
Bioethics and the Law
Commission on Disability Rights
Commission on Domestic and Sexual Violence
Hispanic Legal Rights and Responsibilities
Commission on Homelessness and Poverty
Commission on Immigration
Commission on Law and Aging
Commission on Lawyer Assistance Programs
Center for Racial and Ethnic Diversity
Commission on Sexual Orientation and Gender Identity
Commission on Women in the Profession
Administrative Law and Regulatory Practice
Antitrust Law
Business Law Section
Civil Rights and Social Justice
Criminal Justice Section
Section of Dispute Resolution
Section of Environment, Energy and Resources
Section of Family Law
Government and Public Sector Lawyers Division
Health Law Section
Infrastructure and Regulated Industries Section
Intellectual Property Law
Section of International Law
Judicial Division
Labor and Employment Law
Law Practice Division
Law Student Division
Section of Litigation
Section of Public Contract Law
Real Property, Trust and Estate Law
Science and Technology Law
In December 2017, SCEPR released a Working Draft of its proposal to amend the Model Rules regulating lawyer advertising. Information released also included instructions on how to comment in writing and about the February 2018 public forum the Committee was to host. This was emailed to the state bar associations, state disciplinary agencies and the ethics committees of the following ABA entities:

Antitrust Law
Business Law
Criminal Justice
Dispute Resolution
Environment, Energy and Resources
Family Law
Government and Public Sector Lawyers Division
Health Law
Intellectual Property
International Law
Judicial Division
Labor and Employment Law
Law Practice Division
Litigation
Real Property, Trust and Estate Law
Senior Lawyers
Solo, Small Firm, and General Practice
State and Local Govt. Law
Tort Trial and Insurance Practice
Young Lawyers Division

SCEPR also made its work available to the press and the public. Many news articles about its work appeared in the Lawyers’ Manual on Professional Conduct, the ABA Journal, and other legal news outlets.

In February 2018, SCEPR hosted a Public Forum at the Midyear Meeting in Vancouver. More than 50 people attended, many spoke, and many written comments were received. A transcript of the proceedings and all the Comments were posted on the Committee’s website.
In March 2018, SCEPR hosted a free webinar on the revisions it made to its proposal to amend the Model Rules. Information was emailed to members of the ABA House of Delegates, state bars, state regulators, and other groups.

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

Barbara S. Gillers, Chair, Standing Committee on Ethics and Professional Responsibility
New York University School of Law
40 Washington Square South, Room 422
New York, New York 10012
W: 212-992-6364
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C: 312.753.9518
Dennis.Rendleman@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.)

Barbara S. Gillers, Chair, Standing Committee on Ethics and Professional Responsibility
New York University School of Law
40 Washington Square South, Room 422
New York, New York 10012
W: 212-992-6364
C: 917-679-5757
barbara.gillers@nyu.edu
1. Summary of Resolution.

The Resolution proposes changes to Model Rules 7.1 through 7.5, known as the lawyer advertising rules. The changes highlight the American Bar Association’s long-standing leadership in promulgating rules for the professional conduct of lawyers generally, and in the rules governing lawyer advertising in particular.

A dizzying number of state variations in the rules governing lawyer advertising exist. There are vast departures from the Model Rules and numerous differences between jurisdictions. These differences cause compliance confusion among intra-state and interstate lawyers and firms, time-consuming and expensive litigation, and enforcement uncertainties for bar regulators. At the same time, changes in the law on commercial speech, trends in the profession including increased cross-border practice and intensified competition from inside and outside the profession, and technological advances demand greater uniformity, more simplification, and focused enforcement.

As amended the rules will provide lawyers and regulators nationwide with models that protect clients from false and misleading advertising, free lawyers to use expanding and innovative technologies for advertising, and enable bar regulators to focus on truly harmful conduct. The amended rules will also increase consumer access to accurate information about the availability of legal services and, thereby, expand access to legal services.

2. Summary of the issues which the Resolution addresses.

The Resolution addresses at least five issues. First, the Resolution addresses the overwhelming variation in the rules governing lawyer advertising by promoting simplified, targeted, and more uniform regulation in this area. Second, the Resolution addresses changes in the profession resulting from increased competition from inside and outside the profession and from increased cross-border practice. Lawyers who serve clients across jurisdictions and clients who need service across jurisdictions will benefit from the proposed changes. Third, the Resolution frees bar regulators to focus on truly harmful conduct: advertising that is misleading, harassing, and coercive. Fourth, the Resolution will increase access to legal services by freeing lawyers and clients to connect via ever-expanding technologies. Finally, the Resolution responds to developments in First Amendment law governing commercial speech and antitrust concerns.

3. An explanation of how the proposed policy position will address the issue.

At least three policies inform the Resolution. First, lawyers and clients should be free to use advancing technology to provide the public with greater access to legal services. Second, lawyer advertising rules should focus on truly harmful conduct: false, deceptive, and misleading statements, harassment, coercion, and invasions of privacy, freeing
lawyers of unnecessary restrictions. Finally, bar regulators should be able to concentrate their limited enforcement resources on truly harmful conduct.

4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified.

Minority opposition has been received from two state bar associations: the Illinois State Bar Association and the New Jersey State Bar Association. There was also opposition, but only on two amendments, from the Connecticut Bar Association Standing Committee on Professional Ethics (the “Connecticut Ethics Committee”). The two amendments opposed by the Connecticut Ethics Committee are: (i) eliminating the labeling requirement and (ii) permitting nominal gifts for recommendations.

That said, proposals to change the Model Rules of Professional Conduct typically generate diverse comments rooted in dissimilar philosophical and drafting approaches. The comments received by SCEPR throughout this process followed that pattern; they reflected divergent approaches toward lawyer advertising. Generally, however, the minority views fell into two categories.

One group of minority views argued that SCEPR’s proposals do not remove enough restrictions on lawyer communications with the public regarding legal services and the availability of legal services. In this group are states and individuals—within and outside the ABA—who argue that the Model Rules should prohibit only false or misleading communications.

The other group thought the opposite was true—that SCEPR’s proposals went too far in lifting regulatory constraints on lawyers. In this group are a handful of individuals and state bar associations that oppose, for example, (i) lifting limitations on communicating with experienced users of legal services in business matters, (ii) permitting nominal gifts for recommendations, and (iii) removing the labeling requirement on targeted mail. Some of these commenters also opposed the simple restructuring of current provisions on firm names and claims about specialization.

SCEPR considered all of these, as well as other comments. After significant study, debate, deliberation, and work, SCEPR concluded that its proposals represent the right mix of regulations to protect the public from false, misleading, and harassing conduct while freeing lawyers to use innovative technologies to communicate accurate information about the availability of legal services, enabling clients to find lawyers using those technologies, and focusing regulators on truly harmful conduct.
RESOLVED, That the American Bar Association urges Congress to enact former Sections 215 and 682 of the Internal Revenue Code that, before their repeal in the Tax Cuts and Jobs Act of 2017 allowed payors to deduct and required payees to treat as taxable income alimony payments.

FURTHER RESOLVED, That, if Congress does not reinstate the alimony deduction and section 682 of the Internal Revenue Code, the American Bar Association urges all federal, state, territorial and tribal governments to enact laws protecting the reasonable expectations of taxpayers with respect to agreements and arrangements entered into prior to the effective date of said repeal, including but not limited to pre-nuptial agreements, post-nuptial agreements, trusts and similar arrangements, but only to the extent that income is not attributable to corpus added to a trust after the effective date of on which the Tax Cuts and Jobs Act of 2017 became effective.
REPORT

I. INTRODUCTION AND SUMMARY

Among the many tax deductions that the Tax Cuts and Jobs Act eliminated from the Internal Revenue Code was the deduction for alimony payments. This deduction is not a deduction like others that eliminates the payment of tax on income. Rather, this deduction shifts the tax obligation to the individual who has the benefit of spending the income. In promoting the 2017 Tax Act, the Joint Committee on Taxation characterized the alimony deduction as a “divorce subsidy” which gives an advantage to divorced couples over married couples and projected that the elimination of the alimony deduction will increase tax revenues by $8.3 billion over 10 years.1 Even if true, this savings should not be funded at the expense of divorcing families whose financial conditions are most often changing for the worse. The 2017 Tax Cuts and Jobs Act was signed into law on December 22, 2017. The elimination of the alimony deduction applies to:

(1) any divorce or separation instrument (as defined in section 71(b)(2) of the Internal Revenue Code of 1986 as in effect before the date of the enactment of this Act) executed after December 31, 2018, and

(2) any divorce or separation instrument (as so defined) executed on or before such date and modified after such date if the modification expressly provides that the amendments made by this section apply to such modification.

This Resolution asks Congress to reinstate the alimony deduction available to payors of alimony. Eliminating the deduction will make court proceedings more costly and time consuming as many states which currently use gross income to calculate alimony awards will now have to determine net income to calculate alimony awards. Further, divorcing couples will receive less favorable tax benefits than married couples. Without the alimony deduction, alimony paying spouses will pay taxes on money they do not get to spend at a higher tax rate and without many of the deductions available to married couples. As a result, the same gross income that was available during the marriage to support one household will be taxed at a higher rate leaving less net income to allocate between two households. Finally, the elimination of the alimony deduction will negatively affect couples who entered into prenuptial agreements with alimony provisions based on the assumption that the alimony deduction would be available. Because prenuptial agreements do not qualify as “divorce or separation instruments,” if the couple divorces after December 31, 2018, the party who agreed to pay alimony on the assumption that it would be tax deductible will now be required to pay the amount agreed upon without that benefit and the party receiving the alimony will receive a windfall.

The 2017 Tax Act also repealed section 682 of the Tax Code which provided rules regarding the tax treatment of income of alimony trusts payable to a former spouse. Section 682(a)(1) Joint Committee on Taxation, Description of the Chairman’s Mark of the “Tax Cuts and Jobs Act” (JCX-51-17) (2017).

REPORT

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provides that the donee spouse is to include the gross income actually received rather than requiring the donor spouse to include the gross income. With the repeal of section 682, parties that set up such alimony trusts prior to December 31, 2018 but who are not divorced or legally separated until after December 31, 2018 will lose the anticipated tax treatment.

II. BACKGROUND

In a divorce situation, alimony payments are often based upon one party’s need and the other party’s ability to pay or on the disparity in the parties’ incomes. It is well recognized that it is more expensive for families to support two households after a divorce. The alimony deduction has been part of the Internal Revenue Code for the last seventy-five years.2 The Internal Revenue Code includes alimony and separate maintenance receipts in the definition of “Gross Income.”3 The Internal Revenue Code defines “alimony or separate maintenance payments” as follows:

<table>
<thead>
<tr>
<th>(1) In general.</th>
<th>The term “alimony or separate maintenance payment” means any payment in cash if—</th>
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</thead>
<tbody>
<tr>
<td>(A)</td>
<td>such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,</td>
</tr>
<tr>
<td>(B)</td>
<td>the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,</td>
</tr>
<tr>
<td>(C)</td>
<td>in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and</td>
</tr>
<tr>
<td>(D)</td>
<td>there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.4</td>
</tr>
</tbody>
</table>

Before its repeal Section 215 provided:

In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual’s taxable year.5

The change is effective for any divorce or separation agreements or court orders entered into after December 31, 2018 and for any divorce or separation agreements or court orders entered into before December 31, 2018 that are modified after December 31, 2018. A party paying alimony will no longer receive a deduction and the party receiving alimony will no longer have to

III. PURPOSE OF THE RESOLUTION

The purpose of this Resolution is to urge Congress again enact the alimony deduction. Over the last seventy-five years, the ability to deduct alimony payments has made paying alimony more palatable to the higher income spouse, has enabled divorcing couples to continue to share income as they did during marriage and has done so in a manner that makes calculations easy for the parties without the expense of having attorneys, experts and the court perform complicated net income calculations.

The other purpose of this Resolution is to urge Congress to enact legislation to protect the expectation of taxpayers who entered into agreements to create Section 682 Trusts in the event of a divorce. If such legislation is not enacted, couples who have a 682 Trust agreement in place but who do not divorce before December 31, 2018 will lose the anticipated ability to transfer tax liability to the spouse receiving the payment and the grantor spouse will be required to pay tax on all trust income. As a result, the grantor spouse will have a higher tax burden and beneficiary spouse will receive non-taxable funds.

IV. THE IMPORTANCE OF THE ALIMONY DEDUCTION

The alimony deduction has been an important tool for family law attorneys since 1942 and has enabled divorced families to easily calculate alimony agreements without the necessity of lengthy and expensive court proceedings involving experts to calculate net incomes of the parties. Allowing the higher income spouse to make payments based on gross income by shifting part of the tax liability on his/her income to the lower income spouse enables the divorcing couple to share the same income they had to support one household during the marriage in a way that results in the ability to provide for the two households. Further, unlike other tax deductions, the alimony deduction is not one that results in no revenue to the federal government. Rather, the alimony deduction shifts the tax obligation to the party who actually receives the funds. Without the alimony tax deduction, divorced spouses will be unable to continue to share the same income that was available in the household during the marriage and the higher income spouse will not be able to pay alimony at a rate that will enable the lower income spouse to support his/her own household.

Currently, in most cases, after a divorce, the spouse paying the alimony is in a considerably higher tax bracket than spouse receiving the money. The difference between these tax brackets provides a benefit to the spouse paying the alimony and an even

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greater benefit to the one receiving it. Essentially, the spouse receiving alimony is getting considerably more in actual dollars than the spouse paying it.⁸

Thus, many family law attorneys view the elimination of the alimony tax deduction as a “divorce penalty,” not a “divorce subsidy.”⁹

If alimony is no longer deductible, the ability of an ex-spouse to pay it may be limited, due to other fixed expenses, such as child support payments, and education expenses for children. There is only so much juice that can be squeezed from the orange.⁹

Additionally, many states use gross income to determine a party’s alimony obligation because the party receiving alimony will be paying the taxes on the funds. Being able to calculate a party’s alimony obligation based on gross income is easier for the courts and results in less frequent modifications due to fluctuating tax deductions from year to year. The elimination of the alimony deduction will require many states to formulate a new methodology for determining alimony and will likely cause parties to file modification requests more frequently as their tax obligations change.

There is a concern among the family law bar that the elimination of the alimony deduction will result in fewer settlements, higher litigation costs and lower support orders for the dependent spouse as the parties will now be sharing less net income between two households. Divorcing couples will have greater tax obligations than married couples on the same amount of gross income. There is also concern that the elimination of the alimony deduction will cause some unhappy couples or couples where domestic violence or other abuses exist to remain married because they will simply be unable to afford to get divorced.

Family lawyers are also concerned that the repeal of the alimony deduction has overlooked couples who have entered into prenuptial agreements with alimony provisions on the assumption that the alimony deduction will be available. Since the Internal Revenue Code’s definition of “divorce or separation instrument” does not include a prenuptial agreement that is not in pay status, the couple divorces after December 31, 2018, the party who agreed to pay alimony will no longer be able to deduct the payments. Rather, the party paying alimony will have to pay the agreed upon amount without being able to deduct the payments and the party receiving alimony will receive an unanticipated windfall by not having to pay taxes on the payments. This unanticipated consequence could lead to more court proceedings in seeking to modify or enforce such prenuptial agreements.

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⁹ Id.
V. THE IMPORTANCE OF IRC SECTION 682

The effect of the repeal of IRC Section 682 is addressed in the attached Tax Section Report on Alimony Transitional Guidance. As noted therein, before its repeal, Section 682 allowed the grantor spouse to transfer separate property to a trust for the benefit of the other spouse. Upon divorce, the beneficiary spouse would receive the income from the trust for a certain term and pay the taxes on the income received. The principal would eventually revert back to the grantor spouse.

The 2017 Tax Act did not grandfather in Section 682 Trusts and agreements to create 682 trusts in the event of a divorce that are not yet in pay status. Thus, couples who divorce after December 31, 2018 will not receive the benefit of their bargain. Rather, the grantor spouse who agreed to place certain assets into trust with the expectation of transferring the tax liability for the payments made by the trust will now have to pay the taxes. If the beneficiary spouse is not willing to renegotiate changes to the trust or if the trust is irrevocable, the divorcing couples may experience further stress and additional litigation costs.

VI. CONCLUSION

This Resolution urges Congress to consider the detrimental effects on the family court system and divorced families caused by eliminating the alimony deduction and to reinstate the alimony deduction. This Resolution also urges Congress to reinstate former Section 682 of the Internal Revenue Code, as its elimination will have unintended consequences for parties who established alimony trusts prior to December 31, 2018, but who are not yet divorced or legally separated.

VII. Alimony Transitional Guidance

Background On The Alternative Resolution

Prior to its repeal in the Tax Cut And Jobs Act of 2017 (TCJA), the alimony deduction, as codified by Internal Revenue Code (IRC) Section 71, was one of the longest-standing deductions available to individual taxpayers. A part of the income tax law for roughly 75 years, the alimony deduction predates the first modern income tax code. For many taxpayers, the alimony deduction was treated as an immutable fact upon which to base planning for future divorce contingencies. The revocation of the alimony deduction puts many taxpayers who incorporated the alimony deduction into their post marital planning in a difficult position. These taxpayers have pre-existing, binding agreements that will lose their intended economic effect if the taxpayer divorces after 2018.

Restoring the alimony deduction, as requested by the ABA Family Law Section in Resolution 115A would eliminate the issues addressed below. Should Congress not restore the alimony deduction, this report is intended to: 1) identify issues that should be addressed by separate legislation, or if appropriate, rule-making; and 2) provide recommendations on how to correct some of the most serious problems arising from the repeal of the alimony deduction.
Current State Of The Law

The alimony deduction allows the payor of alimony, as specifically defined, to take a deduction from income for amounts paid to a former spouse. The recipient of the alimony then includes the payment as income and pays tax on the amounts received. As long as both the payor and the recipient include the same amount as deductible and as income, 100% of the income is reported to the IRS. Each party is then responsible for calculating and paying the correct amount of tax based upon their individual situation. Given the recipient of the alimony often has a lower marginal rate than the person paying the alimony, the deduction frequently reduces the combined overall tax burden of the former spouses.\(^{10}\)

The TCJA repealed the alimony deduction for couples divorcing after 2018. Couples that are divorced, or finalize their divorce, prior to the end of 2018, may apply pre-TCJA law and will be able to claim the alimony deduction. Those couples that divorce in 2019 or later will no longer be able to claim the alimony deduction. Absent the alimony deduction, all income is taxed to the person who earned the income regardless of what obligations they may have to pay support to a former spouse.

Guiding Principles Of The Report

This report is not intended to be an exhaustive list of potential future problems associated with the repeal of the §71 alimony deduction. It is intended to be narrowly construed and only seeks to comment on issues that are of importance to the integrity of tax administration, which seeks to provide consistent tax treatment of similarly situated taxpayers. The repeal of the alimony deduction has created two categories of taxpayers who may face different and unequal treatment under the new law because it grandfathers in certain taxpayers into the current alimony rules but excludes others. These two categories of excluded taxpayers are:

1. Taxpayers who entered into binding contracts through pre and post nuptial agreements, prior to the repeal of the alimony deduction, under which they are obligated to make alimony payments.

2. Taxpayers who entered into binding contracts to create, or have previously created, trusts that pay support similar to alimony and which prior to 2019, would result in the payments from the trust being income to the beneficiary rather than the grantor under IRC Section 682.

Importance Of Equal Treatment

The issues selected for this report were selected because the repeal of the alimony deduction changed the economic effect of previously agreed to contracts. Other similar contracts, such as privately negotiated divorce settlements entered into prior to 2019, were allowed to maintain the bargained-for economic effect. This creates a system where two contracts, both made before the effective date of TCJA, that both made the same assumptions about the future deductibility of alimony payments, and both provided for the same alimony payments, nonetheless have two different tax treatments under TCJA.

10Many scholars view alimony payments as payments made for the value of gains made by the marital unit during the length of marriage. Under this gain theory of alimony these payments represent ongoing property divisions from current income rather than true “deductions” which are normally tied to expenses for the production of income.

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10Many scholars view alimony payments as payments made for the value of gains made by the marital unit during the length of marriage. Under this gain theory of alimony these payments represent ongoing property divisions from current income rather than true “deductions” which are normally tied to expenses for the production of income.
It is important to note how similar these types of private contracts are to divorce decrees or separation agreements. Taxpayers who enter into an agreement in contemplation of divorce have the same type of representation as those taxpayers who enter into settlement after a couple has filed for divorce. In both circumstances, each party is represented by a family law attorney, each has access to the other party's financial information, and both use similar information to calculate support payments.

Pre and Post Nuptial Agreements

Pre and postnuptial agreements are binding agreements made between individuals that are enforceable under state law. As these agreements specify what should happen in the event of a future divorce, they require the parties and their counsel to make assumptions about what the future will hold. Every agreement that specifies support after the termination of the marriage, either by the application of an earnings formula or a specified dollar amount, is implicitly based upon the assumption that alimony would be deductible by the payor.

TCJA grandfathers payments structured under a pre-2019 divorce decree, allowing application of the alimony deduction. However, pre and postnuptial agreements entered into prior to 2019 are not grandfathered under the legislation. This causes a number of problems for currently married couples who entered into these agreements. First, if a couple with a prenuptial agreement, even a 20 year old prenuptial agreement, divorces after 2019, the economic effect of the agreement has been altered. The payor will likely end up with a larger tax burden than anticipated, while the recipient will receive tax-exempt payments.

Fixing these economic distortions is not as simple as saying the agreement should be renegotiated. Even under the best of circumstances, renegotiating the agreement would cause familial stress. Each side would likely incur additional legal fees and in many cases the renegotiation would fail. It is likely that in many circumstances the recipient of the alimony would refuse to renegotiate if the recalculated alimony amount would be reduced because that would be against their interests. It is also likely that there would be an increased volume in contests to the validity of the agreement based on the change in the law. This could lead to litigation and uncertainty, which is what pre and post nuptial agreements are intended to avoid.

Trust Payments Pursuant To A Divorce - Irc Section 682

Prior to its repeal by the Tax Cut and Jobs Act of 2017, Section 682 provided that income from a trust established by a grantor as part of a divorce decree or a separation agreement was properly taxable to the designated beneficiary, rather than the grantor of the trust. Section 682 allowed a spouse with substantial separate property to transfer a principal amount to a trust. In the event of a divorce, or pursuant to a preexisting plan or agreement, the income from the property held by the trust would be payable to the former spouse for a certain term, after which the property, or the income from the property would revert back to the grantor.

The advantage of a Section 682 trust was that it reduced some of the uncertainties for each party. The contributing party was assured that the principal would not be at risk. The recipient of
the income would be assured of steady stream of income from assets that could not be squandered or transferred beyond their reach, and each party could rely on a professional to manage the assets of the trust so that the assets would generate a commercially reasonable rate of return.

Like pre/post nuptial agreements, existing Section 682 trusts and agreements to create Section 682 trusts in the event of a divorce, are not grandfathered into the alimony deduction under TCJA. If a couple has a valid Section 682 trust agreement in place and does not divorce before 2019, the trust will be treated under the general grantor trust rules, which essentially treat the grantor as the taxpayer. The grantor would be responsible for paying tax on all of the income from the trust assets, including amounts legally required to be transferred to the former spouse.

The economic distortion caused by the repeal of the alimony deduction on Section 682 trusts is twofold. First, the grantor will have a higher tax burden and the beneficiary will receive non taxable distributions. Second, if the agreement only specified a set amount of principal to be transferred to the trust because the negotiations assumed, but the documents did not incorporate in a support formula with an assumed rate of a return and the beneficiary’s tax rate on that income, the amount of principal contributed may be higher than needed to achieve the desired agreed upon result.11

Curing these economic distortions may not always be possible. In some cases, Section 682 trusts are irrevocable trusts. As an irrevocable trust, it may be impossible for the settlor or the beneficiary to modify the terms of the trust so that it complies with the couple’s original intentions. As with prenuptial agreements, the beneficiary spouse may be unwilling to negotiate any changes, and any negotiations regardless of success will take resources and cause family stress.

Solution To TCJA Created Consequences For Pre-2019 Marital Agreements And Trusts

Payments under binding agreements such as prenuptial agreements and Section 682 trusts entered into before 2019 should be given the same tax treatment as payments pursuant to divorce decrees entered into before 2019. In both situations, the payor should receive a deduction and the payee should pay tax on the amount that would be considered alimony under the pre-2019 rules.

Granting binding agreements the same protections as divorce decrees is good tax policy. Pre and post nuptial agreements as well as Section 682 trusts are not substantially different from the agreement that currently are grandfathered into the existing alimony deduction. As binding agreements, the parties should be able to enjoy the economic effect that they agreed to when entering the contract. Grandfathering these agreements into the alimony deduction creates certainty for the parties involved. Furthermore, the proposed grandfathering saves taxpayers time, resources, and marital stress by not forcing them to attempt to renegotiate old agreements.

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11 A simple support formula may be Annual Support = (Principal x rate of return) - Beneficiary’s tax rate. The document may simply solve for Principal to avoid the grantor being responsible for a lower than expected rate of return due to market conditions.
Administration Of Proposed Solution

From an administrative standpoint, proving the existence of a pre-2019 agreement does not require significant resources. Any agreement which would be grandfathered into the current alimony rules is a written agreement which is dated and signed by the parties. In the event of an audit, a revenue agent can simply request a copy of the document and verify the date on which the parties signed the agreement. If there is a question of authenticity there are other parties which can verify the date of the agreement. Overall, it is a small burden for the IRS when compared to the significant impact on affected taxpayers.

Conclusion

Good tax administration should strive to treat all similarly situated taxpayers the same way. The way the repeal of the alimony deduction was drafted does not accomplish this goal. The law as written grandfathered in some taxpayers into the current alimony system while depriving other similarly situated taxpayers the same benefit. In order to treat all similarly situated taxpayers the same, Congress should pass legislation that extends the alimony deduction to all taxpayers who entered into binding agreements prior to the repeal date.

Respectfully submitted,

Roberta S. Batley
Chair, Family Law Section

Dated: August 2018
1. **Summary of Resolution(s).** The Resolution urges Congress to reinstate the tax deduction for alimony payments.

2. **Approval by Submitting Entity.** The ABA Section of Family Law approved submission of this Resolution on June 4, 2018.

3. **Has this or a similar resolution been submitted to the House or Board previously?** Yes, it was submitted for the Midyear 2018 Meeting of the House of Delegates, but was withdrawn prior to February 5.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** There is no ABA policy on this subject so no existing policy would be adversely affected by this Resolution. This resolution strives to give divorcing individuals equal treatment to other taxpayers and is in harmony with other ABA policy designed to ensure equal protection.

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.** The Resolution urges enactment of tax code sections previously repealed on December 22, 2017, but there is no pending legislation.

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

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

9. **Disclosure of Interest.** (If applicable). Not Applicable.

10. **Referrals.**
    - Section of Taxation
    - Real Property, Trust and Estate Law Section
    - Business Law Section
    - Litigation Section
    - Dispute Resolution Section
    - Solo, Small Firm and General Practice Division
    - Young Lawyers Division
    - Senior Lawyers Division
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address).

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution
The Resolution urges Congress to reinstate the tax deduction for alimony payments.

2. Summary of the Issue that the Resolution Addresses
Alimony is often relied upon to provide ongoing financial support to the lower income spouse following a divorce. The alimony deduction helps enable divorced families to support two households on the same income that married couples use to support one household by shifting the income to the spouse in a lower tax bracket. Without the alimony deduction, there will be a larger portion of the income going to the government and a smaller portion of the income allocated between two households. Elimination of the alimony deduction from the new tax code may have a chilling effect on divorce settlements; may result in lower alimony awards; and may have a negative effect on divorced families.

3. Please Explain How the Proposed Policy Position will address the issue
This Resolution urges Congress to enact anew provisions providing for an alimony deduction. It similarly urges Congress to reinstate Section 682 of the Internal Revenue Code, with similar effect on the taxability of alimony trusts.

4. Summary of Minority Views
None.
RESOLVED, That the American Bar Association adopts the ABA Model Act Governing Assisted Reproductive Technology dated August 2018 ("2018 Model Act") to replace the 2008 ABA Model Act Governing Assisted Reproductive Technology; and

FURTHER RESOLVED, That the American Bar Association urges state, territorial, and tribal governments to enact the 2018 Model Act.
AMERICAN BAR ASSOCIATION
MODEL ACT GOVERNING
ASSISTED REPRODUCTIVE TECHNOLOGY [2018]

ARTICLE 1. GENERAL PROVISIONS

SECTION 101. SHORT TITLE

SECTION 102. DEFINITIONS

ARTICLE 2. INFORMED CONSENT

SECTION 201. INFORMED CONSENT STANDARDS

SECTION 202. RECORD AUTHORIZATION REQUIRED

SECTION 203. DISCLOSURES

SECTION 204. DONOR LIMITATIONS

SECTION 205. COLLECTION OF GAMETES OR EMBRYOS FROM PRESERVED TISSUE OR FROM DECEASED OR INCOMPETENT INDIVIDUALS

SECTION 206. LOSS OF EMBRYOS OR GAMETES DUE TO NATURAL DISASTER, ACT OF GOD, TERRORISM OR WAR

ARTICLE 3. MENTAL HEALTH EVALUATION AND ADDITIONAL COUNSELING

SECTION 301. MENTAL HEALTH EVALUATION

SECTION 302. ADDITIONAL COUNSELING REQUIREMENTS

ARTICLE 4. PRIVACY AND CONFIDENTIALITY

SECTION 401. INDIVIDUALLY IDENTIFIABLE MEDICAL INFORMATION

ARTICLE 5. EMBRYO TRANSFER AND DISPOSITION OF EMBRYOS NOT TRANSFERRED

SECTION 501. PARENTAL RIGHTS AND OBLIGATIONS UNDER EMBRYO AGREEMENTS

SECTION 502. DONATION OF UNUSED EMBRYOS

SECTION 503. SCREENING OF EMBRYO DONORS

SECTION 504. ABANDONMENT OF EMBRYOS AND DISPOSITION OF ABANDONED EMBRYOS

SECTION 505. TRANSPORTATION OF EMBRYOS

ARTICLE 6. CHILD OF ASSISTED REPRODUCTION
SECTION 601. SCOPE OF ARTICLE
SECTION 602. PARENTAL STATUS OF DONOR
SECTION 603. PARENTAGE OF CHILD OF ASSISTED REPRODUCTION
SECTION 604. CONSENT TO ASSISTED REPRODUCTION
SECTION 605. LIMITATION LEGAL SPOUSE’S DISPUTE OF PARENTAGE
SECTION 606. EFFECT OF DISSOLUTION OF MARRIAGE OR WITHDRAWAL OF CONSENT
SECTION 607. PARENTAL STATUS OF DECEASED INDIVIDUAL

ARTICLE 7. SURROGACY
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SECTION 702. ELIGIBILITY
SECTION 703. REQUIREMENTS FOR A SURROGACY AGREEMENT
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SECTION 705. ESTABLISHMENT OF PARENT CHILD RELATIONSHIP – GESTATIONAL SURROGACY
SECTION 706. ESTABLISHMENT OF PARENT CHILD RELATIONSHIP – GENETIC SURROGACY
SECTION 707. DUTY TO SUPPORT
SECTION 708. EFFECT OF SURROGATE’S SUBSEQUENT MARRIAGE
SECTION 709. IRREVOCABILITY
SECTION 710. NONCOMPLIANCE
SECTION 711. EFFECT OF NONCOMPLIANCE
SECTION 712. IMMUNITIES
SECTION 713. DAMAGES
SECTION 714. INSPECTION OF RECORDS
SECTION 715. EXCLUSIVE, CONTINUING JURISDICTION

ARTICLE 8. PAYMENT TO DONORS AND GESTATIONAL CARRIERS
SECTION 801. REIMBURSEMENT
SECTION 802. COMPENSATION

ARTICLE 9. HEALTH INSURANCE
SECTION 901. INFERTILITY AND EXPERIMENTAL PROCEDURES
SECTION 902. REQUIRED NOTICE
SECTION 903. QUALIFICATION OF PROVIDERS

ARTICLE 10. QUALITY ASSURANCE
SECTION 1001. QUALIFICATION OF PROVIDERS
SECTION 1002. DONOR AND COLLABORATIVE REPRODUCTION REGISTRIES
ARTICLE 1. GENERAL PROVISIONS

SECTION 101. SHORT TITLE

This Act is entitled the 2018 Model Act Governing Assisted Reproductive Technology.

SECTION 102. DEFINITIONS

1. “ART Storage Facility” means a licensed facility that stores reproductive, biological, or genetic material used in Assisted Reproductive Technology, and is in compliance with the Fertility Clinic and Certification and Success Rate Act of 1992 (FCSRCA, or Public Law 102-493).

2. “Assisted Reproduction” means a method of causing pregnancy through means other than by sexual intercourse. In the foregoing context, the term includes, but is not limited to:
   - Intracytoplasmic sperm injection.

3. “Assisted Reproductive Technology” (“ART” as used in this Act) means any medical or scientific intervention, provided with the intent of having a Child.


5. “Child” means an individual born pursuant to ART whose parentage may be determined under this Act or other law.

6. “Collaborative Reproduction” involves any Assisted Reproduction in which an individual other than an intended parent provides genetic material or agrees to act as a Gestational or Genetic Surrogate.

7. “Compensation” means payment of any valuable consideration for time, effort, pain and/or risk to health in excess of reasonable medical and ancillary costs.

8. “Consultation” means a meeting with a licensed professional for the purpose of counseling and educating the Participant in accordance with ASRM guidelines about the effects and potential consequences of their participation in any ART procedure.

9. “Court” means the appropriate court with competent jurisdiction as determined by the State.
10. “Donor” means an individual, including an Embryo Donor or a Genetic Surrogate, who provides gametes for Assisted Reproduction. The term does not include: (a) an intended parent who provides gametes to be used for Assisted Reproduction; (b) a woman who gives birth to a Child by means of Assisted Reproduction except as otherwise provided in Article 6; or (c) a parent under Article 6 or an intended parent under Article 7.

11. “Embryo” means a fertilized egg that has the potential to develop into a fetus if transferred into a uterus.

12. “Embryo Donor” means an individual who transfers ownership of an Embryo to another and relinquishes all parental rights of and obligations to the resulting Child.

13. “Embryo Transfer” (also referred to herein as “Transfer”) means the placement of an Embryo into a uterus.

14. “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.

15. “Escrow Agent” means the trustee for an Escrow Account.

16. “Evaluation” means a Consultation with and, where required by this Act, an assessment in accordance with ASRM guidelines as to whether a Participant is cleared to proceed with participation in any ART procedure.

17. “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.

18. “Gamete Provider” means an individual who provides sperm or eggs for use in Assisted Reproduction.
19. “Genetic Surrogate” means an adult, not an Intended Parent, who enters into a Surrogacy Agreement to bear a Child and who is a Gamete Provider for the Child.

20. “Genetic Surrogacy Agreement” is a written contract between Intended Parent(s) and a Genetic Surrogate.

21. “Genetic Surrogacy Arrangement” means the process by which a Genetic Surrogate intends to carry and give birth to a Child.

22. “Gestational Surrogate” means an adult, not an Intended Parent, who enters into a Surrogacy Agreement to bear a Child and who is not a Gamete Provider for the Child.

23. “Gestational Surrogacy Agreement” is a written contract between Intended Parent(s) and a Gestational Surrogate.

24. “Gestational Surrogacy Arrangement” means the process by which a Gestational Surrogate intends to carry and give birth to a Child.

25. “Independent Legal Representation” (also referred to herein as “Independent Legal Counsel”) means representation of the Participants by separate legal counsel as required by the applicable rules of professional responsibility unless such representation is knowingly and voluntarily waived in writing.

26. “Infertility” means the definition set forth by ASRM.

27. “Intended Parent” means an individual who intends to be legally bound as a parent of the Child.

28. “Legal Spouse” means an individual married to another.

29. “Medical Evaluation” means a Consultation with and an evaluation by a physician meeting the requirements of Section 903.

30. “Medical Information” means any protected individually identifiable health information obtained by a health care provider in the course of Medical Evaluation, Consultation, diagnosis, or treatment.

31. “Mental Health Counseling” means additional Consultation(s) after an initial Consultation for the purpose of advising and supporting the Participant throughout the implementation of any ART procedure.

32. “Mental Health Evaluation” means a Consultation with and an evaluation by a mental health professional meeting the requirements of Section 301.
ARTICLE 2. INFORMED CONSENT

SECTION 201. INFORMED CONSENT STANDARDS

1. Informed consent must be provided by all Participants prior to the commencement of Assisted Reproduction.
2. Informed consent requires that all of the following be provided to all Participants orally and in a Record that meets the requirements of Section 202:

(a) A statement that the Patient retains the right to withhold or withdraw consent at any time prior to Transfer of Gametes or Embryos without affecting the right to future care or treatment or risking the loss or withdrawal of any program benefits to which the Patient would otherwise be entitled.

(b) A statement that the ART Provider retains the right to withdraw for reasonable justification and with reasonable notice.

(c) A statement that the Donor’s, right to withdraw or refrain from participating in an ART procedure is not otherwise waived by the Participant. The Patient may have to pay a fee for copies of his/her Medical Information to the extent allowed by applicable law and not otherwise waived by the Participant. The Patient may have to pay a fee for copies of the Record.

(d) A statement of the known, potential medical and procedural risks and benefits of ART. Such description shall include the inherent risk of Embryo loss due to aneuploidy, thawing, and failure of implantation; the risks associated with the use of hormones and other drugs that may be used; the procedural risks associated with egg Retrieval and/or other ART procedures; the incidence of, and risks regarding, multiple pregnancies and selective reduction; and the incidence and risk of birth defects associated with IVF.

(e) A statement of acknowledgement that alternative therapies and options have been discussed in detail.

(f) A statement that the Patient shall be informed that there may be foreseen or unforeseen legal consequences and that Independent Legal Representation is advisable and may be required by this Act or by State law.

(g) A statement describing all existing confidentiality protections.

(h) A statement of guarantee that a Patient, whether a Donor, Intended Parent, Gestational Surrogate or Genetic Surrogate (a Participant), has access to all of his/her Medical Information to the extent allowed by applicable law and not otherwise waived by the Participant. The Participant may have to pay a fee for copies of the Record.

(i) A statement that the Intended Parent has a right to access a summary of medical and psychological information about Donors and Gestational or Genetic Surrogates as described in this Act.

(j) A statement that the release of any Participant-identifiable information, including images, shall not occur without the consent of the Participant in a Record.
(k) A statement that the Intended Parent(s) or an Embryo Donor, not the ART Provider or ART Storage Facility, has the right to possession and control of their Embryos, subject to any prior agreement in a Record or as provided in Section 504.

(l) A statement of the need for Intended Parents to agree in advance who shall acquire the right to possession and control of the Embryos or Gametes in the event of marriage dissolution or separation of the Intended Parents, death of one or both of them, or subsequent disagreement over disposition in compliance with the provisions of Section 501 of this Act.

(m) The policy of the provider regarding the number of Embryos Transferred and any limitation on the number of Embryos Transferred, as well as the existence of national guidelines as published by the ASRM.

(n) A statement of the need for Participants to decide whether the Embryos or Gametes can be used for purposes other than Assisted Reproduction.

(o) Signed in presence of member of staff or notary.

SECTION 202. RECORD AUTHORIZATION REQUIRED

1. The provider must document informed consent in a Record for each Participant that must:

   (a) Be in plain language;

   (b) Be dated and signed by the provider and by the Participant in the presence of a member of the staff of the provider or before a notary;

   (c) State that disclosures have been made pursuant to this Act;

   (d) Specify the length of time the consent remains valid; and

   (e) Advise the party signing the informed consent document of the right to receive a copy of the Record.

2. The Record(s) must be executed in accordance with this Act before informed consent is valid or the commencement of any Assisted Reproduction.

3. The Record required in paragraph 1 of this Section shall become part of the medical record.

4. If Collaborative Reproduction is utilized and a legal agreement is entered into between the Participants, the Record must reflect that the parties have entered into a signed legal agreement with Independent Legal Representation, prior to the start of any medications.
SECTION 203. DISCLOSURES

1. Disposition of preserved Embryos: Prior to each Retrieval, a Provider must disclose to all Intended Parents and Donors, whose identity is known to the Provider, the following possible dispositions of Embryos:

   (a) Storage, including length of time, costs, and location;

   (b) Embryo Transfer;

   (c) Donation:

      (i) To a known individual for Embryo Transfer;

      (ii) To an anonymous individual for Embryo Transfer, either directly or through the provider, or through a third party Embryo donation program;

      (iii) For scientific or clinical research, including the institution conducting the research and the intended nature of the research, if known, subject to any agreement in a Record as provided in Section 502; or

   (d) Destruction.

2. Right to transport. A Provider is not required to offer all possible dispositions, but the provider must inform the Patient that other providers may offer other options and that the Patient has the right to transport Embryos to other providers.

3. Embryo Transfer disclosure. Before each Embryo Transfer cycle, the provider must provide each Intended Parent with the following information in a Record, where applicable:

   (a) Method used to achieve fertilization and the results of semen analysis, including, but not limited to, motility, count, and morphology;

   (b) Number of eggs retrieved;

   (c) For the Retrieval and Transfer of fresh Embryos:

      (i) Number formed;

      (ii) Number viable for Embryo Transfer;

      (iii) Number to be Transferred;

      (iv) Number preserved;

      (v) Quality of each Embryo Transferred; and
(vi) Quality of each Embryo preserved;  
(d) For the Transfer of preserved Embryos:  
(i) Number of Embryos thawed;  
(ii) Number of Embryos viable for Embryo Transfer after thawing; and  
(iii) Quality of Embryos Transferred;  
(iv) Remaining viability of thawed but unused Embryos, if any.  
(e) A statement that failure to adhere to drug administration schedules may affect the outcome of the treatment.  

4. Disclosure to Donors. If additional information is learned through medical or psychological evaluation prior to or upon Retrieval of Gametes that is relevant to the Donor’s health that information must be made available to the Donor if the Donor has made such a request. The Provider must disclose to a Donor that such information can be made available upon request.  

5. Disclosure regarding health. Individuals from whom eggs are retrieved must be informed prior to the Retrieval or commencement of medications of the health risks and adverse effects of ovarian stimulation and retrieval. Women undergoing Transfer must be informed of the health risks of that process. Health risk disclosures must include, where relevant, the following information regarding the fertility drugs to be used:  
(a) Known potential present and future side effects;  
(b) Alternative drug therapies and natural cycling;  
(c) Process of drug administration; and  
(d) Whether the drug is approved by the Food and Drug Administration (FDA).  

6. Disclosure regarding multiple births/Retrievals. Where relevant, a Provider must disclose in a Record, to Participants other than Donors, prior to Retrieval, the known risks of multiple births to the Participant and to the fetuses, including the positive and negative factors involved in selective reduction; and the known potential birth defects related to IVF. A Provider must disclose prior to Retrieval to individuals undergoing egg retrieval the known potential present and future risks of multiple courses of ovarian stimulation drugs.  

7. Disclosure regarding Embryo research. A Provider shall not accept from a Participant an Embryo designated for research under Section 502, and the Provider must disclose the
SECTION 204. DONOR LIMITATIONS

In accordance with the requirements set forth elsewhere in this Act:

1. A Donor of Gametes or Embryos may condition donation on a reasonable assurance of anonymity so long as non-identifying health information is provided.

2. A Donor who has given permission for release of identifying health or other information may not revoke such permission after Transfer of the donated Gametes or of Embryos formed with the donated Gametes.

3. A Donor of Gametes or Embryos may condition donation on other reasonable use or disposition restrictions as set forth in a Record prior to donation.

SECTION 205. COLLECTION OF GAMETES FROM PRESERVED TISSUE OR GAMETES FROM DECEASED OR INCOMPETENT INDIVIDUALS

1. Gametes shall not be collected from deceased or incompetent individuals or from preserved tissues unless consent in a Record was executed prior to death or incompetency by the individual from whom the Gametes are to be collected, or the individual’s authorized fiduciary who has express authorization from the principal to so consent, does consent.

2. In the event of an emergency where the required consent is alleged but unavailable and where, in the opinion of the treating Physician, loss of viability would occur as a result of delay, and where there is a genuine question as to the existence of consent in a Record, an exception is permissible.

3. If Gametes are collected pursuant to paragraph 2 of this Section, Transfer of Gametes or of an Embryo formed from such a Gamete is expressly prohibited unless approved by a Court. Absence of a Record as described in Paragraph 1 shall constitute a presumption of non-consent.

Legislative Note: States should customize this article to comport with the State’s criminal code.

SECTION 206. LOSS OF EMBRYOS OR GAMETES DUE TO NATURAL DISASTER, ACT OF GOD, TERRORISM, OR WAR

An ART Storage Facility for Embryos or Gametes is not liable for destruction or loss of Embryos due to natural disaster, act of God, terrorism or war.

Legislative Note: States should customize this article to comport with the State’s criminal code.
ARTICLE 3. MENTAL HEALTH EVALUATION AND ADDITIONAL COUNSELING

SECTION 301. MENTAL HEALTH EVALUATION

1. Intended Parents must receive a Mental Health Consultation prior to undergoing any ART procedure.

2. All other Participants known to the ART Provider, other than Intended Parents, must undergo a Mental Health Evaluation with a Mental Health Professional in accordance with the most recently published Professional Guidelines of ASRM prior to the ART procedure.

The results of this Evaluation shall only be used to determine suitability to participate in Collaborative Reproduction.

3. During a Mental Health Consultation or Mental Health Evaluation described above, the Provider must inform the Participant(s) of additional counseling options. The Participant’s acceptance of additional counseling is voluntary.

4. For purposes of this Article, Mental Health Professional is an individual who:

   (a) Holds a Masters or Doctoral degree in the field of Psychiatry, Psychology, Counseling, Social Work, Psychiatric Nursing, Marriage and Family Therapy, or State equivalent; and

   (b) Is licensed, certified, or registered to practice in the mental health field; and

   (c) Has received training in, or has knowledge of, reproductive physiology; the testing, diagnosis, and treatment of Infertility; and the psychological issues in Infertility and Collaborative Reproduction. If there are questions about inherited or genetic disorders, the Mental Health Professional must refer the Participant to a qualified professional for Consultation.

SECTION 302. ADDITIONAL COUNSELING REQUIREMENTS

1. An ART procedure using Collaborative Reproduction shall not be initiated or performed until:

   (a) All Participants made known to the ART Provider have been offered Mental Health Counseling following the initial Evaluation as provided for in Section 301; and

   (b) The Mental Health Professional(s) have prepared and delivered to the medical Provider(s) a statement in a Record that he or she has met with the Participant(s) and that they have undergone the requisite Mental Health Evaluation;
2. Opportunity to receive counseling. It shall be conclusively presumed that a Participant has been offered an opportunity to receive additional counseling from a Mental Health Professional pursuant to Section 301 if that individual signs a statement containing the following language:

“I understand that counseling is recommended for all participants in collaborative reproduction and that counseling is a separate process from any consultation that [Provider] has required me to complete. [Provider] has given me the opportunity to meet with and receive counseling from a mental health professional with specialized knowledge of the social and psychological impact of assisted and collaborative reproduction on participants. I understand that I may choose any such mental health professional, and that I am not required to choose one recommended by this treatment facility.”

3. Assessment available to Intended Parents. A Mental Health Professional’s recommendation regarding the assessment of that Gamete Donor or Surrogate Participant for Collaborative Reproduction shall be transmitted to an Intended Parent only if:

(a) Intended Parent has requested such recommendation;
(b) Intended Parent’s request is prior to Transfer of gametes or embryos;
(c) Intended Parent’s request is prior to execution of any Collaborative Reproduction agreement; and
(d) The affected Participant’s Informed Consent was obtained pursuant to Article 201.
(e) Any such transmission as well as the retention of the information transmitted or the documents or other materials upon which the assessment was based, shall otherwise be controlled by applicable state or Federal law.

ARTICLE 4. PRIVACY AND CONFIDENTIALITY

SECTION 401. INDIVIDUALLY IDENTIFIABLE MEDICAL INFORMATION

All individually identifiable information obtained or created in the course of ART treatment is Medical Information and subject to medical record confidentiality requirements.

ARTICLE 5. EMBRYO TRANSFER AND DISPOSITION OF EMBRYOS NOT TRANSFERRED

SECTION 501. PARENTAL RIGHTS AND OBLIGATIONS

1. Intended Parents shall enter into a written agreement prior to Embryo formation detailing:
(a) Intended use of Embryos;

(b) Disposition of cryopreserved Embryos in the event of:

(i) Dissolution of Intended Parents’ relationship (or divorce of Intended Parents, if married); and

(ii) Incapacity or death of one or both Intended Parents.

2. Such agreements may be amended in a Record, at any time prior to Embryo Transfer or the death of either Intended Parent.

3. All agreements shall include an address and permanent identifier of the Intended Parents.

4. All agreements must be delivered to the Providers and the ART Storage Facility, if any.

5. Any party to an Embryo storage or disposition agreement may withdraw his or her consent to the terms of the agreement in writing prior to an Embryo Transfer to a uterus of an Intended Parent, Gestational Surrogate, or Genetic Surrogate.

(a) Notice of said withdrawal of consent to the terms of the agreement must be given in a Record to the parties to the agreement and the Providers and ART Storage Facility, if any.

(b) After receipt of said notice in a Record by the other Intended Parent and/or by the ART Provider or ART Storage Facility of that individual’s intent to avoid Embryo Transfer, an Intended Parent may not Transfer the Embryos into the uterus of any person with the intent to create a Child. No prior agreement to the contrary will be enforceable.

(c) In the event that an Embryo Transfer occurs after receipt of notice in a Record of that individual’s intent to avoid Embryo Transfer as set forth in paragraph (b), that Section of this Agreement will not be the Parent of a resulting Child.

6. Following the death of an Intended Parent who has previously consented in a Record to posthumous use of cryopreserved Gametes and/or Embryos, the surviving Intended Parent or the person designated in the Record to receive control of use of the Embryos may use the Embryos in accordance with the decedent’s written consent in a Record. Except as otherwise provided in the enacting jurisdiction’s probate code, the Child born as a result of Embryo Transfer after the death of an Intended Parent or Gamete Provider is not the Child of that Gamete Provider or Intended Parent unless the deceased individual consented in a Record that if Assisted Reproduction were to occur after death, the deceased individual would be a Parent of the Child.

6. Following the death of an Intended Parent who has previously consented in a Record to posthumous use of cryopreserved Gametes and/or Embryos, the surviving Intended Parent or the person designated in the Record to receive control of use of the Embryos may use the Embryos in accordance with the decedent’s written consent in a Record. Except as otherwise provided in the enacting jurisdiction’s probate code, the Child born as a result of Embryo Transfer after the death of an Intended Parent or Gamete Provider is not the Child of that Gamete Provider or Intended Parent unless the deceased individual consented in a Record that if Assisted Reproduction were to occur after death, the deceased individual would be a Parent of the Child.
7. No Provider shall Transfer or create any Embryos following the death of an Intended Parent unless the necessary consent referred to in paragraph 6 of this Section is obtained and permanently recorded.

8. In the event that a written agreement pursuant to paragraph 1 is not executed prior to Embryo formation, the Intended Parent(s) may execute an agreement consistent with this Section that may be enforceable on a prospective basis.

SECTION 502. DONATION OF UNUSED EMBRYOS

Intended Parent(s) may choose to donate their unused Embryos for any of the following purposes subject only to any limitations set forth in a Record prior to donation as permitted and imposed pursuant to the provisions of Section 204 hereof, which choices shall be reflected in their agreement(s):

1. Donation to another Patient(s), either known or anonymous, for the purpose of the recipient attempting to create a Child and become that Child’s Parent.

2. Donation for approved research, the nature of which may be specifically set forth in the informed consent Record and which has received the approval of an institutional review board.

No research will be permitted that is not within the scope of the informed consent of the recorded agreement. This agreement may only be modified with the consent of the Intended Parent(s). After an Intended Parent has died, that individual’s consent endures and is irrevocable.

SECTION 503. SCREENING OF EMBRYO DONORS

Donors shall be screened prior to such donation in compliance with applicable state and federal law in accordance with applicable medical standards. Records of the donation shall be maintained in compliance with applicable state and federal law.

SECTION 504. ABANDONMENT OF EMBRYOS AND DISPOSITION OF ABANDONED EMBRYOS

1. An Embryo is deemed to be abandoned only if:

(a) At least five years have elapsed since last communication from Intended Parents to Provider and/or ART Storage Facility unless the Participants select another time by agreement as provided in a Record; and

(b) A diligent attempt to notify the interested Participants, as well any Provider(s) who contracted for storage, that the Embryo is deemed to be abandoned (such attempt shall include, but not be limited to, notice by certified mail (or equivalent trackable medium) to each interested Participant’s permanent address or last known address, and shall require a period of not less than ninety days to elapse before any action is taken); and

(a) At least five years have elapsed since last communication from Intended Parents to Provider and/or ART Storage Facility unless the Participants select another time by agreement as provided in a Record; and

(b) A diligent attempt to notify the interested Participants, as well any Provider(s) who contracted for storage, that the Embryo is deemed to be abandoned (such attempt shall include, but not be limited to, notice by certified mail (or equivalent trackable medium) to each interested Participant’s permanent address or last known address, and shall require a period of not less than ninety days to elapse before any action is taken); and
(c) The interested Participants have acknowledged that they have been informed of the provisions of (a) and (b) of this paragraph in an agreement in a Record executed prior to storage with the Provider and/or ART Storage Facility.

2. Disposition of an Embryo deemed to be abandoned under Paragraph 1 must be in accordance with the most recent recorded agreement between Participants and the ART Storage Facility. If there is no agreement in a Record, or if no agreement in a Record can be found after a diligent search, disposition must be as ordered by a Court.

3. Any Provider and/or ART Storage Facility that disposes of Embryos in compliance with this Section is immune from all civil and criminal liability that may arise as a result of the disposition of such Embryos, absent criminal intent, gross negligence, or intentional misconduct.

SECTION 505. TRANSPORTATION OF EMBRYOS

1. Transportation of Embryos is the responsibility of the individual or individuals requesting the transport.

2. Unless the ART Storage Facility has requested or required transport, it is immune from all civil and criminal liability incurred as a result of the transport, absent criminal intent, gross negligence, or intentional misconduct.

ARTICLE 6. CHILD OF ASSISTED REPRODUCTION

SECTION 601. SCOPE OF ARTICLE

This Article does not apply to the birth of a Child conceived by means of sexual intercourse, or as the result of a Surrogacy Agreement as provided in Article 7.

SECTION 602. PARENTAL STATUS OF DONOR

A. A Donor is not a Parent of a Child conceived by means of Assisted Reproduction.

B. Donor Agreements Authorized.

1. A Gamete Donor and an Intended Parent(s) may enter into an agreement in a Record providing that:

   (a) The Donor agrees to donate Gametes in order for the Intended Parent(s) to conceive a Child through Assisted Reproduction.

   (b) The Donor, and spouse if married, relinquishes all property, parental, or other rights, responsibilities and claims with respect to any resulting Gametes, Embryos, and any Child born as a result of the Gamete donation;
(c) Any donated Gametes, and any Embryos formed from the donated Gametes, shall be the sole property and responsibility of the Intended Parent(s), subject to the terms of the Donor agreement; and

(d) The Intended Parent(s) shall be the Child’s Parent(s), and shall have a Parent-Child Relationship from birth with all the rights and responsibilities resulting therefrom.

2. Any Donor limitations as noted in Section 204 should be specified in the Donor agreement.

SECTION 603. PARENTAGE OF CHILD OF ASSISTED REPRODUCTION

An individual who provides Gametes for, or consents to, Assisted Reproduction by a person as provided in Section 604 with the intent to be a Parent of the Child is a Parent of the resulting Child.

SECTION 604. CONSENT TO ASSISTED REPRODUCTION

1. An individual’s consent to be a Parent of a Child born by Assisted Reproduction must be in a signed Record in accordance with Article 2. This requirement does not apply to a Donor.

2. Failure of an Intended Parent to sign a consent required by paragraph 1, before or after birth of the Child, does not preclude a finding of parentage if the person giving birth and the Intended Parent resided together with the Child during the first two years of the Child’s life and openly held out the Child as their own, unless the individual dies or becomes incapacitated before the child becomes two years of age or the Child dies before the Child becomes two years of age, in which case a court may find consent to parentage under this subsection if a party proves by clear-and-convincing evidence that the person giving birth and the individual intended to reside together in the same household with the Child and both intended that the individual would openly hold out the Child as the individual’s child, but that the individual was prevented from carrying out that intent by death or incapacity.

SECTION 605. LIMITATION ON LEGAL SPOUSE’S DISPUTE OF PARENTAGE

1. The Legal Spouse of a person who gives birth to a Child by means of Assisted Reproduction may not challenge the parentage of the Child unless:

(a) Within two years after learning of the birth of the Child a proceeding in the appropriate Court is commenced to adjudicate parentage and the Court finds that the Legal Spouse did not provide the Gametes for the Child and did not consent to Assisted Reproduction, before or after birth of the Child; or

(b) The Legal Spouse never openly held out the Child as his or her own; or

2. The Legal Spouse of a person who gives birth to a Child by means of Assisted Reproduction may not challenge the parentage of the Child unless:

(a) Within two years after learning of the birth of the Child a proceeding in the appropriate Court is commenced to adjudicate parentage and the Court finds that the Legal Spouse did not provide the Gametes for the Child and did not consent to Assisted Reproduction, before or after birth of the Child; or

(b) The Legal Spouse never openly held out the Child as his or her own; or
2. This Section applies to a marriage declared invalid after Assisted Reproduction.

SECTION 606. EFFECT OF DISSOLUTION OF MARRIAGE OR WITHDRAWAL OF CONSENT

1. If a marriage is dissolved before an insemination or Embryo Transfer the former spouse is not a Parent of the resulting Child unless the former spouse consented in a Record that if Assisted Reproduction were to occur after a divorce, the former spouse would be a Parent of the Child.

2. The consent of an individual to Assisted Reproduction may be withdrawn by that individual in a Record at any time before an insemination or Embryo Transfer. An individual who withdraws consent under this Section is not a Parent of the resulting Child.

SECTION 607. PARENTAL STATUS OF DECEASED INDIVIDUAL

Except as otherwise provided in the enacting jurisdiction's probate code, if an individual who consented in a Record to be a Parent by Assisted Reproduction dies before an insemination or Embryo Transfer, the deceased individual is not a Parent of the resulting Child unless the deceased spouse consented in a Record that if Assisted Reproduction were to occur after death, the deceased individual would be a Parent of the Child.

ARTICLE 7. SURROGACY

SECTION 701. SURROGACY AGREEMENTS AUTHORIZED

A. A Gestational or Genetic Surrogate and, if married, the Gestational or Genetic Surrogate’s Legal Spouse and the Intended Parent(s) may enter into an agreement in a Record providing that:

1. The Gestational or Genetic Surrogate agrees to attempt pregnancy by means of Assisted Reproduction;
2. The Gestational or Genetic Surrogate and, if married, the Gestational or Genetic Surrogate’s Legal Spouse relinquish all parental rights and duties with respect to any Child resulting from the Assisted Reproduction procedure(s); and
3. The Intended Parent(s) shall be recognized as the sole Parent(s) of the Child.

B. A Surrogacy Agreement may provide for payment of consideration under Article 8 of this Act.

(c) The Legal Spouse and the person who gave birth to the child have not cohabited since the probable time of assisted reproduction.
C. A Surrogacy Agreement may not limit the right of the Gestational or Genetic Surrogate to make decisions to safeguard the Gestational or Genetic Surrogate’s health or that of the Embryo(s) or fetus.

D. A Genetic Surrogacy Agreement shall be subject to the following additional requirements and is enforceable only if:

1. Judicially validated as provided in Section 706; and

2. The Assisted Reproduction procedure(s) utilized to attempt a pregnancy are performed under the supervision of a licensed Physician.

SECTION 702. ELIGIBILITY

A. A Gestational or Genetic Surrogate shall be deemed to have satisfied the requirements of this Act if the Gestational or Genetic Surrogate has met the following requirements at the time the Surrogacy Agreement is executed and prior to the anticipated pregnancy. The Gestational or Genetic Surrogate:

1. Is at least twenty-one (21) years of age;

2. Has given birth to at least one (1) Child;

3. Has completed a Medical Evaluation relating to the anticipated pregnancy;

4. Has completed a Mental Health Evaluation relating to the anticipated Surrogacy Arrangement;

5. Has undergone legal Consultation with Independent Legal Counsel regarding the terms of the Surrogacy Agreement and the potential legal consequences of the Surrogacy Arrangement;

6. Has, or obtains prior to undergoing Assisted Reproduction procedure(s) to achieve pregnancy, a health insurance policy that covers major medical treatments and hospitalization and the health insurance policy has a term that extends throughout the duration of the expected pregnancy and for eight (8) weeks after the birth of the Child; however, the policy may be procured by the Intended Parents on behalf of the Gestational or Genetic Surrogate pursuant to the Surrogacy Agreement.

B. The Intended Parent(s) shall be deemed to have satisfied the requirements of this Act if the Intended Parent(s) have met the following requirements at the time the Surrogacy Agreement is executed and prior to the anticipated pregnancy. Intended Parent(s):

1. Is at least twenty-one (21) years of age;

2. Has given birth to at least one (1) Child;

3. Has completed a Medical Evaluation relating to the anticipated pregnancy;

4. Has completed a Mental Health Evaluation relating to the anticipated Surrogacy Arrangement;

5. Has undergone legal Consultation with Independent Legal Counsel regarding the terms of the Surrogacy Agreement and the potential legal consequences of the Surrogacy Arrangement;

6. Has, or obtains prior to undergoing Assisted Reproduction procedure(s) to achieve pregnancy, a health insurance policy that covers major medical treatments and hospitalization and the health insurance policy has a term that extends throughout the duration of the expected pregnancy and for eight (8) weeks after the birth of the Child; however, the policy may be procured by the Intended Parents on behalf of the Gestational or Genetic Surrogate pursuant to the Surrogacy Agreement.

B. The Intended Parent(s) shall be deemed to have satisfied the requirements of this Act if the Intended Parent(s) have met the following requirements at the time the Surrogacy Agreement is executed and prior to the anticipated pregnancy. Intended Parent(s):
1. Have a medical need for the Surrogacy Arrangement as evidenced by a qualified Physician’s affidavit attached to the Surrogacy Agreement;

2. Have completed a Mental Health Consultation relating to the anticipated Surrogacy Arrangement; and

3. Have undergone legal Consultation with Independent Legal Counsel regarding the terms of the Surrogacy Agreement and the potential legal consequences of the Surrogacy Arrangement.

C. The relevant State regulatory agency may adopt rules pertaining to the required Medical Evaluations and Mental Health Evaluations for a Surrogacy Agreement. Until the relevant State regulatory agency adopts such rules, Medical Evaluations and Mental Health Evaluations and procedures shall be conducted in accordance with the recommended guidelines published by ASRM. The rules may adopt these guidelines or others by reference.

SECTION 703. REQUIREMENTS FOR A SURROGACY AGREEMENT

A. A Surrogacy Agreement is enforceable only if:

1. It meets the contractual requirements set forth in Section 703(B); and

2. It contains at a minimum each of the terms set forth in Section 703(C); and

3. If the Surrogacy Agreement is a Genetic Surrogacy Agreement, it must be judicially validated, as required by Section 706, prior to attempting pregnancy by means of Assisted Reproduction.

B. A Surrogacy Agreement shall meet the following requirements:

1. It shall be in writing;

2. It shall be executed prior to the commencement of any medical procedures in furtherance of the Surrogacy Arrangement (other than Medical Evaluations or Mental Health Evaluations necessary to determine eligibility of the parties pursuant to Section 702 of this Act), by:

   (a) A Gestational or Genetic Surrogate meeting the eligibility requirements of Section 702(A) of this Act and, if married, the Gestational or Genetic Surrogate’s Legal Spouse; and

   (b) The Intended Parent(s) meeting the eligibility requirements of Section 702(B) of this Act.
3. The Gestational or Genetic Surrogate, and, if married, the Gestational or Genetic Surrogate’s Legal Spouse, and the Intended Parent(s) shall be represented by Independent Legal Counsel in all matters concerning the Surrogacy Arrangement and the Surrogacy Agreement;

4. Each of the parties acknowledge in writing that they received information about the legal, financial, and contractual rights, expectations, penalties, and obligations of the Surrogacy Agreement;

5. If the Surrogacy Agreement provides for the payment of Compensation to the Gestational or Genetic Surrogate, the Compensation shall be placed in escrow with an independent Escrow Agent prior to the Gestational or Genetic Surrogate’s commencement of any medical procedure (other than Medical or Mental Health Evaluations necessary to determine the Gestational or Genetic Surrogate’s eligibility pursuant to Section 702(A) of this Act); and

6. Each party’s signature shall be notarized or witnessed by two (2) competent adults who are not parties to the Surrogacy Agreement.

C. A Surrogacy Agreement shall provide for:

1. The express written agreement of the Gestational or Genetic Surrogate to:
   
   (a) Undergo Assisted Reproduction procedure(s) to achieve a pregnancy and attempt to carry and give birth to a Child; and
   
   (b) Surrender custody of any Child resulting from such Assisted Reproduction procedure(s) to the Intended Parent(s) immediately upon birth;

2. If the Gestational or Genetic Surrogate is married, the express agreement of the Gestational or Genetic Surrogate’s Legal Spouse to:
   
   (a) Undertake the obligations imposed on the Gestational or Genetic Surrogate pursuant to the terms of the Surrogacy Agreement; and
   
   (b) Surrender custody of any Child resulting from such Assisted Reproduction procedure(s) to the Intended Parent(s) immediately upon birth;

3. The right of the Gestational or Genetic Surrogate to utilize the services of a Physician chosen by the Gestational or Genetic Surrogate, after Consultation with the Intended Parents, to provide care to the Gestational or Genetic Surrogate during the pregnancy; and
4. The right of the Gestational or Genetic Surrogate to make decisions to safeguard their own health or that of the Embryo(s) or fetus(es).

5. The express written agreement of the Intended Parent(s) to:

(a) Accept custody of any Child resulting from such Assisted Reproduction procedure(s) immediately upon birth regardless of number, gender, or mental or physical condition; and

(b) Assume sole responsibility for the support of the Child immediately upon birth.

6. Intended Parent(s) payment of reasonable medical and/or ancillary expenses including:

(a) The premiums for a health insurance policy that covers medical treatment and hospitalization for the Gestational or Genetic Surrogate unless otherwise mutually agreed upon by the parties, pursuant to the terms of the Surrogacy Agreement; and

(b) The payment of all uncovered medical expenses; and

(c) Other reasonable financial arrangements mutually agreed upon by the parties, pursuant to the terms of the Surrogacy Agreement.

D. The appropriate State law for determining the Parent-Child Relationship pursuant to a Surrogacy Agreement is where:

1. At least one of the parties to the Surrogacy Agreement is a resident; or

2. At least one of the medical procedures pursuant to the Surrogacy Agreement occurs; or

3. The birth occurs or is anticipated to occur.

E. A Surrogacy Agreement is enforceable even though it contains one or more of the following provisions, and if any of the following provisions are included in the Agreement, such provisions are enforceable:

1. The Gestational or Genetic Surrogate’s agreement to undergo all medical exams, treatments, and fetal monitoring procedures that the Physician recommends for the success of the pregnancy;
2. The Gestational or Genetic Surrogate’s agreement to abstain from any activities
that the Intended Parent(s) or the Physician reasonably believe to be harmful to
the pregnancy and future health of the Child, including, without limitation,
smoking, drinking alcohol, using non-prescribed drugs, using prescription
drugs not authorized by a Physician aware of the Gestational or Genetic
Surrogate’s pregnancy, exposure to radiation, or any other activities proscribed
by a health care Provider;

3. The agreement of the Intended Parent(s) to pay the Gestational or Genetic
Surrogate reasonable Compensation; and

4. The agreement of the Intended Parent(s) to pay for or reimburse the Gestational
or Genetic Surrogate for reasonable expenses (including, without limitation,
medical, legal, or other professional or necessary expenses) related to the
Surrogacy Arrangement and to the Surrogacy Agreement.

SECTION 704. TERMINATION OF SURROGACY AGREEMENT

A. Prior to Pregnancy

1. Before a Gestational or Genetic Surrogate undergoes the Assisted Reproduction
procedure(s) to attempt pregnancy, and subject to the terms of the Surrogacy
Agreement, any party may terminate the Surrogacy Agreement by giving
written notice of termination to all other parties.

2. No party may terminate the Surrogacy Agreement after an Embryo Transfer
procedure and prior to a pregnancy test at a time to be determined by a qualified
Physician.

3. Any party who terminates a Genetic Surrogacy Agreement after the appropriate
Court issues an order validating a Genetic Surrogacy Agreement under Section
706 but before the Genetic Surrogate becomes pregnant by means of Assisted
Reproduction shall also file notice of the termination with the appropriate
Court. On receipt of the notice, the appropriate Court shall order a stay on all
medical procedures contemplated under the terms of the Genetic Surrogacy
Agreement.

4. Except as otherwise agreed to among the parties in the Surrogacy Agreement,
no party shall be liable to any other party for terminating the Surrogacy
Agreement before the Gestational or Genetic Surrogate becomes pregnant by
means of Assisted Reproduction.

B. After Pregnancy is confirmed

1. Subject to the provisions of Section 714(C), no party may terminate a Surrogacy
Agreement once a successful pregnancy is confirmed.
SECTION 705. ESTABLISHMENT OF PARENT CHILD RELATIONSHIP IN GESTATIONAL SURROGACY

A. RIGHTS OF PARENTAGE

1. Except as provided in this Act, a woman who gives birth to a Child is presumed to be the mother of that Child for purposes of State law.

2. The parties to a Gestational Surrogacy Agreement shall assume the rights and obligations of paragraphs 2 and 3 of this Section 705(A) if:

   (a) The Gestational Surrogate satisfies the eligibility requirements set forth in Section 702(A);

   (b) The Intended Parent(s) satisfy the eligibility requirements set forth in Section 702(B); and

   (c) The Gestational Surrogacy Agreement complies with the requirements of Section 703.

3. In the case of a Gestational Surrogacy Agreement satisfying the requirements set forth in paragraph 1 of this Section 705(A):

   (a) The Intended Parent(s) shall be the Parents of the Child for purposes of State law immediately upon the birth of the Child;

   (b) The Child shall be considered the Child of the Intended Parent(s) for purposes of State law immediately upon the birth of the Child;

   (c) Parental rights shall vest in the Intended Parent(s) immediately upon the birth of the Child;

   (d) Sole custody of the Child shall rest with the Intended Parent(s) immediately upon the birth of the Child; and

   (e) Neither the Gestational Surrogate nor the Gestational Surrogate’s Legal Spouse, if any, shall be the Parent of the Child for purposes of State law immediately upon the birth of the Child.

4. If the parentage of a Child born to a Gestational Surrogate is alleged not to be the result of the Assisted Reproduction procedure(s), the appropriate Court shall order genetic testing to determine the parentage of the Child. If the child was not conceived as result of the Assisted Reproduction procedure(s), the Parent-Child Relationship shall be determined as provided under other applicable State law.

3. In the case of a Gestational Surrogacy Agreement satisfying the requirements set forth in paragraph 1 of this Section 705(A):

   (a) The Intended Parent(s) shall be the Parents of the Child for purposes of State law immediately upon the birth of the Child;

   (b) The Child shall be considered the Child of the Intended Parent(s) for purposes of State law immediately upon the birth of the Child;

   (c) Parental rights shall vest in the Intended Parent(s) immediately upon the birth of the Child;

   (d) Sole custody of the Child shall rest with the Intended Parent(s) immediately upon the birth of the Child; and

   (e) Neither the Gestational Surrogate nor the Gestational Surrogate’s Legal Spouse, if any, shall be the Parent of the Child for purposes of State law immediately upon the birth of the Child.

4. If the parentage of a Child born to a Gestational Surrogate is alleged not to be the result of the Assisted Reproduction procedure(s), the appropriate Court shall order genetic testing to determine the parentage of the Child. If the child was not conceived as result of the Assisted Reproduction procedure(s), the Parent-Child Relationship shall be determined as provided under other applicable State law.
5. In the case of a Gestational Surrogacy Arrangement meeting the requirements set forth in this Section 705, in the event of a laboratory error in which the laboratory transfers embryo(s) not legally belonging to the Intended Parent(s), the Intended Parents will be the Parents of the Child for purposes of State law unless otherwise determined by a Court in an action which can only be brought by one or more of the parties to the Surrogacy Agreement or the genetic contributors within two (2) years of the date of the Child’s birth.

B. ADMINISTRATIVE ESTABLISHMENT OF THE PARENT-CHILD RELATIONSHIP

1. For purposes of the State’s relevant parentage act, the Parent-Child Relationship that arises immediately upon the birth of the Child pursuant to Section 705(A) is established, if, prior to or within three (3) business days following the birth of a Child born through a Gestational Surrogacy Agreement, the attorneys representing both the Gestational Surrogate and the Intended Parent(s) certify in a record to the birth hospital and the State office responsible for issuing birth records that the parties entered into a Surrogacy Agreement and satisfied the requirements of Section 704 of this Act with respect to the Child.

2. The attorneys’ certifications required by paragraph 1 of this Section 705(B) shall be filed on forms prescribed by the relevant State regulatory agency and in a manner consistent with the requirements of the State’s relevant parentage act, if any.

3. The attorney certifications required by paragraph 1 of this Section 705(B) shall be effective for all purposes hereunder if completed prior to or within three (3) business days following the Child’s birth.

4. In lieu of the attorney certifications required by paragraph 1 of this Section 705(B), a party to a Surrogacy Agreement that has satisfied the requirements of Section 704 of this Act may petition the appropriate Court for a pre-birth or post-birth judgment establishing the parent-child relationship with respect to the Child.

5. Upon compliance with the certification provision of this Section, or upon presentation of a Court-ordered judgment establishing the parent-child relationship, all hospital representatives and/or employees and the State’s relevant regulatory agency shall, on an expedited basis, complete all birth records and the original birth certificate of the Child to reflect the Intended Parent(s) as the Child’s Parent(s) thereon.

6. If a birth results under a Gestational Surrogacy Agreement that does not comply with all the requirements and procedures set forth in this Section 705, the Parent-Child Relationship shall be determined as provided under other relevant regulatory agency shall, on an expedited basis, complete all birth records and the original birth certificate of the Child to reflect the Intended Parent(s) as the Child’s Parent(s) thereon.

7. Upon compliance with the certification provision of this Section, or upon presentation of a Court-ordered judgment establishing the parent-child relationship, all hospital representatives and/or employees and the State’s relevant regulatory agency shall, on an expedited basis, complete all birth records and the original birth certificate of the Child to reflect the Intended Parent(s) as the Child’s Parent(s) thereon.

8. If a birth results under a Gestational Surrogacy Agreement that does not comply with all the requirements and procedures set forth in this Section 705, the Parent-Child Relationship shall be determined as provided under other relevant regulatory agency shall, on an expedited basis, complete all birth records and the original birth certificate of the Child to reflect the Intended Parent(s) as the Child’s Parent(s) thereon.
applicable State law specifically taking into consideration the intent of the parties at the time of the execution of the Gestational Surrogacy Agreement and the best interests of the Child. An Intended Parent is a presumed parent who has standing to request and be awarded legal parentage of the Child for the purposes of this provisions and any parentage proceeding hereunder.

SECTION 706. ESTABLISHMENT OF PARENT CHILD RELATIONSHIP IN GENETIC SURROGACY

A. RIGHTS OF PARENTAGE

1. The parties to a Genetic Surrogacy Agreement shall assume the rights and obligations of paragraphs 2 and 3 of this Section 706(A) if:

(a) The Genetic Surrogate satisfies the eligibility requirements set forth in Section 702(A);

(b) The Intended Parent(s) satisfy the eligibility requirements set forth in Section 702(B); and

(c) The Genetic Surrogacy Agreement complies with the requirements of Section 703 and has been judicially pre-approved prior to the commencement of any medical procedures in furtherance of the Surrogacy Arrangement (other than Medical Evaluations or Mental Health Evaluations necessary to determine eligibility of the parties pursuant to Section 702 of this Act) as set forth in this Section 706.

2. In the case of a Genetic Surrogacy Agreement satisfying the requirements set forth in paragraph 1 of this Section 706(A):

(a) The Intended Parent(s) shall be the Parents of the Child for purposes of State law immediately upon the birth of the Child;

(b) The Child shall be considered the Child of the Intended Parent(s) for purposes of State law immediately upon the birth of the Child;

(c) Parental rights shall vest in the Intended Parent(s) immediately upon the birth of the Child;

(d) Sole custody of the Child shall rest with the Intended Parent(s) immediately upon the birth of the Child; and

(e) Neither the Genetic Surrogate nor the Genetic Surrogate’s Legal Spouse, if any, shall be the Parent of the Child for purposes of State law immediately upon the birth of the Child.
1195 3. In the case of a Genetic Surrogacy Arrangement meeting the requirements set forth in this Section 706, in the event of a laboratory error in which the laboratory transfers embryo(s) not legally belonging to the Intended Parent(s), unless otherwise determined by a Court in an action which can only be brought by one or more of the parties to the Surrogacy Agreement or the genetic contributors within two (2) years of the date of the Child’s birth.

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B. JUDICIAL PRE-APPROVAL OF GENETIC SURROGACY AGREEMENT

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1205 1. Prior to the commencement of any medical procedures in furtherance of the Genetic Surrogacy Arrangement (other than Medical Evaluations or Mental Health Evaluations necessary to determine eligibility of the parties pursuant to Section 702 of this Act), the Intended Parent(s), the Genetic Surrogate, and Genetic Surrogate’s Legal Spouse, if any, shall commence a proceeding to obtain judicial pre-approval of a Genetic Surrogacy Agreement by filing a petition in the appropriate Court. A proceeding to obtain judicial pre-approval of a Genetic Surrogacy Agreement may not be maintained unless all parties to the Genetic Surrogacy Agreement join in the petition. A copy of the fully-executed Genetic Surrogacy Agreement must be filed with the petition.

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3. The Court shall issue an order under this Section 706(B) only on finding that:

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(a) The requirements of Section 702 have been satisfied;

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(b) The requirements of Section 706(B) have been satisfied;

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(c) All parties have voluntarily entered into the Genetic Surrogacy Agreement meeting the requirements of Section 703 and understand its terms;

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(d) Adequate provision has been made for all reasonable health-care expenses associated with the Genetic Surrogacy Agreement, including responsibility for those expenses if the Genetic Surrogacy Agreement is terminated, as set forth in Section703(C)(6); and

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(e) The consideration, if any, to be paid to the Genetic Surrogate is reasonable.

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C. PARENTAGE UNDER A JUDICIALLY PRE-APPROVED GENETIC SURROGACY AGREEMENT

1. Upon birth of a Child pursuant to a judicially pre-approved Genetic Surrogacy Agreement, all parties shall jointly file a notice with the appropriate Court that a Child has been born as a result of the Assisted Reproduction procedure(s).

Thereupon, the appropriate Court shall issue an order:

(a) Confirming that the Intended Parent(s) are the Parent(s) of the Child;

(b) If necessary, ordering that the Child be surrendered to the Intended Parent(s); and

(c) Directing the agency maintaining birth records to issue a birth certificate naming the Intended Parent(s) as Parent(s) of the Child on an expedited basis.

2. If the parentage of a Child born to a Genetic Surrogate is alleged not to be the result of the Assisted Reproduction procedure(s), the appropriate Court shall order genetic testing to determine the parentage of the Child. If the child was not conceived as result of the Assisted Reproduction procedure(s), the Parent-Child Relationship shall be determined as provided under other applicable State law.

3. If the parties fail to comply with paragraph 1 of this Section 706(C), the appropriate State agency may, upon request of any party, file notice with the appropriate Court that a Child has been born to the Genetic Surrogate as a result of Assisted Reproduction. Upon proof of a Court order issued pursuant to Section 706(B) validating the Genetic Surrogacy Agreement, the appropriate Court shall order that the Intended Parent(s) are the sole legal Parent(s) of the Child and are financially responsible for the Child.

4. If a birth results under a Genetic Surrogacy Agreement that is not judicially pre-approved as provided in this Section 706, the Parent-Child Relationship shall be determined as provided under other applicable State law specifically taking into consideration the intent of the parties at the time of the execution of the Gestational Surrogacy Agreement and the best interests of the Child. An Intended Parent is a presumed parent who has standing to request and be awarded legal parentage of the Child for the purposes of this provisions and any parenting proceed hereunder.

SECTION 707. FULL FAITH AND CREDIT

An establishment of parentage pursuant to Section 705 or 706 of this Act shall be given full faith and credit in another State if the establishment was in a signed Record and otherwise complies with the law of the other State.

An establishment of parentage pursuant to Section 705 or 706 of this Act shall be given full faith and credit in another State if the establishment was in a signed Record and otherwise complies with the law of the other State.
SECTION 708. DUTY TO SUPPORT

A. Any individual who is considered to be the Parent of the Child pursuant to Section 705 or Section 706 of this Act shall be obligated to support the Child.

B. Intended Parents who are parties to a non-compliant Gestational Surrogacy Arrangement or an unapproved Genetic Surrogacy Agreement may be held liable for support of the resulting Child under other law.

C. Breach of the Surrogacy Agreement by the Intended Parent(s) shall not relieve such Intended Parent(s) of the support obligations imposed by this Act.

SECTION 709. EFFECT OF SURROGATE’S SUBSEQUENT MARRIAGE

A. Gestational Surrogacy

Subsequent marriage of the Gestational Surrogate after execution of a Surrogacy Agreement under this article does not affect the validity of the Surrogacy Agreement, consent to the Surrogacy Agreement from the Gestational Surrogate’s Legal Spouse is not required, and the Gestational Surrogate’s Legal Spouse is not a presumed Parent of the resulting Child.

B. Genetic Surrogacy

After the issuance of an order validating a Surrogacy Agreement between Intended Parents and a Genetic Surrogate under this article, subsequent marriage of the Genetic Surrogate does not affect the validity of a Surrogacy Agreement, consent to the Surrogacy Agreement from the Genetic Surrogate’s Legal Spouse is not required, and the Genetic Surrogate’s Legal Spouse is not a presumed Parent of the resulting Child.

SECTION 710. IRREVOCABILITY

No action to challenge the rights of parentage established pursuant to Section 705 or Section 706 of this Act or the relevant State parentage act provisions shall be commenced after twelve (12) months from the date of birth of the Child.

SECTION 711. NONCOMPLIANCE

Noncompliance occurs when a Gestational or Genetic Surrogate, and, if married, the Gestational or Genetic Surrogate’s Legal Spouse, or the Intended Parent(s) breach a provision of the Surrogacy Agreement or any party to or agreement for a Surrogacy Arrangement fails to meet any of the requirements of this Act.
SECTION 712. EFFECT OF NONCOMPLIANCE

In the event of noncompliance with this Article, the appropriate Court of competent jurisdiction shall determine the respective rights and obligations of the parties to any Surrogacy Agreement based solely on evidence of the parties’ original intent.

SECTION 713. IMMUNITIES

Except as provided in this Act, no person shall be civilly or criminally liable under State law for non-negligent actions taken pursuant to the requirements of this Act. This provision shall not prevent liability or actions between or among the parties, including actions brought by or on behalf of the Child, based on negligent, reckless, willful, or intentional acts that result in damages to any party.

SECTION 714. DAMAGES

A. Except as expressly provided in the Surrogacy Agreement, the Intended Parent(s) shall be entitled to all remedies available at law or equity in the event of a breach of the Surrogacy Agreement.

B. Except as expressly provided in the Surrogacy Agreement, a Gestational or Genetic Surrogate shall be entitled to all remedies available at law or equity in the event of a breach of the Surrogacy Agreement.

C. There shall be no specific performance remedy available for a breach by a Gestational or Genetic Surrogate of a Surrogacy Agreement that limits the right of the Gestational or Genetic Surrogate to make decisions regarding the Gestational or Genetic Surrogate’s own health or forces the Gestational or Genetic Surrogate to undergo Assisted Reproduction for the purposes of becoming pregnant.

SECTION 715. INSPECTION OF RECORDS

The proceedings, records, and identities of the individual parties to a Surrogacy Agreement under this Article are subject to inspection by the parties and their attorneys of record under the standards of confidentiality applicable to adoptions as provided under other law of this State.

SECTION 716. EXCLUSIVE, CONTINUING JURISDICTION

During the period governed by the Surrogacy Agreement, the Court conducting a proceeding under this Act has exclusive, continuing jurisdiction of all matters arising out of the Surrogacy Agreement until the Child, delivered by the Gestational or Genetic Surrogate during the term of the Surrogacy Agreement, attains the age of ninety (90) days, however, nothing in this provision gives the Court jurisdiction over a child custody or a child support action where such jurisdiction is not otherwise authorized.
ARTICLE 8. PAYMENT TO DONORS AND GESTATIONAL CARRIERS

SECTION 801. REIMBURSEMENT

1. A Donor may receive reimbursement for economic losses resulting from the Retrieval or storage of Gametes or Embryos and incurred after the Donor has entered into a valid agreement in a Record to be a Donor.

2. Economic losses occurring before a Donor, Gestational Surrogate or Genetic Surrogate has entered into valid agreement in a Record may not be reimbursed unless subsequently agreed upon in the agreement, except as provided for in paragraph 3 hereof.

3. Premiums paid for insurance against economic losses directly resulting from the Retrieval or storage of Gametes or Embryos for donation may be reimbursed, even if such premiums have been paid before the Donor has entered into a valid agreement in a Record, so long as such agreement becomes valid and effective before the Gametes or Embryos are used in Assisted Reproduction in accordance with the agreement.

SECTION 802. COMPENSATION

1. The consideration, if any, paid to a Donor, Gestational Surrogate, or Genetic Surrogate must be reasonable and negotiated in good faith between the parties.

2. Compensation may not be conditioned upon the quantity, purported quality or genome-related traits of the Gametes or Embryos.

3. Compensation may not be conditioned on actual genotypic or phenotypic characteristics of the Donor or of the Child.

ARTICLE 9. HEALTH INSURANCE

SECTION 901. INFERTILITY AND EXPERIMENTAL PROCEDURES

1. The ASRM or other appropriate governmental regulatory authority may designate, from time to time, a list of ART procedures and treatments considered to be experimental.

2. The notice required under this Section must be prominently positioned in any literature, insurance application, or insurance policy plan description made available or distributed by the group health benefits plan to enrollees.
A health insurer may require that any licensed Physician participating in the treatment of Infertility must be:

(a) Board certified in Obstetrics and Gynecology by the American Board of Obstetrics and Gynecology and have a practice comprised substantially of Infertility cases; or

(b) Board certified in both Obstetrics and Gynecology and in Reproductive Endocrinology by the American Board of Obstetrics and Gynecology, with a practice comprised substantially of Infertility cases; or

(c) Board certified in both Andrology and Urology by the American Board of Urology.

ARTICLE 10. QUALITY ASSURANCE

SECTION 1001. QUALIFICATIONS OF PROVIDERS

ART Providers and ART Storage Facilities (hereafter “Program”) shall assure the quality of their services by developing and complying with at least the following quality assurance measures:

(a) Personnel. The Program shall document that senior and supervisory staff are adequately trained, including formal training in genetics. Documentation shall also include staff participation in laboratory training programs and regular updating of staff skills and knowledge.

(b) Equipment. The Program shall develop, implement, and test regularly backup and contingency plans for cryopreservation systems, computer systems, and records.

(c) Testing. The Program shall use a laboratory that participates in proficiency testing and on-site inspection, in compliance with the requirements for certification promulgated by the State Department of Health, if any. If genetic diagnostic services are provided, the Program or the laboratory shall comply with the applicable guidelines of organizations otherwise recognized by ASRM, such as the College of American Pathologists and the American College of Medical Genetics.

SECTION 1002. DONOR AND COLLABORATIVE REPRODUCTION REGISTRIES

1. Donor and Collaborative Reproduction registries (or equivalent) created for the purpose of maintaining contact, medical, and psychosocial information about Donors, gestational

SECTION 903. QUALIFICATION OF PROVIDERS

A health insurer may require that any licensed Physician participating in the treatment of Infertility must be:

(a) Board certified in Obstetrics and Gynecology by the American Board of Obstetrics and Gynecology and have a practice comprised substantially of Infertility cases; or

(b) Board certified in both Obstetrics and Gynecology and in Reproductive Endocrinology by the American Board of Obstetrics and Gynecology, with a practice comprised substantially of Infertility cases; or

(c) Board certified in both Andrology and Urology by the American Board of Urology.

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(a) Personnel. The Program shall document that senior and supervisory staff are adequately trained, including formal training in genetics. Documentation shall also include staff participation in laboratory training programs and regular updating of staff skills and knowledge.

(b) Equipment. The Program shall develop, implement, and test regularly backup and contingency plans for cryopreservation systems, computer systems, and records.

(c) Testing. The Program shall use a laboratory that participates in proficiency testing and on-site inspection, in compliance with the requirements for certification promulgated by the State Department of Health, if any. If genetic diagnostic services are provided, the Program or the laboratory shall comply with the applicable guidelines of organizations otherwise recognized by ASRM, such as the College of American Pathologists and the American College of Medical Genetics.

SECTION 1002. DONOR AND COLLABORATIVE REPRODUCTION REGISTRIES

1. Donor and Collaborative Reproduction registries (or equivalent) created for the purpose of maintaining contact, medical, and psychosocial information about Donors, gestational
carriers, and Children born as a result of ART, or to benefit the public health, operating within this jurisdiction shall incorporate, at a minimum, the following elements:

(a) Establish procedures to allow the disclosure of non-identifying information, while protecting the anonymity of Donors;

(b) Establish procedures to allow the disclosure of identifying information about Participants only if mutual consent of all parties affected is obtained prior to the release of such information;

(c) Maintain medical and genetic information and updated current health information, including change in health status, about the Donor; Donors or Providers are not required to update such information unless required by written agreement;

(d) Establish procedures to allow disclosure of non-identifying medical and psychosocial information to the resulting Child;

(e) Establish whether a resulting Child is authorized to contact a program; and

(f) Retain all records involving third party reproduction until the resulting Child has reached the age of 40.

2. Health care Providers in this jurisdiction shall not utilize registries that fail to comply with the requirements of paragraph 1, except as may be otherwise required or permitted by federal or State law.

SECTION 1003. HEALTH INFORMATION MANAGEMENT

1. The Program shall maintain all records in compliance with State and Federal law.

2. The Provider:

(a) Shall attempt to maintain, contact information, including an address, of the Participants for contact by Patients, resulting Children, and Participants;

(b) Shall participate in a national Donor and Collaborative Reproduction registry, if established as described in Section 1002 of this Act, so that Intended Parents and Donors can provide the program with address information;

(c) Shall participate in a national Donor and Collaborative Reproduction registry, if established as described in Section 1002 of this Act, by collecting medical and genetic information and updated current health information, including change in health status of the Donor; and

2. Health care Providers in this jurisdiction shall not utilize registries that fail to comply with the requirements of paragraph 1, except as may be otherwise required or permitted by federal or State law.

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(b) Shall participate in a national Donor and Collaborative Reproduction registry, if established as described in Section 1002 of this Act, so that Intended Parents and Donors can provide the program with address information;

(c) Shall participate in a national Donor and Collaborative Reproduction registry, if established as described in Section 1002 of this Act, by collecting medical and genetic information and updated current health information, including change in health status of the Donor; and
(d) Shall maintain an accurate record of the disposition of all Gametes and Embryos.

3. The Program shall transfer all records involving Collaborative Reproduction to a national Donor and Collaborative Reproduction registry in compliance with its requirements, if established as described in Section 1002 of this Act.

4. Disclosure of Medical Information.
   (a) Medical Information may be disclosed to an interested party or resulting Child only if an authorization is provided in accordance with applicable law;
   (b) The Program may disclose aggregate, non-identifiable data for quality assurance and reporting requirements, for the limited purpose of:
      (i) Ensuring a standard for the maintenance of records on laboratory tests and procedures performed, including safe sample disposal;
      (ii) Maintaining records on personnel and facilities, schedules of preventive maintenance; and
      (iii) Ensuring minimum qualification standards for personnel.

SECTION 1004. PATIENT SAFETY

1. Conduct medical testing for sexually transmitted diseases in Gamete Providers, whether Donors or Intended Parents, and gestational carriers in compliance with the laws and regulations of or applying to appropriate governmental regulatory authorities; and

2. Conduct medical screening and genetic testing of Gamete and Embryo Donors for genetic disorders. The extent of such screening shall be in conformity with guidelines established by the ASRM. In the event that no such guidelines have been developed, the screening shall be in accordance with accepted standards of medical practice for ART Providers.

3. Establish procedures for the proper labeling of Embryos and Gametes in compliance with the laws and regulations of or applying to appropriate governmental regulatory authorities.

ARTICLE 11. ENFORCEMENT

SECTION 1101. DAMAGES
1. The failure of a Provider to comply with this Act shall constitute unprofessional conduct and may be reported to any controlling licensing authority.

2. In addition to other remedies available at law, including but not limited to causes of action under HIPAA, a Participant whose ART information has been used or disclosed in violation of this Act and who has sustained economic loss or personal or emotional injury therefrom may recover compensatory damages, reasonable attorney’s fees, and the costs of litigation.

3. Failure to account for all Embryos, misuse of Embryos, theft of Embryos, or unauthorized disposition of Embryos may subject a Provider or ART Storage Facility to criminal and civil penalties, including punitive damages, and reasonable legal fees to the prevailing party.

4. Any individual or entity not acting in accordance with this Act may be subject to civil and/or criminal liability.

ARTICLE 12. MISCELLANEOUS PROVISIONS

SECTION 1201. LIMITATION OF MEDICAL PROFESSIONAL LIABILITY

1. Licensed Providers rendering services in compliance with practice and ethical guidelines (contemporaneous to the time of alleged breach of the standard of care) or applicable State or federal regulations or statutes are presumed to have rendered care within accepted standards of care.

SECTION 1202. SEVERABILITY

The invalidation of any part of this legislation by a court of competent jurisdiction shall not result in the invalidation of any other part.

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Introduction & Summary

This ABA Model Act Governing Assisted Reproductive Technology (“2018 Model Act”) was developed by the American Bar Association Section of Family Law to replace the ABA Model Act Governing Assisted Reproductive Technology (2008) (“2008 Model Act”).

Significant social, legal, and medical advancements require modernization of the provisions of the 2008 Model Act. Many changes in the form, makeup, and reality of modern families affect how we form parental relationships and impose support obligations. Advances in medicine continue to expand the options for and genetic nuances of intended parents and their resulting children. To keep up with the modern realities of assisted reproductive technology and the modern realities of how families are formed, the Model Act must be updated as well.

The Section of Family Law circulated the substantive draft documents to the following ABA entities, who were also invited to take part in a working group session for review and additional feedback: Section of Business Law; Section of Civil Rights and Social Justice; Section of Health Law; Section of International Law; Section of Litigation, Real Property, Trust and Estate Law; Section of Science and Technology Law; the Solo, Small Firm and General Practice Division; Section of Tort, Trial and Insurance Practice; and the Young Lawyers Division.

That there is a need for such uniform legislation is expressed clearly in an appellate decision involving a dispute about parentage:

We join the chorus of judicial voices pleading for legislative attention to the increasing number of complex legal issues spawned by recent advances in the field of assisted reproduction. Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some over-all legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions.” In re Marriage of Buzzanca, 61 Cal.App.4th 1410, 1428-29, 72 Cal. Rptr. 280 (Cal.App. 1998).

Background

The 2008 Model Act provided a framework to resolve contemporary controversies over parentage via assisted reproduction, a framework to resolve controversies yet to come but that were envisioned by the advancement in assisted reproductive technology, and a framework to guide the expansion of ways by which families are formed. See

Report

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We join the chorus of judicial voices pleading for legislative attention to the increasing number of complex legal issues spawned by recent advances in the field of assisted reproduction. Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some over-all legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions.” In re Marriage of Buzzanca, 61 Cal.App.4th 1410, 1428-29, 72 Cal. Rptr. 280 (Cal.App. 1998).

Background

The 2008 Model Act provided a framework to resolve contemporary controversies over parentage via assisted reproduction, a framework to resolve controversies yet to come but that were envisioned by the advancement in assisted reproductive technology, and a framework to guide the expansion of ways by which families are formed. See
However, in 2015, the Supreme Court ruled in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), that marriage is a fundamental right guaranteed to same-sex couples by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. This advancement of marital rights for same-sex couples in and of itself dictates that the 2008 Model Act be modernized to remove gender- and sexual-orientation-based references. Courts around the country have already begun to expand the definition of parentage in light of Obergefell. Accordingly, the provisions of the 2008 Model Act must be replaced with gender-neutral definitions and language throughout to ensure equal treatment of those children born through assisted reproduction to same-sex couples.

Additionally, the 2008 Model Act sections dealing with parentage were intended, as much as possible, to be consistent with and to track the corresponding provisions of the Uniform Parentage Act (“UPA”)1. The UPA addresses a wide variety of parentage issues, including parentage via assisted reproduction. However, the UPA as amended in 2002 was never widely adopted; only two of the eleven states that adopted the 2002 UPA to date adopted the Article 8 provisions governing surrogacy, and five of those eleven states enacted alternative regulatory schemes for surrogacy that are not based on the UPA. Likewise, since 2008, several other states have enacted surrogacy legislation, which borrowed only minimally from the UPA and the 2008 Model Act. This suggests that the substance of both the UPA and 2008 Model Act are not necessarily a preferred method of regulating surrogacy arrangements and that those provisions should be updated to make them more consistent with current surrogacy practice.

Finally, according to the last success rate updates issued by the Centers for Disease Control and Prevention on February 24, 2016, 1.6 percent of all infants born in the United States each year are conceived using assisted reproductive technology (ART). Thus, it is important to replace the 2008 Model Act to address the issue of the resulting children’s right to access information about their gamete (sperm or egg) donor.

1 The Uniform Parentage Act is a legislative act originally promulgated in 1973 by the National Conference of Commissioners of Uniform State Laws (now known as the Uniform Law Commission). It has since been amended and the most recent changes are reflected in the 2002 version of the Uniform Parentage Act; however, a 2017 version was approved by the Uniform Law Commission and is submitted for approval by the ABA House of Delegates in February 2018. The 2018 Model Act generally tracks with the new version of the UPA.

Major Overhaul to the 2008 Model Act Provided by 2018 Model Act

With this background in mind, the major revisions to the 2008 Act are as follows:

1. 2018 Model Act includes new definitions and gender/sexual orientation neutral language throughout the Act – New defined terms have been added to the 2018 Model Act and definitions have been updated throughout to allow for gender-neutral terminology. These updates leave behind the outdated notion that families

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are created only by two, heterosexual parents, and render the Act equally applicable to children of all individuals building families through ART.


4. **2018 Model Act Adds Parental Establishment Provisions via Traditional/Generic Surrogacy Which Were Not Addressed in the 2008 Act** - The 2018 Model Act substitutes “genetic surrogate” (a surrogate who contributes her own eggs in a surrogacy arrangement) for the more commonly used but vague term “traditional surrogate.” Addressing parentage through genetic surrogacy for the first time, the 2018 Model Act requires a judicial pre-approval process for genetic surrogacy along with a final, post-birth order confirming parentage assuming all parties are still in agreement. If agreement between the parties is lacking, or compliance with the Act is lacking, the 2018 Model Act requires parentage to be determined in accordance with existing parentage presumptions and procedures under applicable state law. Further, the provisions of the 2018 Model Act provide intended parents a right to reimbursement and/or damages if a surrogate breaches the surrogacy agreement.

5. **2018 Model Act Includes Baseline Best Practice and Eligibility Requirements for all Surrogacy** - The 2018 Model Act also includes best-practice baseline requirements for both types of surrogacy in regard to eligibility for surrogates and intended parents as well as establish foundational requirements that must be present in written surrogacy agreements.

**Conclusion**

The 2018 Model Act seeks to bring current parentage law up to speed with social, legal, and medical advancements and is a necessary step in the right direction in preparing for the future of parentage law. Note, as society and medicine continue to advance, the resulting Model Act is unlikely to be the last iteration.

Respectfully submitted,
Roberta S. Batley, Chair
Section of Family Law
August 2018
1. **Summary of Resolution(s).** The Resolution adopts the Model Act Governing Assisted Reproductive Technology dated August 2018 and urges state, territorial, and tribal governments to enact the 2018 Model Act.

2. **Approval by Submitting Entity.** The ABA Section of Family Law approved submission of this Resolution on April 19, 2018.

3. **Has this or a similar resolution been submitted to the House or Board previously?** Yes, this Resolution was previously submitted for the 2018 Midyear Meeting and was subsequently withdrawn.

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”). See 2008M107. Social, legal, and medical advancements in the area of assisted reproductive technologies (“ART”) require modernization of the 2008 Model Act. These include making the language neutral as to gender- and sexual-orientation to insure equal treatment of those children born through assisted reproduction to same-sex couples. Second, the 2008 Model Act aimed to be consistent with and to track the corresponding provisions of the Uniform Parentage Act (“UPA”) (2000), as amended in 2002 (“2002 UPA”), and as the 2002 UPA provisions regulating surrogacy arrangements and ART-parentage have recently been updated for consistency with current practice, so too have the Model Act provisions. Finally, the proposed revisions address the issue of the resulting children’s right to access information about their gamete (sperm or egg) donor. This 2018 Model Act addresses those issues and is intended to replace the 2008 Model Act.

5. **Status of Legislation.** If applicable. Not Applicable.

6. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** If adopted, the Family Law Section, with the assistance of its Assisted Reproductive Technologies Committee, intends to submit the 2018 Model Act to state, territorial, and tribal governments as a model on which to enact their own assisted reproductive technology legislation.

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

10. Referrals. The Section of Family Law circulated the substantive draft documents to the following ABA entities, who were also invited to take part in a Working Group sessions in June 2017 and February, March and April of 2018:

- Section of Business Law
- Section of Civil Rights and Social Justice
- Commission on Sexual Orientation and Gender Identity
- Section of Health Law
- Section of International Law
- Section of Litigation
- Section of Real Property, Trust and Estate Law
- Section of Science and Technology Law
- Solo, Small Firm and General Practice Division
- Section of Tort, Trial and Insurance Practice
- Young Lawyers Division

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

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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.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution
The Resolution adopts the Model Act Governing Assisted Reproductive Technology dated August 2018 and urges state, territorial, and tribal governments to enact the 2018 Model Act.

2. Summary of the Issue that the Resolution Addresses
The Section of Family proposes the Model Act Governing Assisted Reproductive Technology [2018] to replace the Model Act Governing Assisted Reproductive Technology [2008] previously approved by the House of Delegates. Social, legal, and medical advancements in the area of assisted reproductive technologies (“ART”) require modernization of the 2008 Model Act. These include making the language neutral as to gender- and sexual-orientation to insure equal treatment of those children born through assisted reproduction to same-sex couples. Second, the 2008 Model Act aimed to be consistent with and to track the corresponding provisions of the Uniform Parentage Act (“UPA”) (2000), as amended in 2002, and the 2002 UPA provisions regulating surrogacy arrangements and ART-parentage have recently been updated for consistency with current practice. Finally, the proposed revisions address the issue of the resulting children’s right to access information about their gamete (sperm or egg) donor.

3. Please Explain How the Proposed Policy Position will address the issue
The Model Act Governing Assisted Reproductive Technology [2018] includes new defined terms and updated definitions throughout to allow for gender-neutral terminology, updates provisions regulating surrogacy arrangements and ART-parentage for consistency with current practice and addresses children’s right to access information about their gamete (sperm or egg) donor. The Model Act [2018] brings current parentage law up to speed with social, legal, and medical advancements and is a necessary step in the right direction in preparing for the future of parentage law.

4. Summary of Minority Views
Concerns raised by the Sections of Health Law, Science and Technology and Real Property, Trusts and Estates were addressed in substantive working group meetings. The Section of Science and Technology is now a co-sponsor, whereas the Sections of Health Law and Real Property, Trusts and Estates have voted to support and/or not oppose the Resolution. Otherwise, the sponsors are aware of no other minority views, opposition or concerns with the Resolution.

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RESOLVED, That the American Bar Association adopts the ABA Model Impairment Policy for Legal Employers ("Model Policy") dated August 2018; and

FURTHER RESOLVED, That the American Bar Association urges legal employers to adopt the Model Policy.
MODEL IMPAIRMENT POLICY FOR LEGAL EMPLOYERS
(August 2018)

We recognize that well-being is essential to a lawyer’s duty of competence, and that impairment is antithetical to both competence and the quality of service expected by our clients. Unfortunately, it is well documented that the legal profession experiences impairment at disproportionately higher rates due to substance use and other mental health disorders. This Legal Employer is committed to the well-being of its personnel, as well as to the prevention of impairments and to assisting our staff in obtaining treatment when needed. Impairment of an individual, due to substance use or other mental health disorder, including a physical illness or condition that would adversely affect cognitive, motor or perceptive skills, adversely affects not only the individual’s well-being, but also the Legal Employer’s ability to serve our clients capably and responsibly.

The goals of this Policy are: (1) early identification of impairment and proper intervention to assist with preventing, mitigating, or treating the impairment; and (2) preventing our professional standards and the quality of our work for our clients from being compromised by any Legal Employer personnel’s impairment. This Policy is intended to demonstrate compliance with those professional regulations which require legal employers to establish internal policies and procedures ensuring that all lawyers (including those who are impaired) conform to the jurisdiction’s applicable Rules of Professional Conduct (“RPC”), as well as state or federal rules, regulations or statutes.

I. Implementation

This Policy applies to all legal professionals, including, but not limited to, partners, managing attorneys, owners, shareholders, associates, staff attorneys, paralegals, administrators, and legal assistants, whether full-time, part-time, contract or temporary. This Policy will be publicized in the workplace and placed in the legal employers’ personnel handbook. A contact person, such as a managing partner, human resources director, or other designated person, will be responsible for implementing the Policy, but will not undertake/oversee counseling or treatment. The contact person should notify legal professionals of the availability of lawyer assistance programs which can refer impaired persons for assessment, counseling, treatment and other supportive services.

II. Definition of Impairment

For purposes of this Policy, the Legal Employer considers “impairment” to be a condition that materially and adversely affects a person’s judgment, memory, or reactions, or otherwise interferes with work performance and the rendering of legal services to our clients. Unfortunately, it is well documented that the legal profession experiences impairment at disproportionately higher rates due to substance use and other mental health disorders. This Legal Employer is committed to the well-being of its personnel, as well as to the prevention of impairments and to assisting our staff in obtaining treatment when needed. Impairment of an individual, due to substance use or other mental health disorder, including a physical illness or condition that would adversely affect cognitive, motor or perceptive skills, adversely affects not only the individual’s well-being, but also the Legal Employer’s ability to serve our clients capably and responsibly.

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1 The term “legal employer” is not limited to a traditional law firm setting, use of “legal employer” in this instance and throughout the Policy is intended to apply to any organization that employs lawyers, and may be substituted with the appropriate legal employer entity/designation, e.g., a corporate legal department, governmental or municipal agency, etc.

2 See https://www.samhsa.gov/disorders for descriptions of mental and substance use disorders.

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services in a manner consistent with the Legal Employer’s standards and the RPC. The diagnosis of an illness does not equate with impairment for purposes of this Policy. Illness is the existence of a physical or mental disease, while impairment is a functional classification that implies inability (perhaps resulting from a physical or mental disorder) to render services with reasonable skill and safety. Impairment may be caused by, but not limited to, the use of alcohol or drugs (prescribed or non-prescribed), a mental health disorder, or a physical illness or condition that would adversely affect cognitive, motor or perceptive skills. Determinations about impairment will be made carefully by the firm’s Executive Committee or those most qualified to evaluate impairment as designated by the Legal Employer, such as the Legal Employer’s Employee Assistance Program, following a thorough investigation and based on objective information. The privacy rights of all involved will be respected.

III. Professional Conduct Requirements and Illegal Activities

While this Policy emphasizes treatment of impaired personnel, it is not intended to condone or excuse illegal activities and/or unprofessional behavior. The Legal Employer expects all personnel to maintain a high level of competence and professionalism, appropriate to their position. This Policy is in effect during times and at places where personnel are in a position to be regarded or identified as representing the Legal Employer, such as traveling on business or participating in community, organizational, or professional meetings and affairs.

Legal Employer personnel who use, possess, distribute, sell (or attempt to sell), transfer, or purchase any illegal substance or controlled substance for which they do not have a physician’s prescription while at work or while performing in a work-related capacity may be subjected to internal disciplinary action, up to and including termination, and/or civil penalties and criminal penalties if appropriate. In the event of a criminal law or professional liability violation, the Legal Employer, in its sole discretion, may cooperate with courts and disciplinary agencies in the disposition of proceedings by affording treatment to the violator under the impairment procedures of this Policy, or under procedures established by the court or agency.

IV. Duty to Report

Lawyers shall not practice law or otherwise render legal services while impaired, and staff members of legal employers shall not assist in providing legal services while impaired. Legal Employer personnel shall not help a colleague conceal his or her impairment, including by knowingly assisting an impaired colleague in providing legal services.

A. Legal Employer personnel who:

1. believe they are themselves impaired or at risk of becoming impaired, or
2. reasonably believe that another Legal Employer lawyer or staff member may be impaired, shall report their concerns to at least one of the

services in a manner consistent with the Legal Employer’s standards and the RPC. The diagnosis of an illness does not equate with impairment for purposes of this Policy. Illness is the existence of a physical or mental disease, while impairment is a functional classification that implies inability (perhaps resulting from a physical or mental disorder) to render services with reasonable skill and safety. Impairment may be caused by, but not limited to, the use of alcohol or drugs (prescribed or non-prescribed), a mental health disorder, or a physical illness or condition that would adversely affect cognitive, motor or perceptive skills. Determinations about impairment will be made carefully by the firm’s Executive Committee or those most qualified to evaluate impairment as designated by the Legal Employer, such as the Legal Employer’s Employee Assistance Program, following a thorough investigation and based on objective information. The privacy rights of all involved will be respected.

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Legal Employer personnel who use, possess, distribute, sell (or attempt to sell), transfer, or purchase any illegal substance or controlled substance for which they do not have a physician’s prescription while at work or while performing in a work-related capacity may be subjected to internal disciplinary action, up to and including termination, and/or civil penalties and criminal penalties if appropriate. In the event of a criminal law or professional liability violation, the Legal Employer, in its sole discretion, may cooperate with courts and disciplinary agencies in the disposition of proceedings by affording treatment to the violator under the impairment procedures of this Policy, or under procedures established by the court or agency.

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The Legal Employer should include the name and phone number of the lawyer assistance program (LAP) in each state in which it operates. Most LAPs provide free consultations, assessments, brief counseling and education, peer support, intervention, monitoring and referrals. A directory of LAPs may be found at: https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state.html.
V. Confidentiality

The Legal Employer will treat all communications as confidential to the extent consistent with the Legal Employer’s duties to protect clients, as well as to comply with the RPC, state or federal rule, regulation or statute. All protected health information will be handled in accordance with state and federal laws. Communications include those by and between the potentially impaired lawyer and members of the Legal Employer assigned with responsibilities to investigate and assist, as well as any member of the Legal Employer who reports concerns regarding the potential impairment of another.

Please be advised that while the Legal Employer recognizes confidentiality is important for the successful implementation and operation of this Policy, certain matters may not remain confidential (e.g., a threat to harm yourself or others, future criminal conduct, child abuse, or other legal reporting obligations), but reasonable good-faith attempts will be made to keep personal issues confidential.

A. Leave of Absence: The Legal Employer will permit an impaired individual to use accrued paid leave time for treatment, and will provide accommodations upon a return to work as permitted under the Legal Employer’s leave policies and as required under state and federal law.

B. Referral and Treatment: The Legal Employer will make concerted efforts to assist the impaired individual in obtaining appropriate medical care and treatment. The state’s lawyer assistance program may be consulted for assistance with referrals, evaluations and/or monitoring of lawyers.

C. Restriction of Work Duties: The Legal Employer may restrict the impaired individual by removal from client or other work matters, supervision of work attempts will be made to keep personal issues confidential.

VI. Prohibition Against Retaliation or Discrimination

A report made in good faith under this Policy, and good-faith participation in the investigation of any report, will not result in adverse action against any reporting or participating person. Any concern about retaliation must be reported immediately to one of the individuals listed above in Section IV.A. The Legal Employer will investigate any report of retaliation and take such action as may be appropriate, including disciplinary action, against anyone found to have retaliated against a person for reporting a possible impairment or participating in the investigation of a report.

VII. Procedures Upon Determination of Impairment

The Legal Employer seeks early identification of impairment issues of its personnel in order to provide the impaired individual with qualified treatment services as soon as possible to facilitate that person’s recovery. At the same time, the Legal Employer will take such steps as may be necessary to protect the interests of its clients and to comply with the RPC and any state or federal rule, regulation or statute.

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C. Restriction of Work Duties: The Legal Employer may restrict the impaired individual by removal from client or other work matters, supervision of work
activities, or any other reasonable restriction of activities on client matters deemed necessary to protect client interests and comply with the RPC.  

D. Review of Lawyer’s Activity: After determining that a lawyer is, or has been, suffering from an impairment, the Legal Employer will determine if a review of all matters recently handled by the lawyer is warranted in order to take remedial action on client matters. This review may include: review of client files, the lawyer's time and billing records, electronic communications, telephone records, and interviews with others in the Legal Employer with whom the lawyer worked.

E. Remedial Action: The Legal Employer shall immediately take any remedial action on client matters deemed necessary to mitigate any violation, or potential violation, of the RPC or other adverse consequences arising as a result of the individual’s lawyer’s impairment. [See state version of Model Rule 5.1(c).] Disclosure to the client may be required and will be done in compliance with the RPC.

F. Reporting to Disciplinary Authorities: A report will be made to the appropriate professional disciplinary authorities as required by state or federal rule, regulation or statute. [See state version of Model Rule 8.3, ABA Formal Opinion 03-431; ABA Formal Opinion 03-429].

G. Conditional Employment: Continued employment with the Legal Employer, unless otherwise required by the Family and Medical Leave Act or the Americans with Disabilities Act, may be conditioned upon:

1. Taking a leave of absence;
2. Execution of a Return to Work Agreement (see Appendix A);
3. Evaluation by a healthcare professional approved by the Legal Employer;
4. Commitment to a treatment plan, if recommended by the healthcare professional;
5. Periodic alcohol or drug testing resulting in consistent negative results;
6. Ongoing participation in peer support recovery programs;
7. Continuing therapy or medication management;
8. Monitoring by a lawyer assistance program or other professional;
9. Disclosure of evaluation results and verification of participation in appropriate treatment and support programs; and/or
10. Any other condition deemed appropriate by the Legal Employer.

Cooperation in all such matters is required, and failure to cooperate may result in Legal Employer discipline, up to and including possible termination.

H. Termination: Personnel who fail or refuse to avail themselves of the opportunity to seek and follow through on treatment of impairment will be subject to internal discipline, up to and including termination.
VIII. Consequences of Policy Violations

Any person, including any staff or lawyer, who acts contrary to this Policy, or any other Legal Employer policy, or violates any standards hereby established, will be subject to disciplinary action up to and including termination. The Legal Employer may, however, in its discretion, offer personnel the opportunity to participate in a counseling, treatment or rehabilitation program in lieu of such discipline.

IX. Other Laws

This Policy is in no way intended to interfere with the Legal Employer’s obligations to provide reasonable accommodations to those who are disabled under the Americans with Disabilities Act. Please see the Legal Employer’s EEO and Reasonable Accommodation policies for further information.
The American Bar Association has been instrumental in developing recent research examining aspects of impairment among law students and attorneys. This research has quantified an alarming rate of problematic alcohol/substance use and mental health impairments, coupled with deficient help-seeking behaviors in the legal profession. For example, the research indicates that attorneys engage in problematic alcohol use at nearly twice the level of the general population and have higher rates of depression and anxiety throughout their legal careers. Complicating matters, attorneys are reluctant to seek help. They are concerned that available measures are not sufficiently private and confidential, are worried that others will learn of their circumstances, and that any indication of an issue will detrimentally impact their career or position in the legal employer setting.

In 2016, these studies were a catalyst for a coalition of entities within and outside of the ABA to form the National Task Force on Lawyer Well-Being. After analyzing the data and seeking input from numerous sources, the Task Force issued a report in August 2017, which presented a series of recommendations directed at a variety of stakeholders within the justice system, and more importantly, for the purpose of this report, legal employers and lawyers’ professional liability carriers. Both the Conference of U.S. Chief Justices3 (“CCJ”) and the American Bar Association4 have passed resolutions recommending further consideration of the Task Force recommendations.

To further examine these recommendations, in September 2017, American Bar Association President, Hilarie Bass, sought approval for the creation of the Working Group to Advance Well-Being in the Legal Profession (“the Working Group”), to study certain Task Force recommendations as related to law firms and legal employers, and to develop model policies and guidelines for well-being and impairment in this setting. As part of this effort, on April 25, 2018, law firm stakeholders such as law firm managing partners, Executive Committee members, senior risk managers, other law firm leaders, and the equivalent to Directors or above at insurance brokers, came together for a National Workshop in Washington, D.C. The purpose of the interactive Workshop was to create practical and workable law firm policies to reinforce lawyer well-being as a core concern.

Concerns Among American Attorneys

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3 See CCJ Resolution 6. The Resolution may be viewed using the following link: https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lis_colap_conference_of_chief_judges_resolution_6.authcheckdam.pdf.


component of the ethical obligations of competence and diligence as well as professionalism, and to address impairment issues in the law firm setting. Using a collaborative process, participants, including subject matter experts, such as members of lawyer assistance programs, generated ideas, innovations, and tools to develop this national model. Based on all the data and research gathered, the Working Group drafted the Model Impairment Policy for Legal Employers ("the Policy").

The foundation of this Policy is the recognition that well-being is essential to an attorney’s duty of competence, and that impairment is antithetical to both the competence and quality service expected by the clients of the legal employer. To support this duty, legal employers need to demonstrate a commitment to the well-being of their personnel, to the prevention of impairments, and to assisting their employees in obtaining treatment when needed. Impairment of a legal employee, due to substance use or other mental health disorder⁵, including cognitive impairment or dementia, adversely affects not only the individual’s well-being, but also the legal employer’s ability to serve clients capably and responsibly. This Policy deals directly with the impairment of a legal employee. Impairment is a sub-set of the overall well-being of a legal employee, and this Policy is not meant to encompass the panoply of all well-being initiatives that can be employed in the legal employer setting.

Recognizing that law firms, or legal entities that employ multiple practicing attorneys and other staff, are a broad and sizeable group with considerable diversity, this Policy applies fairly universally. However, the policy may need to be tailored to address the realities particular to each legal employer setting. We also recognize that the ABA adopted a Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines. See 1990AM118. The current Policy reinforces, but does not duplicate, the 1990 policy. The 1990 policy primarily focused on “substance use/abuse and dependence,” terminology that is antiquated and no longer used. In fact, in the 2013 edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), the American Psychiatric Association updated the clinical diagnoses to “alcohol use disorder” and “substance use disorder” which may be described as mild, moderate, or severe. The prior clinical diagnoses of “substance abuse” and “substance dependence” were eliminated. Further, the 1990 Policy did not incorporate the current rates of mental health issues seen in the legal profession, and is not reflective of the current resources available to legal professionals in the treatment of problematic substance use and/or mental health disorders. The over-arching goals of the Policy are: (1) early identification of impairment and proper intervention to assist with preventing, mitigating, or treating the impairment; and (2) preventing professional standards and the quality of the work for clients from being compromised by the impairment of any legal personnel. The Policy is intended to demonstrate compliance with those professional regulations which require legal employers to establish internal policies and procedures ensuring that all lawyers and (including those impaired) conform to the jurisdiction’s applicable Rules of Professional Conduct (“RPC”), as well as state or federal rules, regulations or statutes.

⁵ See https://www.samhsa.gov/disorders for descriptions of mental and substance use disorders.
Conclusion

Abraham Lincoln advised that “the best way to predict the future is to create it.” Right now, the leaders of our legal profession stand at a crossroads and must take action. To maintain the status quo is not an option. We can create our future. Too many in our profession are too exhausted, too impaired, or too disengaged to develop into their best selves. Many find themselves in a profession drained of civility and compassion and plagued by chronic stress, poor self-care, and high rates of depression and alcohol problems. The result is that the legal profession is not living up to its full potential as an institution in which attorneys can thrive, best serve their clients, and contribute to a better society. The research demonstrates the need, and the National Task Force on Lawyer Well-Being and key legal employer stakeholders have identified the solutions, one of which is a Model Impairment Policy for Legal Employers. We respectfully ask that the ABA adopt this Model Impairment Policy for Legal Employers, advance the path to lawyers’ well-being, and assure a legal system that deserves the public’s confidence.

Respectfully submitted,

Terry Harrell
Chair, The ABA Working Group to Advance Well-Being in the Legal Profession
August 2018
1. Summary of Resolution(s). The Resolution seeks to have the American Bar Association adopt the ABA Model Impairment Policy for Legal Employers ("Model Policy") dated August 2018, and that the American Bar Association urges legal employers to adopt the Model Policy.


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

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

   At the 1990 Annual Meeting, the House of Delegates passed the Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines, which remains active policy. See 1990AM118. However, that 1990 policy primarily focused on "substance use and dependence," terminology that is antiquated and no longer used, it did not incorporate the current rates of mental health issues seen in the legal profession, and is not reflective of the current resources available to legal professionals in the treatment of problematic substance use and/or mental health disorders.

   The current Policy reinforces, but does not duplicate, the current policy.

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 Working Group to Advance Well-Being in the Legal Profession was established by President Bass to, in part, advance the recommendations of the National Task Force on Lawyer Well-Being and to develop model policies on well-being and impairment in the legal employer setting. Therefore, efforts to implement this policy will come from ABA leadership and be advanced in collaboration with the participating entities that comprise the National Task Force.
8. Cost to the Association. (Both direct and indirect costs) None

9. Disclosure of Interest. (If applicable) N/A

10. Referrals. Prior to filing, the proposed resolution has been circulated to:
    Commission on Lawyer Assistance Programs
    National Organization of Bar Counsel

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

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12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

   Terry L. Harrell
   Executive Director
   Indiana Judges and Lawyers Assistance Program
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   Indianapolis, Indiana 46204
   317/833.0370
   terry.harrell@courts.in.gov
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution seeks to have the American Bar Association adopt the ABA Model Impairment Policy for Legal Employers (“Model Policy”) dated August 2018, and that the American Bar Association urges legal employers to adopt the Model Policy.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the crisis of lawyer well-being that has been documented by research conducted and data compiled by the ABA Commission on Lawyer Assistance Programs and the ABA Working Group to Advance Well-Being in the Legal Profession. The research demonstrates that alcohol use, substance use and mental health disorders among lawyers far exceed other professions and populations. These circumstances undermine the ability of the legal profession to assure the public that the system of American justice is competent, fair and just.

The foundation of this Policy is the recognition that well-being is essential to an attorney’s duty of competence, and that impairment is antithetical to both competence and quality service expected for the clients of legal employers. To support this duty, legal employers need to demonstrate a commitment to the well-being of their personnel, to the prevention of impairments, and to assisting their employees in obtaining treatment when needed. Impairment of a legal employee, due to substance use or other mental health disorder, including cognitive impairment or dementia, adversely affects not only the individual’s well-being, but also the legal employer’s ability to serve clients capably and responsibly.

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

Implementation of the Policy will provide a mechanism within the legal employer setting to identify impairment and craft proper intervention to assist with preventing, mitigating, or treating the impairment; and (2) prevent professional standards and the quality of the work for clients from being compromised by any legal employer personnel’s impairment. The Policy is intended to demonstrate compliance with those professional regulations which require legal employers to establish internal policies and procedures ensuring that all lawyers (including those impaired) conform to the jurisdiction’s applicable Rules of Professional Conduct (“RPC”), as well as state or federal rules, regulations or statutes.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA
Which Have Been Identified

None.

EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution seeks to have the American Bar Association adopt the ABA Model Impairment Policy for Legal Employers (“Model Policy”) dated August 2018, and that the American Bar Association urges legal employers to adopt the Model Policy.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the crisis of lawyer well-being that has been documented by research conducted and data compiled by the ABA Commission on Lawyer Assistance Programs and the ABA Working Group to Advance Well-Being in the Legal Profession. The research demonstrates that alcohol use, substance use and mental health disorders among lawyers far exceed other professions and populations. These circumstances undermine the ability of the legal profession to assure the public that the system of American justice is competent, fair and just.

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4. Summary of Minority Views or Opposition Internal and/or External to the ABA
Which Have Been Identified

None.
RESOLVED, That the American Bar Association urges Congress to enact legislation that:

1. implements the "Law Enforcement Equipment Working Group Recommendations Pursuant to Executive Order 13688" dated May 2015;
2. places strict limitations on the authority of federal agencies to provide State, local, and tribal law enforcement agencies (LEAs) with excess military equipment, or funds to purchase military equipment, in order to maximize the safety and security of law enforcement officers and the communities they serve;
3. establishes a prohibited equipment list identifying categories of military equipment that LEAs would not be able to acquire from any federal agency or using any federal funds;
4. harmonizes any federal programs involving the transfer of excess military equipment, or funds to purchase military equipment, to LEAs so that they have consistent and transparent policies;
5. mandates that LEAs that are eligible to receive military equipment, or funding for such equipment, from any federal agency receive necessary training, and have policies in place that address appropriate use and employment of military equipment and the protection of civil rights and civil liberties in the use of such equipment; and
6. expands the federal government’s monitoring and compliance capabilities to ensure that LEAs acquiring military equipment, or funding for such equipment, from any federal agency comply with the above training and policy requirements.
For decades, the Federal Government has provided, and continues to provide, State, local, and tribal law enforcement agencies (LEAs) with military equipment, including firearms, ammunition, and tactical vehicles. LEAs may acquire equipment from the Federal Government from a variety of federal programs, including excess accumulations from the U.S. Department of Defense (DOD) (commonly referred to as the “1033 Program”); the U.S. General Services Administration’s (GSA) Federal Surplus Personal Property Donation Program, or funding provided by the U.S. Department of Justice (DOJ), U.S. Department of Homeland Security (DHS) or U.S. Department of the Treasury (Treasury).

I. Neighborhoods Are Not War Zones, and Citizens Are Not Wartime Enemies

“Over the last several years, however, community members, LEA leaders, civil rights advocates, and elected leaders have voiced concerns about what has been described as the ‘militarization’ of law enforcement due to the types of equipment at times deployed by LEAs and the nature of those deployments. The most widely publicized example of this phenomenon occurred during the widespread protests in Ferguson, Missouri, in August 2014. At times, the law enforcement response to those protests was characterized as a “military-style” operation, as evidenced by videos and photographs that showed law enforcement officers atop armored vehicles, wearing uniforms often associated with the military, and holding military-type weapons. Even before the events in Ferguson, however, civil rights organizations conducted significant research on the perceived harms of “militarization” of civilian law enforcement agencies in the United States and advocated for systemic change.”

In June 2014, the ACLU released a report, “War Comes Home, The Excess Militarization of American Policing”. According to the report, LEAs, and heavily armed Special Weapons and Tactics (SWAT) teams in particular, routinely use military weapons provided by the federal government, including Mine Resistant Ambush Protected vehicles, battering rams and flashbang grenades. SWAT teams force their way into people’s homes in the middle of the night, often deploying explosive devices such as flashbang grenades to temporarily blind and deafen residents, to serve a search warrant on the suspicion that someone may be in possession of a small amount of drugs. The purportedly non-lethal flashbang grenades has set homes on fire, induced heart attacks, and resulted in civilian deaths. “In 2010, 7-year-old Aiyana Stanley-Jones was killed when, just after midnight, a SWAT team threw a flashbang grenade through the window into the living room where she was asleep. The flashbang burned her blanket and a member of the SWAT team burst into the house, firing a single shot, which killed her.”

3 See id.
The report concludes: “American policing has become unnecessarily and dangerously militarized, in large part through federal programs that have armed state and local law enforcement agencies with the weapons and tactics of war, with almost no public discussion or oversight. Using these federal funds, state and local law enforcement agencies have amassed military arsenals purportedly to wage the failed War on Drugs, the battlegrounds of which have disproportionately been in communities of color. But these arsenals are by no means free of cost for communities. Instead, the use of hyper aggressive tools and tactics results in tragedy for civilians and police officers, escalates the risk of needless violence, destroys property, and undermines individual liberties.”

II. Military Surplus Records Show School Districts Around the Country Received Advanced Military Equipment From the Federal 1033 Program.

In September 2014, the NAACP Legal Defense Fund discovered that grenade launchers, M-16 assault rifles and other weapons intended for military combat had made their way on to K-12 campuses for use by school district police under the 1033 program. The data showed that 22 school districts in Texas, California, Florida, Georgia, Kansas, Michigan, Nevada, and Utah are participating in the 1033 Program, which provides military surplus to local law enforcement organizations. Texas school districts dominated the list of those participating in the 1033 Program, with at least 10 districts reportedly participating. Altogether, these 10 districts had received 64 M-16 rifles, 18 M-14 rifles, 25 automatic pistols, extended magazines, and 4,500 rounds of ammunition. Some of these Texas districts received armored plating, tactical vests, and military vehicles. In California, at least half a dozen school districts reportedly allow campus officers to carry high-powered rifles.4

“We saw in Ferguson how the use of military equipment intensified interactions between community members and police. Those same tensions are playing out in our schools between students of color and school police where implicit bias, broad discretion, and little accountability are resulting in excessive use of force, expulsions and suspensions for minor offenses, and referrals to the juvenile justice system,” said Janel George, Education Policy Counsel for the NAACP Legal Defense Fund. “Adding military weapons will only exacerbate existing tensions and negatively impact students most vulnerable to overly punitive discipline—especially students of color.”5

On September 15, 2014, the NAACP Legal Defense Fund and more than 20 education and civil rights advocacy organizations from across the U.S. called on the federal government to stop the transfer of military weapons to school police through the federal

5 Id.
III. Federal Review of Federal Programs Providing Military Equipment to LEAs

In August 2014, then President Obama ordered a government-wide review of military equipment provided to LEAs. The findings of that Federal Review highlighted a “lack of consistency in how Federal programs are structured, implemented, audited, and informed by conversations with stakeholders.” The Federal Review also identified several areas of focus that could better ensure the appropriate use of Federal programs to maximize the safety and security of law enforcement officers and the communities they serve, including: (1) harmonizing Federal programs so that they have consistent and transparent policies; (2) mandating that LEAs that participate in Federal equipment programs receive necessary training; (3) ensuring that those LEAs have policies in place that address appropriate use and employment of controlled equipment; and (4) requiring that those LEAs also adopt policies addressing protection of civil rights and civil liberties in the use of equipment.

In accordance with the Federal Review, on January 16, 2015, then President Obama issued Executive Order No. 13688, “Federal Support for Local Law Enforcement Equipment Acquisition.” That Executive Order emphasized the need to “ensure that LEAs have proper training regarding the appropriate use of controlled equipment, including training on the protection of civil rights and civil liberties, and are aware of their obligations under Federal nondiscrimination laws when accepting such equipment. To this end, executive departments and agencies (agencies) must better coordinate their efforts to operate and oversee these programs.”

IV. Law Enforcement Equipment Working Group Recommendations Pursuant to Executive Order 13688 dated May 2015

In accordance with Executive Order No. 13688, a federal interagency Law Enforcement Working Group was established, consulted with stakeholders, deliberated, and developed the following recommendations to improve the federal programs providing military equipment and funding to LEAs.


The Prohibited Equipment List identified categories of equipment that LEAs would not be able to acquire via transfer from Federal agencies or purchase using Federally-provided funds.

8 See id., p.6.
funds (e.g., Tracked Armored Vehicles, Bayonets, Grenade Launchers, Large Caliber Weapons and Ammunition).

B. Establishment of Federal Government-wide Controlled Equipment Lists. The Controlled Equipment List identified categories of equipment (e.g., Wheeled Armored or Tactical Vehicles, Specialized Firearms and Ammunition, Explosives and Pyrotechnics, Riot Equipment) that LEAs, other than those solely serving schools with grades ranging from kindergarten through grade 12, would be able to acquire if they provide additional information, certifications, and assurances. While inclusion on these lists would not preclude an LEA from using other funds for such acquisitions, the Working Group’s report urged LEAs to give careful consideration to the appropriateness of acquiring such equipment for their communities.

C. Harmonization of Federal Acquisition Processes. All Federal equipment acquisition programs would require LEAs that apply for controlled equipment to provide mandatory information in their application, including a detailed justification with a clear and persuasive explanation of the need for the controlled equipment, the availability of the requested controlled equipment to LEA in its inventory or through other means, certifications that appropriate protocols and training requirements have been adopted, evidence of the civilian governing body’s review and approval or concurrence of the LEA’s acquisition of the requested controlled equipment, and whether the LEA has been or is in violation of civil rights and other statutes, regulations, or programmatic terms. Ongoing coordination among the various Federal agencies would ensure that a uniform process is in place to assess the adequacy of the justification in each application.

D. Required Protocols and Training for LEAs that Acquire Controlled Equipment. LEAs that acquire controlled equipment through Federal resources would be required to adopt General Policing Standards, including community policing, constitutional policing, and community input and impact principles. LEAs also would be required to adopt Specific Controlled Equipment Standards on the appropriate use, supervision, evaluation, accountability, transparency, and operation of controlled equipment. LEAs must train their personnel on General Policing and Specific Controlled Equipment Standards on an annual basis.

E. Required Information Collection and Retention for Controlled Equipment Use in Significant Incidents. LEAs would be required to collect and retain certain information when the LEA uses controlled equipment in operations or actions that are deemed to be Significant Incidents. LEAs would also be required to collect and retain information when allegations of unlawful or inappropriate police actions involving the use of controlled equipment trigger a Federal compliance review of the LEA. Upon request, the LEA must provide a copy of this information to the Federal agency that supplied the equipment/funds. This information also should be made available to the community the LEA serves in accordance with the LEAs applicable policies and protocols.

B. Establishment of Federal Government-wide Controlled Equipment Lists. The Controlled Equipment List identified categories of equipment (e.g., Wheeled Armored or Tactical Vehicles, Specialized Firearms and Ammunition, Explosives and Pyrotechnics, Riot Equipment) that LEAs, other than those solely serving schools with grades ranging from kindergarten through grade 12, would be able to acquire if they provide additional information, certifications, and assurances. While inclusion on these lists would not preclude an LEA from using other funds for such acquisitions, the Working Group’s report urged LEAs to give careful consideration to the appropriateness of acquiring such equipment for their communities.

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F. Approval for Third-Party Transfers or Sales. LEAs would be required to receive approval from the Federal agency that supplied the funds or equipment before selling or transferring controlled equipment. Third-party LEAs acquiring controlled equipment would be required to provide to the Federal Government the same information, certifications, and assurances that were required of selling/transferring LEAs. Sales or transfers to non-LEAs are restricted to certain types of controlled equipment that do not pose a great risk of danger or harm to the community if acquired by non-LEAs.

G. Increase Federal Government Oversight and Compliance. The Federal Government would expand its monitoring and compliance capabilities to ensure that LEAs acquiring controlled equipment adhere to protocols, training, information collection and retention, and other requirements proposed by the recommendations in this report. Additionally, the Federal Government would create a permanent interagency working group to, among other things, evaluate the Controlled and Prohibited Equipment Lists for additions and deletions, track controlled equipment purchased with Federal resources, develop Government-wide criteria for evaluating applications and conducting compliance reviews, and sharing information on sanctions and violations by LEA applicants. The United States Digital Service would assist Federal agencies in the creation of a database that tracks information about controlled equipment acquired through Federal programs.

H. Status/History
President Obama approved the above recommendations and the Prohibited Equipment List took effect on May 18, 2015, and all other provisions started at the beginning of federal fiscal year 2016.


V. Pending Legislation
Pending before Congress are two bills, HR 1556, introduced on March 16, 2017 and S.1856 introduced on September 25, 2017. Both of these bills seek to limit the authority of the Department of Defense (DOD) to transfer excess military equipment to LEAs, and S.1856 further seeks to limit federal grant programs, which provide LEAs with funds to purchase military equipment.

In September, 2017, a broad coalition of civil liberties, civil and human rights, and government accountability groups sent a joint letter to the Armed Services Committee, the Senate Committee on the Judiciary, the Senate Homeland Security and Governmental Affairs Committee urging a moratorium on the U.S. Department of Defense’s 1033 Program, the largest and most prominent federal program providing LEAs with funds to purchase military equipment.

In September, 2017, a broad coalition of civil liberties, civil and human rights, and government accountability groups sent a joint letter to the Armed Services Committee, the Senate Committee on the Judiciary, the Senate Homeland Security and Governmental Affairs Committee urging a moratorium on the U.S. Department of Defense’s 1033 Program, the largest and most prominent federal program providing LEAs with funds to purchase military equipment.
VI. Conclusion

Since the protections provided by Executive Order No. 13688 are no longer available, there are no restrictions on the types of military equipment that may be provided to LEAs, including school district police. LEAs as well as K-12 school district police may once again receive any military equipment available through the 1033 federal program, including tracked armored vehicles, bayonets, grenade launchers, large caliber weapons and ammunition.

The American Bar Association supports the sensible recommendations of the federal interagency “Law Enforcement Working Group Pursuant to Executive Order 13688 dated May 2015” as summarized above and as fully detailed in the Exhibit A. The American Bar Association further urges Congress to pass legislation that places strict limitations on the authority of federal agencies to provide LEAs with excess military equipment, or funds to purchase military equipment, in order to maximize the safety and security of law enforcement officers and the communities they serve.

It is clear from extensive investigation and research conducted by the various federal agencies and other stakeholders that oversight and training are necessary to ensure that LEAs only receive equipment that is appropriate for community and campus policing, and have proper training regarding the appropriate use of controlled equipment, including training on the protection of civil rights and civil liberties.

Respectfully submitted,

Robert N. Weiner
Chair, Section of Civil Rights and Social Justice
August 2018
1. Summary of Resolution(s). This Resolution urges Congress to enact legislation or regulations that implements the "Law Enforcement Equipment Working Group Recommendations Pursuant to Executive Order 13688" dated May 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? There are no related existing ABA policies.

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


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

9. Disclosure of Interest. (If applicable) There are no known conflicts of interest.

10. Referrals. By copy of this form, the Report with Recommendation will be referred to the following entities:

    Section of Administrative Law and Regulatory Practice
    Section of Business Law
    Infrastructure and Regulated Industries Section
    Section of State and Local Government Law
    Coordinating Committee of Military Lawyers
    Standing Committee on Gun Violence
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution
This Resolution urges Congress to enact legislation or regulations that implements the “Law Enforcement Equipment Working Group Recommendations Pursuant to Executive Order 13688” of dated May 2015.

2. Summary of the Issue that the Resolution Addresses
American policing has become unnecessarily and dangerously militarized, in large part through federal programs that have armed state and local law enforcement agencies [“LEAs”] with the weapons and tactics of war, which this resolution is designed to address.

3. Please Explain How the Proposed Policy Position Will Address the Issue
This Resolution would urge Congress to enact legislation or regulations that implement the “Law Enforcement Equipment Working Group Recommendations Pursuant to Executive Order 13688” dated May 2015.

It is clear from extensive investigation and research conducted by various federal agencies and other stakeholders that oversight and training are necessary to ensure that LEAs receive only equipment that is appropriate for community and campus policing, and have proper training regarding the appropriate use of controlled equipment, including training on the protection of civil rights and civil liberties.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
No minority views or opposition have been identified.
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to adopt and enforce stronger fair lending laws targeted to discrimination in the vehicle sales market;

FURTHER RESOLVED, That the American Bar Association urges Congress to amend the Equal Credit Opportunity Act to require documentation and collection of the applicant’s race or national origin for non-mortgage credit transactions pertaining to vehicle transactions;

FURTHER RESOLVED, That the American Bar Association urges Congress and all state, local, territorial, and tribal legislative bodies and governmental agencies to adopt laws and policies that require a flat percentage fee for dealer compensation, and disclosure of dealer compensation for a vehicle loan;

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to adopt legislation requiring the separate posting of pricing of add-on products by dealers on each vehicle before a consumer negotiates to purchase a vehicle; and

FURTHER RESOLVED, That the American Bar Association encourages state, local, territorial and tribal bar associations to offer programming to educate lawyers and consumers about abusive, deceptive, or fraudulent vehicle sales transaction financing and sales practices.
OVERVIEW
The resolution addresses the highly discriminatory practices and impact to many consumers of color, national origin, and low-income, that arise in the auto lending and sale of auto add-on products. Consumers are burdened with interest-rate markups on loans that have no relation to their credit-risk, and often-relate to prejudices and discriminatory actions. The Resolution also addresses the issue of insufficient data available on credit applicants to identify potential discriminatory impact. Such data is currently collected in the home mortgage market and this resolution would place the one trillion-dollar auto lending market on similar footing. Finally, the resolution addresses the lack of transparency in the auto lending market, which is unacceptable when it represents the third largest consumer debt in America.

BACKGROUND
More than 90% of American households have a vehicle, the auto is the lifeline to the American consumer to securing employment, accessing healthcare, and pursuing educational opportunities. As noted in a recent Consumer Financial Protection Bureau (CFPB) report, today there are almost 100 million auto loans outstanding totaling more than one trillion dollars. Auto loan debt represents the third largest type of consumer debt in America, trailing behind only mortgage and student debt. For consumers who do not own a home, true for many low-income consumers, it can constitute the largest debt they may have to pay back.

The Bureau’s Quarterly Consumer Credit Trends Report, “Growth in Longer-Term Auto Loans”, issued in November 2017, provides that while the rapid increase in automobile loans in the decade is slowly subsiding, an increase in longer-term loans is occurring. These longer-term loans (defined as six or more years) increased from 26 percent of auto loans originated in 2009 to 42 percent of 2017 originations. Also noteworthy is that the credit scores of borrowers taking out longer-term loans is significantly lower than borrowers who take out five-year loans, with six-year loans at 674, which is 39 points lower than five-year loans. Longer-term loans also result in higher loan balances, rising from $20,100 for a five-year loan, compared to $25,300 for a six-year loan. This has resulted in higher cumulative default rates for six-year loans as compared to five-year loans, as noted in trend data for loans originated from 2009 to 2015.

2 Id.
3 Id.
4 Id.
6 Id., page 4.
7 Id., page 5.
8 Id., page 5.
9 Id., page 8.
When you look into the further composition of auto finance lending, the magnitude of touchpoints that impact on low-and moderate-income families is pervasive. The National Consumer Law Center ("NCLC") issued a report in May 2016 on “New Ways to Understand the Impact of Auto Finance on Low-Income Families,” that looks at loan origination as the time when abuses occur or unnecessary costs are incurred. 10 The report reflects that data for 2014 (the most recent time for student debt data at the time of the report), “there were almost three times as many families originating auto finance as borrowers originating student loans, and more than three times the number of auto finance originations as mortgage originations.”11 In 2014, there were almost 28.2 million auto finance originations.12

In analyzing the data, there is a presumption that individuals with lower credit scores are at greatest risk for abusive loans and sale practices. Data on loan origination is not publicly available for mortgage and auto originations based on race or family income. However, consumer credit scores are available and earlier studies by the NCLC reflect a strong correlation with credit scores and applicant’s race, income, educational levels and other characteristics.13

Experian, one of the three major credit reporting agencies, classifies consumer credit scores as prime (best score, includes super prime and prime). Consumers with a prime credit make up the largest contingent of auto loan originations. However, nonprime, subprime and deep subprime, collectively represented 30% of open finance in Q4 2015.14 Thus, the lower credit scores which represent 30% of the open finance market for vehicles and has the greatest risk for vehicle sale and financing transactions is falling disproportionately on persons of color and lower-income consumers.

In comparing total originations of mortgage and auto with Equifax risk score data, another of the three major credit reporting agencies, “those with High-Risk Equifax scores in Q4 2015 originated nearly 25% of auto finance transactions, but just 5% of mortgage transactions.”15 In absolute numbers, there were about 2 million mortgage originations and nearly 6.5 million auto originations during that period.16 Extrapolating the originations to the risk scores, the NCLC report observes that of “struggling consumers with High-Risk scores, more than 1.5 million (1,551,292) bought and financed a car, while just 100, 439 bought a house.”17 In short, struggling consumers are 15 times more likely to be engaged in a vehicle sale and financing transaction than a home mortgage transaction, and

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11 Id., page 5. 
12 Id., page 5. 
13 Id., page 6. 
14 Id., pages 6-7. Credit score categories are based on the Experian Vantage Score 3.0 ranges: Super prime (>781-850; Prime = 681-790; Nonprime = 601-660; Subprime = 501-600; Deep Subprime = 301-500). 
15 Id., page 8. Equifax credit score categories are based on Low-Risk Equifax Risk Score (> or equal to 700); Average-Risk Score (620 < or equal to and < 700); and High-Risk Score (< 620). 
16 Id., page 8. 
17 Id., page 8. 
19 Id., page 5. 
20 Id., page 5. 
21 Id., page 6. 
22 Id., pages 6-7. Credit score categories are based on the Experian Vantage Score 3.0 ranges: Super prime (>781-850; Prime = 681-790; Nonprime = 601-660; Subprime = 501-600; Deep Subprime = 301-500). 
23 Id., page 8. Equifax credit score categories are based on Low-Risk Equifax Risk Score (> or equal to 700); Average-Risk Score (620 < or equal to and < 700); and High-Risk Score (< 620). 
24 Id., page 8. 
25 Id., page 8.
highlights the critical need for protection of low-income consumers from deceptive sale and financing practices.

ISSUES

1. ENFORCEMENT OF DISCRIMINATION LAWS

The American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, sexual orientation, and gender identity and expression. This is evidenced in the Association’s adoption of policies that call upon federal, state and local lawmakers to prohibit such discrimination in housing, as well as in public accommodations, credit, education, and public funding, and in seeking to eliminate such discrimination in all aspects of the legal profession.18 The ABA’s fundamental position condemning such discrimination is based on its underlying commitment to the ideal of equal opportunity and advancement of human rights.19 These two principles united in August 2013, when the ABA adopted a policy to urge governments to “promote the human right to adequate housing for all” and to “prevent infringement of that right.” 20 In furtherance of that right, the Association in August 2017 also urged governments to “enact legislation prohibiting discrimination on the basis of lawful source of income.”21

History of Discrimination in Auto Lending

The Equal Credit Opportunity Act (ECOA) makes it illegal for a “creditor” to discriminate in any aspect of a credit transaction because of race, color, religion, national origin, sex, marital status, age, receipt of income from any public assistance program, or the exercise, in good faith, of a right under the Consumer Credit Protection Act.22 As set forth in the Congressional Report, the ECOA is intended to ensure that “…no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness.”23

Notwithstanding the explicit language of the ECOA, the compelling need for the Association’s full support of enforcement of laws prohibiting discrimination in auto

18 See, e.g., resolutions adopted 8/65 (addressing race, color, creed, national origin); 8/78 (race); 8/72, 2/74, 2/78, 8/74, 8/80, 8/84 (gender); 8/86 (race and gender); 2/72 (sex, religion, race, national origin); 8/77 (“handicap”); 8/77 (condemning hate crimes related to race, religion, sexual orientation, or minority status); 8/89 (urging prohibition of sexual orientation discrimination in employment, housing and public accommodation); 9/91 (urging study and elimination of judicial bias based on race, ethnicity, gender, age, sexual orientation and disability); 2/92 (opposing penalization of schools that prohibit on-campus recruiting by employers discriminating on the basis of sexual orientation); 8/94 (requiring law schools to provide equal educational and employment opportunities regardless of race, color, religion, national origin, sex or sexual orientation status); 8/96 (addressing gender identity and expression).
20 Resolution adopted 8/2013.
lending and sale practices is based on the repeated research studies documenting an extensive history of discrimination in car lending and sale practices, particularly in relation to non-white consumers and low-income consumers.

Yale Law Professor Ian Ayres conducted groundbreaking research in his seminal article *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations* in the Harvard Law Review.24 The 1991 study documented whether testers, employing a uniform negotiating strategy for buying a new car in Chicago dealerships, would receive different treatment by auto retailers on dealer markups for auto loans when buyers differed solely on race or gender.25 The result was black male testers had to pay more than twice the price of white male testers. Compared to white men, White women testers paid more than 40% than white men, and black women testers paid more than three times the markup of white male testers.26

The 1991 study by Professor Ayres, although compelling, was not statistically significant and he therefore followed up the study in 1994. The expanded and retested results were similar in that white male testers were offered lower prices. The one distinction was that, unlike the original study, black male testers were charged higher prices than black female testers.27

A recent investigative report by the National Fair Housing Alliance (NFHA) highlights the early history of discrimination in auto lending and further documents current discriminatory practices.28 It highlights the 2003 study by Vanderbilt University Business Professor Mark A. Cohen, which investigated more than 1.5 million General Motors Acceptance Corporation (“GMAC”) loans made between 1999 and 2003. It was noted that “Black customers were three times as likely as equally qualified White customers to be charged an interest rate markup on their loans financed by GMAC.”29

A separate 2004 abridged report prepared by Dr. Cohen in the *Matter of Terry Willis, Et Al, v. American Honda Finance Corporation (AHFC)*, found that African-American borrowers paid more than twice the subjective mark-up than white borrowers. Dr. Cohen notes that “My analysis in this case, as well as an analysis I have conducted on other auto lenders including GMAC, NMAC and FMCC, provides strong evidence that the

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25 Id at 818.
26 Id at 819.
industry-wide practice of subjective credit pricing results in a disparate impact on minorities.”

The recent investigation conducted by the NFHA during the Fall of 2016 and Spring of 2017 utilized testing, a widely accepted methodology that has been accepted for use in various purposes, to include enforcement, public policy, and compliance monitoring purposes, among others. The use of fair housing testing evidence has been uniformly adopted by the courts, including the U.S. Supreme Court. The testing was conducted at new and used car dealers throughout Eastern Virginia. The findings over eight tests conducted in which non-white testers were always more creditworthy than their white counterparts resulted in five tests where “the Non-White testers received more expensive total overall payment quotes, paying on average $2,662.56 more than the White testers over the course of the loan, despite being more qualified.”

Continued discriminatory treatment in the auto lending and sale practices imperils economic justice and frustrates the human and civil rights of many of our most vulnerable citizens. To root out such practices, the Resolution proposes to enforce the fair lending laws and the auto sale market practices should fully support the active enforcement at the federal level by the Federal Trade Commission (FTC), The Consumer Financial Protection Bureau (CFPB), and the Department of Justice. At the state and local level, vigorous enforcement by state Attorneys General of local lending and consumer protection laws prohibiting discrimination, either individually, or collectively, should be vigorously supported. Enforcement efforts should be addressed to direct and indirect lenders, as well as extended to car dealers, to advance protection to all consumers.

2. AMEND THE EQUAL OPPORTUNITY CREDIT ACT - COLLECTION OF DATA

Under current law, Regulation B, implementing the ECOA, prohibits non-mortgage lenders from asking about or documenting characteristics such as a consumer’s race or national origin. The National Consumer Law Center (NCLC), has noted the irony that in prohibiting non-mortgage lenders from asking about or documenting characteristics it has made it very difficult to determine if discrimination occurs. NCLC, in a 2008 letter to U.S. Congressman Mel Watt noted that “the problem is that without access to data similar in nature and type to that made available through the Home Mortgage Disclosure Act” for mortgage transactions, no one will have an easy time coding an aggregate pool of information sufficient to prove there has been disparate impact discrimination as a

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matters of law under the ECOA. A letter to the U.S. Government Accountability Office has also noted that requiring lenders to collect and report such data could actually assist in stopping discrimination.\textsuperscript{36}

This Regulation B provision frustrates the purpose of the ECOA, which is to "require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to [sex, marital status, race, age, religion, national origin, and age]."\textsuperscript{37} The National Consumer Law Center (NCLC) and other commentators have argued that "if discrimination remains hidden, it will not be possible to end it."\textsuperscript{38} Congress should amend ECOA directly to ensure the collection of data necessary to prevent discrimination. Although some commentators have argued Agency action by the Consumer Financial Protection Bureau (CFPB) to amend Regulation B to require documentation of the customer’s race or national origin for non-mortgage credit transactions is not prohibited by the ECOA and thus can be accomplished by Agency action, Congress should ensure by legislative action that proper collection of data is effectuated that would be consistent with home mortgage credit products today.\textsuperscript{40}

The actions proposed by this Resolution would be consistent with and facilitate furtherance of the Strategic Plan for the CFPB for FY2018-2022.\textsuperscript{41} Goal 2 of the CFPB is to implement and enforce the law consistently to ensure that markets for consumer financial products and services are fair, transparent, and competitive.\textsuperscript{42} It seeks to obtain this goal by achieving the following objectives, of which is Objective 2.1: Protect consumers from unfair, deceptive, or abusive acts and practices and from discrimination.\textsuperscript{43} The strategy to achieve this objective and goal is to "enhance compliance with federal laws intended to ensure fair, equitable and nondiscriminatory access to credit for both individuals and companies and promote fair lending compliance and education."\textsuperscript{44}

Collection of data to identify areas of discrimination will further the strategy, objective and goal of the CFPB in ensuring consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination. The collection of data will provide full transparency and fair lending compliance activities to all consumers.

\textsuperscript{36} National Consumer Law Center letter by Stuart T. Rossman to Congressman Mel Watt, dated July 16, 2008. Available online at \url{https://www.nclc.org/images/pdf/ear_sales/Watt_Regulation_Testimony.pdf}

\textsuperscript{37} U.S. Government Accountability Office, Fair Lending: Race and Gender Data Are Limited for Nonmortgage Lending, GAO-08-698 (June 2008).


\textsuperscript{39} Auto Add-Ons, at 43.

\textsuperscript{40} id. at 43. In the late 1990s The Federal Reserve Board, partly in response to comments by the Department of Justice and the federal financial enforcement agencies, proposed removing the prohibition on seeking information about an applicant’s race, color, religion, national origin, and sex for non-mortgage credit products. 64 Fed. Reg. 44,582, 44, 586 (Aug. 16, 1999).


\textsuperscript{42} id. At 10.

\textsuperscript{43} U.S. Government Accountability Office, Fair Lending: Race and Gender Data Are Limited for Nonmortgage Lending, GAO-08-698 (June 2008).

\textsuperscript{44} id. at 43.


\textsuperscript{46} Auto Add-Ons, at 43.

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\textsuperscript{49} Id. At 10.

\textsuperscript{50} Id. At 10.

\textsuperscript{51} Id. At 10.
3. DISCLOSURE OF DEALER MARK-UP ON LOANS

A common practice in the auto lending market that lacks a great deal of transparency and that has a long history of discriminatory impact is a “dealer markup”, which compensates auto dealers for originating automobile loans by allowing interest rate markups. As noted in CFPB Bulletin 2013-02, “If the dealer charges the consumer a higher interest rate than the lender’s buy rate, the lender may pay the dealer what is typically referred to as “reserve” (or “participation”) compensation, based upon the difference in interest rate revenues between the buy rate and the actual note rate charged to the consumer in the installment sale contract executed with the dealer.” Many studies noted above have documented the discriminatory impact and large public settlements initiated by the CFPB and the Department of Justice in recent years have resulted in restitution and fines to lenders in excess of $150 million to settle claims of discrimination.

The allegations of discrimination noted in the public settlements related to a pattern or practice of conduct in violation of the Equal Credit Opportunity Act, 15 U.S.C. Sections 1691-1691f, by permitting dealers to charge higher interest rates to consumer auto loan borrowers on the basis of race and national origin. Parties have challenged the Bulletin on the basis of whether or not the discrimination that may result from dealer markup is intentional by dealers, or have challenged the bulletin on the basis of whether the CFPB exceeded its agency authority in issuing the bulletin. The General Accountability Office recently concluded in December 2017 that CFPB Bulletin 2013-02, did qualify as a rule, and thus was subject to the little used Congressional Review Act because it served as a general statement of policy.

Without addressing the reasonable legal merits of congressional and agency power matters from different viewpoints, the fundamental issue this resolution desires to address is the significant risk that currently exists in today’s auto lending market that pricing disparities may arise between auto lending customers with equally high lending risk on the basis of race, national origin, and potentially other prohibited bases. One remedy to such matter offered in CFPB 2013-02 and supported by other commentators is that of eliminating the discretion of dealers in dealer markup buy rates. Compensating dealers fairly with another mechanism, such as a flat percentage fee of the auto loan amount, will not lead to discrimination and will promote economic justice and civil rights to all consumers.

Further, consumers today do not have any visibility into the amount of their loan interest rate that is solely a discretionary dealer markup based on the perception of their willingness to pay by the dealer. This portion of the dealer markup is not related at all to their credit risk as a consumer. As noted in a policy brief by the Center for Responsible


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4. TRANSPARENCY OF PRICING OF ADD-ON PRODUCTS

Add-on products, like service contracts, guaranteed asset protection, and window etching, significantly increase the price of the overall auto purchase and have vastly inconsistent pricing between consumers purchasing the same product with the same dealer. The pricing disparities, aided immensely by the lack of transparency of pricing, results in excessive pricing to consumers and discriminatory mark-ups of auto add-ons.

In October 2017, the NCLC issued a report, “Auto Add-Ons Add Up, How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing.” This report is based on an analysis of almost 3 million add-on products from September 2009 through June 2015 based on a nationwide data set of 1.8 million car sale transactions involving over 3,000 dealers. Major items sold included: Service contracts (representing 33% of the products sold), Guaranteed Asset Protection (GAP) products (26%), various warranty-type products (15%), and vehicle identification number (also referred to as “window”) Etching (Etch) (9%). Excluding warranty costs, which were not included in further NCLC analysis as these costs are typically not shown as a separate fee, but are rolled into the major thrust of this CRL study, however, was to evaluate whether the system of dealer interest-rate markups actually serve consumers better under a cost-benefit analysis approach, or whether consumers would benefit from a flat compensation system that would increase transparency and provide greater competition that would more benefit the consumer. The data from the Charles River Associates Report showed that consumers with higher credit scores would have access to multiple lending sources and thus have greater ability to obtain lower rates for credit. They would not therefore be likely subject to a higher cost under a flat rate compensation system. Whereas, consumers with lower credit scores, would be more likely to pay a markup due to having fewer lending options and thus would benefit from switching from a dealer markup system to a flat rate compensation system. It is important to further note that the Report showed that “borrowers of color were more likely to save money than white borrowers if the industry shifted to flat fees instead of discretionary interest rate markups.”

46 Delvin Davis and Chris Kukla, Road to Nowhere: Car Dealer Interest Rate Markups Lead to Higher Interest Rates, Not Discounts, Policy Brief, dated Nov. 2015.
47 Id., at 2.
48 Id., at 2.
49 Id., at 4.
50 Id., at 4.
51 Id., at 4.
52 Auto Add-Ons Add Up, How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing, National Consumer Law Center, October 2017
53 Id., page 9.
54 Id., page 9.
price of the car\textsuperscript{55}, these categories are consistent with the CFPB Examination Procedures document for ancillary products and services.\textsuperscript{56}

Service contracts typically cover an item not covered under a typical manufacturer warranty, or they extend the warranty by having a longer duration. Guaranteed asset protection (GAP) contracts, are designed to cover the “gap” between the debt on the car and what the car is worth, also referred to as “negative-equity” or “under-water.” Finally, window etching (Etch) products, is where dealers will etch in typically the vehicle identification number (VIN) on one or multiple windows to deter theft or aid in finding a stolen car.\textsuperscript{57}

The wide disparities in pricing can be evidenced when comparing to insurance products, which have similar characteristics and are also not tangible in nature. However, insurance pricing is often reviewed by state regulators, pricing discretion is not given to the selling agent, and the insurance agent’s commission is not based on charging different consumers a different price for the same product, as is the case in dealers selling add-ons.\textsuperscript{58}

It is very significant to note that the finding of the NCLC data set was that “looking collectively at service contracts, GAP products and etch products, the combined average rate markup was 170%\textsuperscript{59} To put in perspective, The NCLC report compared the mark-ups for other retail products, which varies greatly by industry. Brick and mortar retailers such as big box office supply or sporting goods stores may mark up their goods by 40% to 50%,\textsuperscript{60} clothing retailers may mark up at 50% to 100%, subject to lower markups for sales.\textsuperscript{61} Jewelry stores have markups between 25% to 125%,\textsuperscript{62} and most relevant, car dealer markups on autos for new cars in a 2015 National Association of Automobile Dealers Association Report reflect 3.4% markup for new cars and 8.6% markup for used cars.\textsuperscript{63}

Another important comparison to look at add-on pricing markups is to commissions independent insurance agents receive when they sell insurance to consumers. The equivalent markup for insurance agents is 11% to 18%.\textsuperscript{64} In 2012, the average dealer markup for Etch sales in the data set was 325% (an average markup of $189 over the dealer’s average cost of $251), and the average dealer markup for service

\textsuperscript{55} Id., page 9.
\textsuperscript{56} CFPB “Automobile Finance Examination Procedures”, dated June 2015, pages 4-5.
\textsuperscript{57} Auto Add-Ons Add Up, at pgs. 7 to 8.
\textsuperscript{58} Id. at 11.
\textsuperscript{59} Auto Add-Ons, NCLC report, Id. Page 10. Note this Report consistently uses markup as the ratio of gross profit to the wholesale price.
\textsuperscript{60} Id. Page 10.
\textsuperscript{61} Id. Page 10.
\textsuperscript{62} Id. Page 11.
\textsuperscript{63} Id. Page 12.
\textsuperscript{64} Id. Page 10.

Id., page 11.
\textsuperscript{65} Auto Add-Ons Add Up, at pgs. 7 to 8.
\textsuperscript{66} Id. at 11.
\textsuperscript{67} Auto Add-Ons, NCLC report, Id. Page 10. Note this Report consistently uses markup as the ratio of gross profit to the wholesale price.
\textsuperscript{68} Id. Page 10.
\textsuperscript{69} Id. Page 12.
contracts was 83% (an average markup of $859 over the dealer’s average cost of $1,032).\textsuperscript{65}

Vehicle Identification Number (Window) Etching pricing by dealers in theory should be consistent in price as the price as the cost to the dealer for Etch products generally does not vary by the price of the car, whether a car is new or used, or other characteristics that vary from car to car.\textsuperscript{66}

The NCLC Report identified a subset in 2012 that sold Etch products that had just one dealer cost for every Etch product they sold and thus represented an excellent review of pricing disparity. The report noted that “only 19 of those 105 dealers sold the Etch product to each of their customers for the same price. 92% of dealers did have a single fixed price for their Etch products, but established a different price depending on the customer. These extreme pricing inconsistencies cannot be explained by different costs to the dealer, different products being sold, or different time periods.”\textsuperscript{67}

Very large variations with no rationale could also be seen in service contracts, where there is disparity in the dealer cost due to factors such as the value of car, new or used, cost of repair and length of coverage.\textsuperscript{68} The NCLC data set reflected wide variations on pricing unrelated to the cost of the service contracts and different pricing methodologies, such as a set fixed add-on price to cost (markup), a set fixed sales price unrelated to cost of the service contract, and at widely varying pricing based on the dealers whim.\textsuperscript{69}

New York City in 2015 successfully implemented a new rule that requires the price of both the car and any add-on products offered with the car to be posted on each car offered for sale by a used car dealer in the city.\textsuperscript{70} Additionally, New York City proposed in early 2018 new rules under Local Laws 197 and 198 in 2017 on second-hand car dealers that would benefit consumers by 1) requiring dealers to provide financing disclosures to consumers, 2) clarify the automobile contract cancellation options that dealers offer to consumers, 3) create a consumer bill of rights that dealers must display, and 4) clarified requirements related to record-keeping by dealers.\textsuperscript{71} The Consumer Bill of Rights, among other provisions, would inform the consumer he or she has the right to receive an itemized price for each add-on product, the consumer would have the right refuse any add-on product by the dealer, and further advises the consumer they have the right to be free from discrimination when applying for credit.

To strengthen consumer protection and promote economic justice, this resolution urges legislators to adopt legislation that requires the posting of nonnegotiable pricing of add-on products by dealers on each vehicle to promote full transparency of available add-ons and prevent discriminatory practices.

\textsuperscript{65} Id., Pages 22 and 26.
\textsuperscript{66} Id., Pages 12 and 13.
\textsuperscript{67} Id., Pages 19 and 20.
\textsuperscript{68} Id., Pages 19 and 20.
\textsuperscript{69} Id., Pages 12 and 13.
\textsuperscript{70} NYC Admin. Code Section 20-271 (Local Laws of the City of New York for the Year 2015, No. 44).
\textsuperscript{71} Amendments to Subchapter K of Chapter 2 of Title 6 of the Rules of the City of New York.

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Consumer protections would be strengthened by enhancing educational opportunities for members of the Bar so they can identify and effectively address the issues facing consumers in the auto lending and sale practices customarily faced today. The magnitude of over 100 million transactions and the substantial economic harm inflicted upon millions of low-income to moderate-income consumers, for whom many the auto is the single-largest debt, makes it imperative that the Association vigorously address the legal and consumer needs of lawyers and consumers.

Lawyer education, such as the recent webinar in March 2018, “Abusive Car Loan and Sale Practices: Scope and Potential Remedies to Strengthen Consumer Protections,” sponsored jointly by the economic justice committee of the Civil Rights and Social Justice Section and the State Attorneys General and Department of Justice Issues Committee of the State and Local Government Law Section is an excellent example of expanding timely and relevant information to lawyers. Additional educational materials include further training, seminars, and various publications on relevant topics to arm the lawyer with the skills that provide a level playing field for all consumers in making such a large financial purchase.

Finally, the Association needs to enhance its efforts to help all citizens in understanding their legal rights and addressing situations where those rights are violated. A starting point is communicating a model “Consumer Bill of Rights” so that all taxpayers are aware of their rights to receive an auto loan free of discrimination, based solely on their financial credit-risk, and full transparency prior to entering negotiations for an auto purchase as to all relevant terms of the loan being offered, including discretionary dealer markup above the risk-based price of the loan, as well as the price each available add-on product.

Conclusion
This policy will affirm the ABA’s commitment to actively opposing discrimination on the basis of protected classifications as articulated in the EOCA, will strengthen consumer protections for all, and will promote economic justice. By adopting this resolution, this policy will advance the work of consumer advocates, legislators, public attorneys and litigators who seek to advance justice and fairness for all consumers, particularly low-income consumers and consumers who suffer discrimination based on color, national origin, or some other protected class.

Respectfully submitted,

Robert N. Weiner
Chair, Section of Civil Rights and Social Justice
August 2018
1. Summary of Resolution(s). The resolution urges Congress to amend the Equal Credit Opportunity Act to require documentation and collection of the applicant’s race or national origin for non-mortgage credit transactions pertaining to vehicle transactions; it urges Congress and all state, local, tribal, and governmental agencies to adopt laws and policies that require a flat percentage fee for dealer compensation, and disclosure of dealer compensation for a vehicle loan; and adopt legislation requiring the separate posting of pricing of add-on products by dealers on each vehicle before a consumer negotiates to purchase a vehicle; and to offer programming to educate lawyers and consumers about abusive, deceptive, or fraudulent vehicle sales transaction financing and sales practices.


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

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, sexual orientation, and gender identity and expression. The Association has adopted policies calling upon local, state, and federal lawmakers to prohibit such discrimination in housing, as well as in public accommodations, credit, education, and public funding and has sought to eliminate such discrimination in all aspects of the legal profession. The ABA’s fundamental position condemning such discrimination is based on its underlying commitment to the ideal of equal opportunity and advancement of human rights. These two principles united in August 2013, when the ABA adopted policy to urge governments to “promote the human right to adequate housing for all” and to “prevent infringement of that right.”

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. Currently, New York City requires both the price of the car and the price of any add-on products to be posted on each car offered by a used car dealer in the city, and has proposed a rule requiring dealers to provide financing disclosure for dealer compensation, and disclosure of dealer compensation for a vehicle loan; and adopt legislation requiring the separate posting of pricing of add-on products by dealers on each vehicle before a consumer negotiates to purchase a vehicle; and to offer programming to educate lawyers and consumers about abusive, deceptive, or fraudulent vehicle sales transaction financing and sales practices.


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to dealers. This Resolution will allow the ABA to encourage other jurisdictions to adopt similar laws.

Additionally, on May 21, 2018, President Trump signed into law S.J. Res. 57 – a measure passed by Congress to reject a Washington bureaucracy’s rule which could have eliminated the ability of car dealerships to discount loans for their customers.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.

8. Cost to the Association. Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. Disclosure of Interest. There are no known conflicts of interest.

10. Referrals. By copy of this form, the Report with Recommendation will be referred to the following entities:

   - Section of Business Law
   - Section of Infrastructure and Regulated Industries Section
   - Section of Public Contract Law
   - Section of Taxation
   - Section of State and Local Government Law
   - Government and Public Sector Lawyers Division
   - Commission of Racial and Ethnic Diversity in the Profession
   - Commission of Hispanic Legal Rights and Responsibilities
   - Standing Committee on Public Education
   - Law Student Division
   - Young Lawyers Division
   - Commission on Sexual Orientation and Gender Identity
   - Solo, Small Firm and General Practice Division

11. Contact Name and Address Information.

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   Baltimore, MD 21201
   410-685-6589 x17
   Email: afasanelli@hprplaw.org
12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution
The resolution urges Congress to amend the Equal Credit Opportunity Act to require documentation and collection of the applicant’s race or national origin for non-mortgage credit transactions pertaining to vehicle transactions; it urges Congress and all state, local, territorial, and tribal legislative bodies and governmental agencies to adopt laws and policies that require a flat percentage fee for dealer compensation, and disclosure of dealer compensation for a vehicle loan; and adopt legislation requiring the separate posting of pricing of add-on products by dealers on each vehicle before a consumer negotiates to purchase a vehicle; and to offer programming to educate lawyers and consumers about abusive, deceptive, or fraudulent vehicle sales transaction financing and sales practices.

2. Summary of the Issue that the Resolution Addresses
The resolution addresses the highly discriminatory practices and impact to many consumers of color, national origin, and low-income, that arise in the auto lending and sale of auto add-on products. Consumers are burdened with interest-rate markups on loans that have no relation to their credit-risk, and often-relate to prejudices and discriminatory actions. The Resolution also addresses the issue of insufficient data available on credit applicants to identify potential discriminatory impact. Such data is currently collected in the home mortgage market and this resolution would place the one trillion-dollar auto lending market on similar footing. Finally, the resolution addresses the lack of transparency in the auto lending market, which is unacceptable when it represents the third largest consumer debt in America.

3. Please Explain How the Proposed Policy Position Will Address the Issue
This policy will reaffirm the ABA’s commitment to ensuring the enforcement of fair lending laws to protect against discrimination, strengthen consumer protections in the auto lending and sale market, and promote economic justice. It will assist the work of consumer advocates, lawmakers, and litigators who diligently work to provide a fair and transparent economic market for all consumers, regardless of race, color, national origin, or economic position.
At the federal level, various legislators have taken opposing viewpoints on the powers of the Consumer Protection Financial Bureau and whether expressions of policy articulated by the CFPB should be subject to congressional rule making authority. As noted in the report, see the General Accountability Office Letter, B-329129, dated Dec. 5, 2017, addressed to U.S. Senator Patrick J. Toomey, with respect to CFPB Bulletin 2013-02, which provided guidance on the use of discretion in dealer interest mark-up rates.
RESOLVED, That the American Bar Association supports an interpretation of Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), that its prohibition on sex discrimination by covered health programs or activities includes discrimination on the basis of sexual orientation and gender identity; FURTHER RESOLVED, That the American Bar Association urges the Attorney General of the United States and the Secretary of Education to reinstate the guidance letters concerning interpretation of Title IX that were rescinded on February 22, 2017; and FURTHER RESOLVED, That the American Bar Association urges the Attorney General of the United States to withdraw the interpretation proposed by the U.S. Department of Justice in October 2017 that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), does not protect transgender citizens against discrimination.
The American Bar Association (“ABA”) adopts this Resolution to support an interpretation of the Affordable Care Act (“ACA”) prohibition of sex discrimination that includes discrimination on the basis of sexual orientation and gender identity. This report addresses the legal authority supporting this interpretation and the importance of interpreting “sex” discrimination broadly to include all aspects of such discrimination, including discrimination based on sexual orientation and gender identity.

The ABA has adopted several policies that are consistent with this Resolution and that strongly oppose all kinds of discrimination on the bases of sexual orientation and gender identity. The ABA first took such a position against such discrimination nearly 30 years ago when it urged federal, state, and local governments to enact laws prohibiting discrimination on the basis of sexual orientation in employment, housing, and public accommodation. See 1989M8. The ABA re-stated and expanded its opposition to such discrimination in 2006 when it urged federal, state, local, and territorial governments to enact laws prohibiting discrimination on the basis of actual or perceived gender identity or expression in employment, housing, and public accommodations. See 2006A122B. The ABA also urged the EEOC to provide resources sufficient to enable the EEOC to carry out its duties to investigate, conciliate, and where appropriate, take legal action to enforce laws prohibiting discrimination. See 98M116A. Most recently, the ABA adopted Resolution 116A in February 2018, supporting an interpretation of federal employment law prohibiting employment discrimination on the basis of sex to include discrimination on the basis of sexual orientation and gender identity.

These existing policies support an interpretation of the ACA in which its prohibition of sex discrimination includes sexual orientation and gender identity because such an interpretation advances the purpose of existing policy against such discrimination. However, this resolution enables the ABA to file amicus curiae briefs in support of parties that take the position that the ACA’s prohibition against sex discrimination includes a prohibition against discrimination on the bases of sexual orientation and gender identity.

LGBTQ people continue to face discrimination in many areas of their lives, including health care, on the basis of their sexual orientation and gender identity. Under section 1557 of the ACA (42 U.S.C. § 18116(a)), health programs or activities receiving federal financial assistance are prohibited from discriminating against individuals on the basis of sex. The statute incorporates by reference the anti-discrimination provisions and remedies of title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) (“Title IX”), which prohibits discrimination “on the basis of sex.” The scope of Title IX, in turn, is informed by cases interpreting the scope of Title VII.1 Title VII jurisprudence is highly-developed. Title VII prohibits discrimination in employment “because of [an]...”

individual's sex,” 42 U.S.C. § 2000e-2(a), a protection designed “to strike at the entire spectrum of disparate treatment of men and women in employment.”

Laws that prohibit discrimination “on the basis of sex” and “because of [an] individual’s sex” should be interpreted consistently. Unless there is a clear Congressional intent to the contrary, conduct that is unacceptable discrimination in the employment context (Title VII) and education context (Title IX) should be unacceptable discrimination in the health care context (ACA Section 1557).

Statutory Background
The ACA provides, inter alia:

(a) In general. Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

(b) Continued application of laws. Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 794 of title 29, or the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).

42 U.S.C. § 18116. Thus, Section (a) prohibits discrimination on any ground prohibited under title IX and three other federal laws. Section (b) preserves the legal protections afforded by Title VII, Title IX, other specified federal laws, and State laws that provide additional protections against discrimination.

Title IX prohibits discrimination “on the basis of sex” “under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a).


ACA Section 1557 is self-implementing; it is effective whether or not regulations are adopted or effective. Nonetheless, after an extensive rulemaking process that included a Request for Information and Notice of Proposed Rulemaking, the Department of Health and Human Services adopted regulations implementing ACA Section 1557.3 Those regulations state:

“On the basis of sex includes, but is not limited to, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity.” 45 C.F.R. § 92.4.

Further: “Gender identity means an individual’s internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual’s sex assigned at birth. The way an individual expresses gender identity is frequently called ‘gender expression,’ and may or may not conform to social stereotypes associated with a particular gender. A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth.” Id.

Further: “Sex stereotypes means stereotypical notions of masculinity or femininity, including expectations of how individuals represent or communicate their gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include the expectation that individuals will consistently identify with only one gender and that they will act in conformity with the gender-related expressions stereotypically associated with that gender. Sex stereotypes also include gendered expectations related to the appropriate roles of a certain sex.” Id.

LGBTQ People Face Discrimination in the Health Care Context

LGBTQ people continue to face discrimination in many areas of their lives, including health care, on the basis of their sexual orientation and gender identity. The Department of Health and Human Services’ Healthy People 2020 initiative recognizes, “LGBT

3 U.S. Dep’t of Health & Human Servs., Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities, 78 Fed. Reg. 46558 (Aug. 1, 2013); U.S. Dep’t of Health & Human Servs., Nondiscrimination on the Basis of Race, Color, National Origin, Sex, Age, or Disability in Health Programs or Activities Receiving Federal Financial Assistance and Health Programs or Activities Administered by the Department of Health and Human Services or Entities Established under Title I of the Patient Protection and Affordable Care Act, 45 C.F.R. Part 92, 81 Fed. Reg. 31376 (May 18, 2016).

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individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights. LGBTQ people still face discrimination in a wide variety of services affecting access to health care, including reproductive services, adoption and foster care services, child care, homeless shelters, and transportation services—as well as physical and mental health care services. In a recent study published in Health Affairs, researchers examined the intersection of gender identity, sexual orientation, race, and economic factors in health care access. They concluded that discrimination as well as insensitivity or disrespect on the part of health care providers were key barriers to health care access and that increasing efforts to provide culturally sensitive services would help close the gaps in health care access.

Discrimination against the transgender community

Discrimination based on gender identity, gender expression, gender transition, transgender status, or sex-based stereotypes is necessarily a form of sex discrimination. Numerous federal courts have found that federal sex discrimination


statutes reach these forms of gender-based discrimination.9 In 2012, the Equal Employment Opportunity Commission (EEOC) likewise held that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and such discrimination therefore violates Title VII.”10

Twenty-nine percent of transgender individuals were refused to be seen by a health care provider on the basis of their perceived or actual gender identity and 29 percent experienced unwanted physical contact from a health care provider.11 Transgender women, particularly women of color, face high rates of HIV.12 Additionally, the 2015 U.S. Transgender Survey found that 23 percent respondents did not see a provider for needed health care because of fears of mistreatment or discrimination.13

Data obtained by Center for American Progress (CAP) under a FOIA request indicates the Department’s enforcement was effective in resolving issues of anti-LGBTQ discrimination. CAP received information on closed complaints of discrimination based on sexual orientation, sexual orientation-related sex stereotyping, and gender identity that were filed with the Department under Section 1557 of the ACA from 2012 through 2016.

• In approximately 30% of these claims, patients alleged denial of care or insurance coverage simply because of their gender identity – not related to gender transition.
• Approximately 20% of the claims were for misgendering or other derogatory language.
• Patients denied care due to their gender identity or transgender status included a transgender woman denied a mammogram and a transgender man refused a screening for a urinary tract infection.”14

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12 See also Shabab Ahmed Mirza, palms denied care due to their gender identity or transgender status included a transgender woman denied a mammogram and a transgender man refused a screening for a urinary tract infection.”
13 Transgender Survey found that 23 percent respondents did not see a provider for needed health care because of fears of mistreatment or discrimination.
Transition-related care is not only medically necessary, but for many transgender people it is lifesaving.

Discrimination Based Upon Sexual Orientation

Many LGBTQ people lack insurance and providers are not competent in health care issues and obstacles that the LGBTQ community experiences.16 LGBTQ people still face discrimination. According to one survey, 8 percent of lesbian, gay, bisexual, and queer individuals had an experience within the year prior to the survey where a doctor or other health care provider refused to see them because of their actual or perceived sexual orientation and 7 percent experienced unwanted physical contact and violence from a health care provider.17

Fear of discrimination causes many LGB people to avoid seeking health care, and, when they do seek care, LGB people are frequently not treated with the respect that all patients deserve. The study "When Health Care Isn’t Caring" found that 56 percent of LGB people reported experiencing discrimination from health care providers – including refusals of care, harsh language, or even physical abuse – because of their sexual orientation.18 Almost ten percent of LGB respondents reported that they had been denied necessary health care expressly because of their sexual orientation.18 Delay and avoidance of care due to fear of discrimination compound the significant health disparities that affect the lesbian, gay, and bisexual population. These disparities include:

- LGB individuals are more likely than heterosexuals to rate their health as poor, have more chronic conditions, and have higher prevalence and earlier onset of disabilities.19
- Lesbian and bisexual women report poorer overall physical health than heterosexual women.20
- Gay and bisexual men report more cancer diagnoses and lower survival rates, higher rates of cardiovascular disease and risk factors, as well as higher total numbers of acute and chronic health conditions.21

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- Gay and bisexual men report more cancer diagnoses and lower survival rates, higher rates of cardiovascular disease and risk factors, as well as higher total numbers of acute and chronic health conditions.21

15 Kates, supra note 9.
16 Mirza, supra note 8.
18 Id.
20 Id.
21 Id.
Gay and bisexual men and other men who have sex with men (MSM) accounted for more than half (56 percent) of all people living with HIV in the United States, and more than two-thirds (70 percent) of all new HIV infections.

Bisexual people face significant health disparities, including increased risk of mental health issues and some types of cancer.23

This discrimination affects not only the mental health and physical health of LGBTQ people, but that of their families as well. One pediatrician in Alabama reported that “we often see kids who haven’t seen a pediatrician in 5, 6, 7 years, because of fear of being judged, on the part of either their immediate family or them [identifying as LGBTQ]”.24 It is therefore crucial that LGBTQ individuals who have found unbiased and affirming providers, be allowed to remain with them. If turned away by a health care provider, 17 percent of all LGBTQ people, and 31 percent of LGBTQ people living outside of a metropolitan area, reported that it would be “very difficult” or “not possible” to find the same quality of service at a different community health center or clinic.25

Medical professionals are expected to provide LGBTQ individuals with the same quality of care as they would anyone else. The American Medical Association recommends that providers use culturally appropriate language and have basic familiarity and competency with LGBTQ issues as they pertain to any health services provided.26 The World Professional Association for Transgender Health guidelines provide that gender-affirming interventions, when sought by transgender individuals, are medically necessary and part of the standard of care.27 The American College of Obstetricians and Gynecologists warns that failure to provide gender-affirming treatment can lead to serious health consequences for transgender individuals.28 LGBTQ individuals already experience significant health disparities, and denying medically necessary care on the basis of sexual orientation or gender identity exacerbates these disparities.

In addition, LGBTQ individuals face disparities in medical conditions that may implicate the need for reproductive health services. For example, lesbian and bisexual women

24 HUMAN RIGHTS WATCH, supra note 2.
25 Mirsa, supra note 8.
27 The discrimination affects not only the mental health and physical health of LGBTQ people, but that of their families as well. One pediatrician in Alabama reported that “we often see kids who haven’t seen a pediatrician in 5, 6, 7 years, because of fear of being judged, on the part of either their immediate family or them [identifying as LGBTQ].” It is therefore crucial that LGBTQ individuals who have found unbiased and affirming providers, be allowed to remain with them. If turned away by a health care provider, 17 percent of all LGBTQ people, and 31 percent of LGBTQ people living outside of a metropolitan area, reported that it would be “very difficult” or “not possible” to find the same quality of service at a different community health center or clinic.
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report heightened risk for and diagnosis of some cancers and higher rates of cardiovascular disease.29 The LGBTQ community is significantly at risk for sexual violence.30 Eighty-six percent of bisexual women have been raped and 47 percent of transgender people are sexually assaulted at some point in their lifetime. This rate is particularly higher for transgender people of color. Kates, supra note 11, at 8.; 2015 U.S. Transgender Survey, supra note 10, at 5.

Similar to many other civil rights acts and regulations, Section 1557 of the ACA “prohibits discrimination on the basis of race, color, national origin, sex, age, or disability” when participating in certain health activities and programs. 42 U.S.C. § 18116(a). The scope of such protection has arisen in many related contexts, including Title VII (sex discrimination in employment) and Title IX (sex discrimination in education). Courts and administrative agencies have defined sex discrimination to include any actions that are based on stereotypes of sex whether it is stereotyped of how a person should act, dress, be treated, or feel attraction based on the person’s biological sex. The definition of sex discrimination therefore encompasses discrimination based on sexual orientation and gender identity since any discrimination in those areas must also include discrimination based on sex stereotypes.

A clear consensus is emerging among courts and administrative agencies, in several different contexts, that discrimination based on sex includes discrimination based on sexual orientation and gender identity. Therefore, it is sound legal analysis and sound policy to conclude that Section 1557 of the ACA protects against discrimination based on sexual orientation and gender identity as made clear by the judicial history of how sex discrimination has been and continues to be defined.

Discrimination Based on Gender Identity

Discrimination based on gender identity or transgender status is sex discrimination because it treats people differently from otherwise similarly situated people based on their transition from one gender to another, because it treats them differently based on sex stereotypes, and because it treats them differently based on gender identity and transgender status. The First, Sixth, Seventh, Ninth, and Eleventh Circuits have found transgender individuals to be protected by Title VII and other federal sex discrimination laws.32 Numerous district courts have also held that gender identity discrimination is prohibited by Title VII, either as per se sex discrimination because it is based on sex stereotypes.

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Kates, supra note 11 at 4.


Whitaker v. Xenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1047 (7th Cir. 2017); Chavez v. Credit Nation Auto Sales, LLC, 641 F. App’x 883, 884 (11th Cir. 2016); Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005); Smith v. City of Salem, Ohio, 378 F.3d 566, 575 (6th Cir. 2004); Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (8th Cir. 2000); Rosa v. Park West. Bank & Trust Co., 214 F.3d 213, 215 (1st Cir. 2000).

Sex Discrimination As Interpreted by the Courts and Federal Agencies

Sex Discrimination As Interpreted by the Courts and Federal Agencies

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Sex Discrimination As Interpreted by the Courts and Federal Agencies
stereotypes, or because it is based on their gender transition. Numerous agency administrative decisions and regulations have made clear that "sex" includes gender identity and transgender status.33

There is a difference of opinion whether the rationale of the Title VII cases discussed above extends to the context of Title IX. Courts generally hold that the sex discrimination provisions of Title IX protect transgender individuals from discrimination.34 Some courts have held that Title IX is narrower than Title VII and that Title IX does not prohibit discrimination on the basis of gender identity.35


34 See, e.g., Lusardi v. Dep’t of the Army, E.E.O.C. No. 012013395, 2015 WL 1607756, at *11 (E.E.O.C. Apr. 1, 2015); Macj v. Holder, EEOC No. 0120120821, 2012 WL 1435956, *10 (E.E.O.C. Apr. 2, 2012) (“Thus, we conclude that intentional discrimination against a transgender individual because person is transgender, by definition, discrimination based on sex, and such discrimination therefore violates Title VII.”); U.S. Department of Education—34 C.F.R. § 200.12 (“Sex segregation means the assignment of students to public schools … without regard to their sex (including transgender status; gender identity; sex stereotypes, such as treating a person differently because he or she does not conform to sex-role expectations because he or she is attracted to or is in a relationship with a person of the same sex; …);”); United States Department of Health and Human Services - 45 C.F.R. § 92.4 (“On the basis of sex includes, but is not limited to, discrimination on the basis of sex, or gender identity, and on the basis of sex, or gender identity.”)


A compelling and recent analysis is presented in M.A.B. v. Board of Education of Talbot County, 286 F.Supp. 3d 704 (D. Md. 2018), in which a transgender male student was refused use of “neutral” locker rooms to change his clothes for activities requiring it. The neutral locker room did not have the same amenities as the boys’ locker rooms though including a lack of showers and benches. Additionally, the student was the only student in the school that had to use the designated locker room causing embarrassment as other students gave him odd looks when he went to use his designated locker room. Deciding the student’s claim under Title IX, the court considered and relied upon Title VII precedents because the operative language is the same in both statutes. Discrimination based on gender identity had to incorporate consideration of the student’s biological sex and stereotypes associated with the student’s particular biological sex, so gender identity discrimination is unlawful sex discrimination.

Until recently, the U.S. Department of Justice agreed. A December 18, 2014 Memorandum from then-Attorney General Eric Holder announced that “the best reading of Title VII’s prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status.”37 On October 4, 2017, Attorney General Jeff Sessions abruptly reversed course, stating “Title VII does not prohibit discrimination based upon gender identity per se.”38 The impact of the DOJ’s reversal is unclear. A district court opinion issued after the announcement of DOJ’s new position denied summary judgment to the employer without mentioning the DOJ Memorandum.39

There has been a similar Executive-branch change of position in the context of Title IX. In 2015 and 2016, the Department of Education and the Department of Justice issued guidance that the prohibitions on discrimination “on the basis of sex” in Title IX and its implementing regulations included discrimination based on gender identity.40 Those guidance letters were withdrawn through a new “Dear Colleague” letter from the Department of Education and the Department of Justice dated February 22, 2017.41 The letter states: “the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further implement regulations included discrimination based on gender identity, including transgender status.”37 On October 4, 2017, Attorney General Jeff Sessions abruptly reversed course, stating “Title VII does not prohibit discrimination based upon gender identity per se.”38 The impact of the DOJ’s reversal is unclear. A district court opinion issued after the announcement of DOJ’s new position denied summary judgment to the employer without mentioning the DOJ Memorandum.39

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and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them." The letter does not purport to change existing policies or guidance. No new guidance has issued.

In the specific context of ACA Section 1557, the court in Prescott v. Rady Children's Hosp., 265 F.Supp. 3d 1090, 1099 (S.D. Cal. 2017) held: "Because Title VII, and by extension Title IX, recognize that discrimination on the basis of transgender identity is discrimination on the basis of sex, the Court interprets the ACA to afford the same protections." See also Rumble v. Fairview Health Servs., No. 14-2037 (SRN/FLN), 2017 WL 401940, at *10 (D. Minn. Jan. 30, 2017) ("Section 1557 protects plaintiffs who, like Rumble, allege discrimination based on gender identity").42

**Discrimination Based on Sexual Orientation**

Sexual orientation discrimination is a form of sex discrimination because it treats otherwise similarly situated people differently because of their sex, because it treats them differently based on the sex of the individuals with whom they associate, and because such discrimination is rooted in gender stereotypes, i.e., the stereotype that males will be attracted to females and vice versa.

Early in the implementation of Title VII, a number of courts held that federal laws prohibiting sex discrimination should be construed narrowly and therefore did not prohibit discrimination based on sexual orientation or gender identity. This early approach focused on the now discredited view that such laws prohibit only a very narrow spectrum of discrimination based on a person’s biological sex – i.e., discrimination against women because they are women, or against men because they are men. Most of these cases predated a series of Supreme Court decisions which firmly established that Title VII was intended not only to prohibit discrimination against women or men based on their biological sex, but also to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."43

The Supreme Court has not yet addressed whether Title VII prohibits sexual-orientation or gender-identity discrimination. However, several Supreme Court cases shed light on how the Court is likely to examine the question of gender identity and sexual orientation discrimination under Title VII. In City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978), the Court set forth a “simple test” for sex discrimination under Title VII: "treatment of a person in a manner which but for that person’s sex would be different." A decade later the Court held that Title VII prohibits and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them." The letter does not purport to change existing policies or guidance. No new guidance has issued.

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42 The district court in Franciscan v. Burwell entered a nationwide injunction against the implementation of the HHS regulations (45 C.F.R. § 92.4; quoted above) interpreting ACA Section 1557 as including gender identity, but the courts in Prescott and Rumble interpreted the statute without reliance on the HHS regulations.

discrimination against workers for their failure to conform to sex-based stereotypes in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).\textsuperscript{44}

In Oncale v. Sundowner Offshore Services, Inc. 523 U.S. 75 (1998), the Court recognized that same-sex sexual harassment can constitute discrimination because of sex and thus violate Title VII. The Court focused on differential treatment of similarly situated men and women, and away from the specific goals of Congress in passing Title VII. Oncale has been read to preclude courts from creating their own exceptions to Title VII coverage based on speculation about the primary intent of Congress in passing the legislation. The Court in Oncale observed that “[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”\textsuperscript{45} According to the Court, whatever evidentiary route a plaintiff chooses, so long as a plaintiff’s claim “meets the statutory requirements” – i.e., is “discrimination because of sex” – the claim is cognizable.\textsuperscript{46}

Since 2015, the Equal Employment Opportunity Commission (“EEOC”) has opined that “[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.”\textsuperscript{47} Numerous federal district courts have agreed.\textsuperscript{48}

The Courts of Appeal are split. In Evans v. Georgia Reg’l Hosp., 850 F.3d 1248, 1255 (11th Cir.), cert. denied, 138 S. Ct. 557 (2017), the Eleventh Circuit refused to depart from its “binding precedent” in Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (holding “[d]ischarge for homosexuality is not prohibited by Title VII....”).

In contrast, the Seventh and Second Circuits have taken a fresh look at the question and concluded that sexual orientation discrimination is sex discrimination prohibited by Title VII. In Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339 (7th Cir. 2017), Seventh Circuit Court of Appeals affirmed that discrimination based on sexual

\textsuperscript{45} Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (“As for the legal relevance of stereotypes, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”)

\textsuperscript{46} id. at 79.

\textsuperscript{47} id. at 80.


\textsuperscript{50} Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (“As for the legal relevance of stereotypes, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”)

\textsuperscript{51} id. at 79.

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orientations was a type of sex discrimination. In that case a female employee, who openly identified as a lesbian, was discriminated against based on her sexual orientation. She was an adjunct professor at a New York City College and regardless of her experience, track record, or teaching abilities, she was refused as a full-time professor. She applied to several positions and instead, her contract as an adjunct professor was discontinued. She sued under title VII stating she was discriminated against for being a lesbian. The district court initially dismissed the case stating sexual orientation did not fit within the Title VII definition of sex, but the Court of Appeals reversed, holding that discrimination based on sexual orientation must take into consideration the sex of the employee and therefore is discrimination based on sex. Discrimination based on sexual orientation can only occur if the discriminator considers the sex of the employee and the sex of who the employee is attracted to first, so sexual orientation discrimination is “because of … sex.”

The Second Circuit Court of Appeals reached the same conclusion in Zarda v. Altitude Express, 893 F.3d 100 (2d Cir. 2018). In Zarda, a sky diving instructor told one of his female clients he was gay to help make her feel more comfortable. In this instance though, the client and her boyfriend complained about the instructor’s openness about his sexual orientation, stating it was inappropriate, and the instructor was fired. The Court of Appeals stated the firing violated Title VII because it was based on a sex stereotype. The client and the employer held a belief that males should be attracted to females and the instructor was fired for not fitting that stereotype. For the stereotype to apply, the instructor’s sex had to be taken into consideration. Therefore, sex discrimination includes discrimination based on sexual orientation.

The EEOC has continued to interpret Title VII as prohibiting sexual orientation discrimination, including the filing of an amicus brief in the Zarda case, discussed above. The EEOC argued in Zarda that because sexual-orientation discrimination claims necessarily involve impermissible consideration of an individual’s sex, gender-based associational discrimination, and sex stereotyping, such claims “fall squarely within Title VII’s prohibition against discrimination on the basis of sex.”49 Interestingly, the Department of Justice filed its own amicus brief in the Zarda case, arguing that Title VII does not protect employees from sexual orientation discrimination.50 The Second Circuit’s opinion rejected the DOJ’s reasoning.

Conclusion

Several federal statutes prohibit sex discrimination, including Title VII, Title IX, and ACA Section 1557. A strong judicial consensus has emerged that Title VII and Title IX prohibit sex discrimination in the form of gender identity discrimination and sexual orientation discrimination. The Department of Justice, Department of Education and


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As a matter of sound legal argument and in keeping with existing ABA policy and Goals III and IV of the ABA’s Mission, the ABA supports an interpretation of ACA Section 1557 that prohibits sex discrimination in health care on the bases of gender identity and sexual orientation; the ABA urges the Attorney General of the United States and the Secretary of Education to reinstate the guidance letters concerning interpretation of Title IX that were rescinded on February 22, 2017; and the ABA urges the Attorney General of the United States to withdraw the interpretation proposed by the U.S. Department of Justice in October 2017 that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), does not protect transgender citizens against discrimination.

Respectfully submitted,

Robert Weiner
Chair, Section of Civil Rights and Social Justice
August 2018
1. **Summary of Resolution.** The resolution supports an interpretation of ACA’s anti-discrimination provision, Section 1557, that sex discrimination includes discrimination on the basis of gender identity and discrimination on the basis of sexual orientation. Such an interpretation would be consistent with ABA Resolution 98M116A and the mainstream interpretation of Title VII’s and Title IX’s anti-discrimination provisions.

2. **Approval by Submitting Entity.** The Section of Civil Rights and Social Justice approved this policy resolution on Friday April 20, 2018. The Commission on Sexual Orientation and Gender Identity approved this policy resolution on Wednesday, April 25, 2018.

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 prior policy supporting laws that prohibit discrimination in employment on the basis of sexual orientation and gender identity (06A122B, 89M8, and 98M116A).

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.** N/A

7. **Brief explanation regarding 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 ABA amicus curiae brief in the U.S. Supreme Court or other appropriate judicial forum in any case presenting the issues that are addressed in the policy.

8. **Cost to the Association.** 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.

9. **Disclosure of Interest.** There are no known conflicts of interest.
10. **Referrals.** By copy of this form, the Report with Recommendation will be referred to the following entities:

- Government and Public Sector Lawyers Division
- Law Practice Division
- Judicial Division
- Law Student Division
- Senior Lawyers Division
- Young Lawyers Division
- Section of Health Law
- Section of Dispute Resolution
- Section of International Law
- Section of Labor and Employment Law
- Section of Litigation
- Section of State and Local Government Law
- Solo, Small Firm and General Practice Division

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution supports an interpretation of ACA’s anti-discrimination provision, Section 1557, that sex discrimination includes discrimination on the basis of gender identity and discrimination on the basis of sexual orientation.

2. Summary of the Issue that the Resolution Addresses

The Resolution addresses differing interpretations regarding the scope of sex discrimination protections under Title VII, Title IX, and ACA Section 1557 itself. A strong judicial consensus emerged in recent years, but courts have not been unanimous in their interpretation. The Executive Branch recently shifted from a broad interpretation of these statutes to a narrower interpretation, making it likely that differing interpretations will continue.

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

The Resolution clarifies and emphasizes the ABA’s position on sex discrimination on the bases of sexual orientation and/or gender identity and more fully enables the ABA Governmental Affairs Office, the ABA President, and the Standing Committee on Amicus Curiae Briefs to act.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None.
RESOLVED, That the American Bar Association urges federal, state, local, tribal, and territorial governments to enact legislation providing employees with job-guaranteed paid sick days and job-guaranteed paid family and medical leave.
There is a growing consensus that current workplace structures do not recognize the realities of the family and work lives of workers today, most notably the fact that most families no longer have one partner who is able to stay at home and care for the family and household. As of 2012, 42% of women were sole or primary breadwinners, earning at least half of family earnings. Twenty-two point four percent of women were co-breadwinners, bringing home 25% to 49% of family earnings. In addition, the vast majority of adults with custodial children are in the labor force. Working men and women struggle to meet the caregiving needs of their children and parents while maintaining employment. U.S. labor standards and workplace policies must be updated to reflect the reality of the 21st century workforce and to ensure that the nation’s public policies are in line with the needs of today’s working families. Adoption of this resolution will put the ABA on record in support of legislation that provides paid and job-guaranteed sick leave and paid, job-guaranteed family and medical leave legislation to enable caregivers to meet the needs of their families, and to guarantee paid sick leave when employees themselves are ill.

In 1993, President Bill Clinton signed the Family and Medical Leave Act (FMLA) into law. The FMLA entitles employees who have worked for at least one year and a minimum of 1250 hours in the past year for an employer with at least 50 employees working within a 75 mile radius of the employee, to take unpaid, job-guaranteed leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. An eligible employee working for a covered employer may take up to 12 workweeks of leave in a 12-month period for any of the following circumstances: the birth of a child and to care for the newborn child within one year of birth; the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement; to care for the employee’s spouse, child, or parent who has a serious health condition; a serious health condition that makes the employee unable to perform the essential functions of his or her job; any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty.” The FMLA also provides for 26 workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member’s spouse, son, daughter, or parent or next of kin.

For those who are eligible, the FMLA has provided significant assistance, enabling workers to avoid job loss when they need to take time off work to care for a family member or for their own illness. However, less than 50% of workers are eligible for FMLA leave, and many more who are eligible are unable to take FMLA leave because they cannot afford unpaid leave. Only 14% of workers in the U.S. have access to paid family leave through their employers, and less than 40% have access to personal medical leave through employer-provided short-term disability insurance.

Recognizing the need for workers to have access to paid leave from work for family and medical caregiving needs, California (2002), Rhode Island (2013), New Jersey (2008) and New York (2016) have adopted legislation providing paid family and medical leave to meet the caregiving needs of their children and parents while maintaining employment. U.S. labor standards and workplace policies must be updated to reflect the reality of the 21st century workforce and to ensure that the nation’s public policies are in line with the needs of today’s working families. Adoption of this resolution will put the ABA on record in support of legislation that provides paid and job-guaranteed sick leave and paid, job-guaranteed family and medical leave legislation to enable caregivers to meet the needs of their families, and to guarantee paid sick leave when employees themselves are ill.

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that enables workers to receive partial income replacement when they take time away from work to address a serious health condition, including pregnancy, care for a family member with a serious health condition, or care for a newborn, newly-adopted, or newly-placed foster child. In addition, Washington state and the District of Columbia have passed paid family and medical leave laws that will go into effect in 2020. These laws provide up to 12 weeks of leave for these purposes in a 12 month period.

A 2011 study found that workers and businesses report positive effects of the California law providing paid family and medical leave.1 Following this lead, Representative Rosa DeLauro (D-CT) and Senator Kirsten Gillibrand (D-NY) introduced the Family and Medical Insurance Leave Act (S. 337/H.R. 947), which would provide workers with up to 12 weeks of partial income replacement when they take time away from work to care for their own serious health conditions, including pregnancy and childbirth recovery; the serious health condition of a child; parent, spouse, or domestic partner; the birth or adoption of a child; and/or for particular military caregiving and leave purposes.

Separately, there has been a very fast-spreading movement in support of paid sick and safe days legislation. Beginning with the Healthy Families Act which was first introduced by Senator Kennedy in 2005, many states and localities have now adopted similar legislation that would mandate that employers of a certain size or larger provide up to 7 days of job guaranteed paid sick leave per year to employees. The length of this leave and its purposes complements the paid, job guaranteed family and medical leave laws described above because it is for different purposes and shorter time spans – more for short term emergencies rather than longer term medical needs and family caregiving responsibilities.

As of January 2018, ten states (Arizona, California, Connecticut, Maryland, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont and Washington) and the District of Columbia have adopted legislation requiring employers to provide paid sick leave to their employees.2 These laws vary in terms of the size of employer, the type of employee (part-time, full-time, years of employment, among others), and the amount of leave time allowed the employee. All of the laws permit the worker to take the paid sick leave to care for their own illness or that of specified family members, including children and spouses, same-sex domestic partners, domestic partners, and a person with whom the worker has a committed relationship, depending on the state. Some of these laws are considered “Paid Sick and Safe Day” laws because a worker is also permitted to use the leave to address the impacts of domestic violence, sexual assault, and/or stalking suffered by the worker, and in some states, where the worker’s family member is the victim.

In addition, at least 30 cities and counties have adopted paid sick leave ordinances or laws that require employers to provide similar types of leave to their workers.3

On September 7, 2015, President Barack Obama signed Executive Order (EO) 13706, Establishing Paid Sick Leave for Federal Contractors and on September 30, 2016, the U.S. Department of Labor issued regulations to implement the EO.4 The EO requires certain employers that contract with the federal government to provide their employees with up to 7 days of paid sick leave annually. The employee may use the paid sick leave if s/he is absent because of his/her own physical or mental illness, injury, or medical condition; to obtain a diagnosis, care, or preventive care from a health care provider; to care for his or her child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, who has any of the conditions or need for diagnosis, care, or preventative care described, or is otherwise in need of care; or to address the impact of domestic violence, sexual assault, or stalking victimization on themselves to obtain additional counseling, seek relocation from a victim services organization, take related legal action, including preparation for or participation in any related civil or criminal legal proceeding, or to assist an individual related to the employee as defined.

Paid, job guaranteed sick leave and paid, job guaranteed family and medical leave legislation each have broad popular support and are the logical and necessary to ensure maximum opportunities for all workers to maintain employment and meet their family, medical, and caregiving responsibilities.

The American Bar Association has a long history of supporting equality in the workplace through laws and policies that promote gender equality and equal opportunity in employment.

The ABA supports the Paycheck Fairness Act to strengthen gender-based pay discrimination protection under the Equal Pay Act of 1964. The ABA also adopted a resolution endorsing the Model Workplace Policy on Employer Responses to Domestic Violence, Sexual Violence, Dating Violence and Stalking, and encouraged all employers to enact workplace policies that address, prevent, and provide assistance to employees who experience violence and to hold perpetrators accountable. At the 2018 Midyear Meeting, the House of Delegates overwhelmingly adopted a resolution urging employers to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity.

In light of its long history of supporting equitable employment practices, particularly when the burdens fall disproportionally on women, the ABA should be at the forefront of advocacy for this long overdue legislation.


Respectfully submitted,

Robert N. Weiner
Chair, Section of Civil Rights and Social Justice
August 2018
1. **Summary of Resolution(s).** The resolution urges federal, state, local, territorial, and tribal governments to enact legislation providing employees with paid sick days and paid family and medical leave.

2. **Approval by Submitting Entity.** The Council of the Section of Civil Rights and Social Justice approved the Resolution on April 20, 2018.

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

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** The American Bar Association has a long history of supporting equality in the workplace through laws and policies that promote gender equality and equal opportunity in employment. Specifically, the ABA supports the Paycheck Fairness Act to strengthen gender-based pay discrimination protection under the Equal Pay Act of 1964. The ABA also adopted a resolution endorsing the Model Workplace Policy on Employer Responses to Domestic Violence, Sexual Violence, Dating Violence and Stalking, and encouraged all employers to enact workplace policies that address, prevent, and provide assistance to employees who experience violence and to hold perpetrators accountable. And at the 2018 Midyear Meeting, the House of Delegates overwhelmingly adopted a resolution urging employers to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity.

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.** The adopted and pending legislation in state, local, and federal governments is addressed within the Report. See specifically notes 3 and 4 of the Report.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.
8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. Disclosure of Interest. (If applicable) There are no known conflicts of interest.

10. Referrals. By copy of this form, the Report with Resolution will be referred to the following entities:

- Section of Administrative Law and Regulatory Practice
- General Practice, Solo and Small Firm Division
- Section of Litigation
- Section of State and Local Government Law
- Commission on Mental and Physical Disability Law
- Section of Business Law
- Section of Health Law
- Section of Family Law
- Section of Labor and Employment
- Client Protection Committee
- Joint Committee on Employee Benefits

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

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   Email: Paula.Shapiro@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.)

   **Estelle H. Rogers**  
   111 Marigold Ln  
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   Tel.: 202-337-3332 (work)  
   E-mail: testellerogers@gmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution
The resolution urges federal, state, local, territorial, and tribal governments to enact legislation providing employees with paid sick days and paid family and medical leave.

2. Summary of the Issue that the Resolution Addresses
There is a growing consensus that current workplace structures do not recognize the realities of the family and work lives of workers today, most notably the fact that most families no longer have one partner who is able to stay at home and care for the family and household. U.S. labor standards and workplace policies must be updated to reflect the reality of the 21st century workforce and to ensure that the nation’s public policies are in line with the needs of today’s working families.

Paid sick leave and family and medical leave have broad popular support and are the logical and long-awaited extension of the Family and Medical Leave Act, which was signed in 1993—25 years ago. The FMLA has provided many workers with job security in challenging times, but paid leave will enable many more workers to actually take leave and will address one of the contributors to the pernicious gender and racial wage gap.

3. Please Explain How the Proposed Policy Position Will Address the Issue
The ABA, with its long history of supporting equitable employment practices, particularly when the burdens fall disproportionally on women, should be at the forefront of advocacy for this long overdue legislation.

Adoption of this resolution will put the ABA on record in support of legislation that provides paid and job-guaranteed family and medical leave to enable caregivers to meet the needs of their families, and to guarantee paid sick leave when employees themselves are ill.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
No minority views or opposition have been identified.

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4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
No minority views or opposition have been identified.
RESOLVED, That the American Bar Association urges federal, state, local, and tribal governments and international institutions to adopt and implement legislation and regulations to eliminate, prevent and provide remedies for gender-based violence in the workplace, including sexual harassment, based on virtue of their actual or perceived sex (including pregnancy), family responsibilities, sexual orientation, gender identity, gender expression, the intersectionality between race and sex or status as a victim of domestic or sexual violence.

FURTHER RESOLVED, That the American Bar Association urges all employers conducting business in the United States to adopt policies, programs, and procedures to create workplaces free of gender-based violence, including sexual harassment, and address the structural inequalities that allow such violence to occur.
Recent events, including media coverage of the sexual harassment and assault of female and male workers for many years by high-profile male power-brokers in Hollywood, in the media, and in restaurants and disclosure by thousands of women in social media of as a part of #metoo have led to a public reckoning about the limits of our existing legal and policy structures to prevent and remedy these behaviors.

Heightened public awareness of the incidents and scope of gender-based violence in the world of work and its impact is necessary in order for change to happen. But so is international and domestic law and policy that addresses societal, cultural, and economic structures that create and perpetuate the high rates of gender-based violence at work. It is not enough to make examples of a few famous serial harassers and assailants. Employers, governments, and international institutions must take responsibility as well by addressing the power dynamics and structural inequalities that empower men to violate women in the workplace. The recent backlash against the impunity of sexual harassers provides a rare opportunity to create effective mechanisms for preventing andremedying gender-based violence on the job.

As we approach a systemic and comprehensive response to gender-based violence in workplace, it is required that we take an intersectional approach if we are truly going to create effective responses and structures to address gender-based violence for all workers. This term, intersectionality, was first utilized by Kimberle Crenshaw to address sexual harassment in the workplace against Black women. She recognized how individuals with different identities come together to create unique experiences of discrimination and harassment. She also identified that historically our laws, including federal law intended to prohibit discrimination on the basis of race, color, sex, religion, and national origin are not structured to address or understand the experiences or needs of individuals with multiple identities such as Black women, or a gay Hispanic man. Similarly, historically, employer policies and programs to address sexual harassment have not been effective when they have failed to incorporate an intersectional approach. This policy proposes that an intersectional approach is necessary.

Current Status of U.S. Law

In the United States, Title VII of the Civil Rights Act of 1964, as amended, and state laws prohibit sexual discrimination, interpreted to include sexual harassment and assault, by employers against applicants for employment and employees in the terms and conditions of employment. However, these laws do not expressly prohibit or have been interpreted by the courts to exclude many forms of gender-based harassment and violence at work.

1 Kimberle Crenshaw, Race, Gender, and Sexual Harassment, 65 S. Cal. L. Rev. 1467 (1992).
2 See Jeffries v. Harris Cnty. Cmty. Action Ass’n, 615 F.2d 1025, 1034 (5th Cir. 1980)(The court declared that recognizing black females as a protected subgroup “is the only way to identify and remedy discrimination directed toward black females.”)

including the verbal, psychological and emotional abuse that workers describe as having lifelong, devastating impacts on their personal lives and careers. Nor do these laws cover domestic workers, contract workers, volunteers, interns or trainees. In addition, they do not clearly provide protections from gender-based violence and harassment by customers, clients, or on transportation provided by the employer to and from work. Further, these laws do little to tackle insidious, institutionalized gender inequality that enable serial sexual harassers.

As a result of #metoo, many states are considering amendments to their state laws to address these issues, and many state houses and federal Congress have drafted legislation to improve responses to and protections from sexual harassment. In addition the Time’s Up Legal Defense Fund has been created and funded to provide education, awareness, and legal assistance to victims of sexual harassment in the workplace.5

The Scope of the Problem

In 2015, years before #metoo, the U.S. Equal Employment Opportunity Commission (EEOC) which is the federal agency charged with enforcing Title VII, established a Select Task Force on the Study of Harassment in the Workplace consisting of a group of outside experts including management and plaintiffs’ attorneys, representatives of employee and employers advocacy groups, labor representatives, and academics who have who have studied this field for years, to examine harassment in the workplace, its causes, its effects, and what can be done to prevent it.6 The report contained critical conclusions: (1) that workplace harassment remains a persistent problem, (2) it too often goes unreported, (3) there is a compelling business case for stopping and preventing harassment, (4) leadership and accountability are critical, (5) training must change, (6) new and different approaches to training should be explored, and (7) its on us which necessitates that we launch an It’s On Us campaign for the workplace modeled after the one launched on college campuses by the Obama Administration.7

Gender-based violence impacts all workers, but women suffer at a much higher rate than men.8 Enforcement of existing protections domestically and internationally is extremely limited, especially for low-wage working women, women of color, migrant workers, LGBTQI workers, immigrant women and domestic workers.9 Women make up the majority of low-wage, precarious and informal workers in global supply chains and

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9 Nat’l Women’s Law Ctr., Legal Network for Gender Equity, available at https://nwlc.org/about/nwlc-legal-network/
7 Id.
5 Nat’l Women’s Law Ctr., Legal Network for Gender Equity, available at https://nwlc.org/about/nwlc-legal-network/
3 Id.
migratory employment, where the risks for exploitation of all kinds, including sexual violence, is most acute. Moreover, although sexual assault is a crime in the United States, and in many other countries, it is rarely reported by employers or employees for myriad reasons. And even when it is reported, it is rarely appropriately investigated or prosecuted. This is evident because gender-based violence, including sexual harassment and assault remain extremely prevalent in America’s workplaces as highlighted by the recent #metoo movement and high-level ongoing reporting by the U.S. and international media.

In FY 2015, the EEOC received approximately 28,000 charges alleging harassment from employees working in the private sector, or state and local government employers. 45% of these charges were on the basis of sex. In 2016 alone, the EEOC recovered $164.5 million for workers alleging harassment, and this is just a sliver of the costs because it does not include employer costs, court costs, costs in settlement and court cases. This represents just a small fraction of the sexual harassment experienced in the workplace, however, since the vast majority of women who experience it do not complain or tell anyone.

Between 50 and 80% of women workers state that they have experienced sexual harassment at work, depending on the survey, but only twenty-five percent told anyone, and only 5% complained formally. Rates of gender-based violence vary based on the industry, and on intersectionality.

For example, 60% of women respondents to a survey of restaurant workers reported being sexually harassed, and more than half reported incidents occurring at least once a week. An investigation conducted by UNITE HERE Local 1 in Chicago found that 58% of hotel workers and 77% of casino workers surveyed have been sexually harassed by a guest. Of these, almost half of hotel workers had a guest answer the door naked or exposed themselves. Fifty-six percent of women who had been harassed by a guest said that they did not feel safe returning to work after the incident, but many reported that they felt there was nothing that they or anyone could do about it. In addition, although women

13 EEOC Select Task Force Report
14 EEOC Select Task Force Report
only make up 2.6% of workers in construction and extraction occupations, a U.S. Department of Labor study found that 88% of them reported experiencing sexual harassment at work. Twenty-eight percent of women in tech and 34% of women in IT report being sexually harassed at work, and 33% female executives and engineers reported that they had been sexually harassed. Finally, surveys of female farmworkers have found that anywhere from 40 to 80% have experienced sexual harassment, including verbal harassment to rape on the job.

Domestic and International Responses

Successful efforts to address gender-based violence in the U.S. have been led by women of color and immigrant workers, including Kimberle Crenshaw’s tremendous contributions to legal theories to address sexual harassment as described above. In Chicago, UNITE HERE conducted participatory research to learn about the experiences of hotel workers with sexual harassment. Their work resulted in the "Hands Off, Pants On" campaign and a report on the high rates of gender-based violence that hotel and casino workers experience at the hands of customers. This research was instrumental in passage of a city ordinance in Chicago requiring that all hotel workers be provided with a panic button. In Florida, the Coalition of Immokalee Workers have designed a training and education program with the support of the brands that purchase the produce they pick – tomatoes – that has eradicated sexual harassment and violence from their workplace.

In June 2018, the International Labor Organization, a UN organization comprised of trade unions, governments and companies, will discuss creating an international labor standard, which, if adopted, could provide workers, unions, employers and governments with a powerful global tool. Now is the time for workers, unions and employers to support the adoption of a standard that will prevent and address the gender-based violence at work and vindicate the women who have bravely disclosed their abuse—and those who have been unable to do the same. The international focus on this issue provides a unique opportunity to amend U.S. national, Tribal, state and local law as well.

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21 Hands Off Pants On, Sexual Harassment in Chicago’s Hospital Industry, available at https://www.handsoffpantson.org
22 Coalition of Immokalee Workers, Tag: Sexual Harassment, http://ciw-online.org/blog/tag sexual-harassment/
International and domestic laws should be amended to define employee to include full-time, part-time, short or long term contractual employee, trainee, apprentice, volunteer or intern who is or is paid or unpaid, employed on a daily, weekly, monthly, hourly or seasonal basis. They should define employer as any person or organization, for-profit or not-for-profit, private or public, whether incorporated or not, who or which employs workers under a contract of employment or any other manner and includes:

a. an heir, successor or assignee, of the employer;
b. any person responsible for the direction, administration, management and control of management;
c. the owner of the organization and every director, manager, agent, or person concerned with the management of the affairs of the organization;
d. Any contractor or an organization of a contractor who or which undertakes to procure the labor or services of employees for the use by another person or in another organization for any purpose and for payment in any form and on any basis.

The laws should define gender-based violence and harassment as adverse treatment by an employer of an employee based on the employee’s actual or perceived sex (including pregnancy), child care responsibilities, sexual orientation, gender identity, gender expression, or status as a victim of domestic violence or sexual violence causing interference with work performance or creating an intimidating, hostile or offensive work environment, or the attempt to punish the complainant for reporting sexual harassment or for refusing to comply to such a request or is made a condition of employment. Sexual harassment includes but is not limited to:

a. Making unwelcome or unwanted verbal or physical conduct of a sexual nature;
b. Verbal harassment or abuse, verbal or written communication (including narration of sexual incidents, emailing or messaging or showing explicit sexual content in print or electronic form (SMS, Email, Screensavers, Posters, CDs etc))
c. Request for sexual favors (invitations for sex, requests for going out on dates)
d. Unwelcome physical conduct (touching, kissing, patting, pinching, physical assault like rape etc)
e. Sexually demeaning attitude (leering or staring at a person’s body)
f. Abuse of authority or Quid Pro Quo harassment which is a demand of sexual favors by an employer, and making it a condition of obtaining certain job benefits which may include:
   i. Wage increase
   ii. Promotion (to a higher grade)
   iii. Training opportunity (within or outside the country)
   iv. Transfer (to another place, department, etc.)
   v. The Job itself

g. Creation of Hostile Working Environment
   i. any unwelcome advances,
   ii. request for sexual favor,
   iii. other verbal or physical conduct which interferes with individual’s work performance or creates a hostile and intimidating work environment.

International and domestic laws should be amended to define employee to include full-time, part-time, short or long term contractual employee, trainee, apprentice, volunteer or intern who is or is paid or unpaid, employed on a daily, weekly, monthly, hourly or seasonal basis. They should define employer as any person or organization, for-profit or not-for-profit, private or public, whether incorporated or not, who or which employs workers under a contract of employment or any other manner and includes:

a. an heir, successor or assignee, of the employer;
b. any person responsible for the direction, administration, management and control of management;
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g. Creation of Hostile Working Environment
   i. any unwelcome advances,
   ii. request for sexual favor,
   iii. other verbal or physical conduct which interferes with individual’s work performance or creates a hostile and intimidating work environment.
h. Retaliation. If the victim rejects sexual advances or abuse of authority, the perpetrator can retaliate in following ways:
   i. Limiting an employee’s options for training, future promotions
   ii. Distorting the evaluation (annual confidential reports)
   iii. Generating gossip against the employee
   iv. Limiting access to his/her rights (right to complain, right to work with dignity, right to freedom of association, right to promotions, wage increases. Etc.)
   v. Any adverse action taken against a complainant or witness of sexual harassment (of any side) for lodging complaint of harassment with the employer or a government agency.

The laws should be amended to define the workplace as the place of work or the premises where an organization or individual operates and includes building, factory, open area, the place of work or the premises. In the case of an organization or individual which operates in more than one geographical area where the activities of the organization or individual are carried out including transportation to and from the workplace when provided by the employer. “any situation that is linked to official work or official activity outside office”.

The prohibition of gender-based violence and harassment should state that it is unlawful for an employee to be sexually harassed by an employer as defined in this Act or by a third party, including a customer or client of the employer, because of the employee’s perceived or actual or perceived sex (including pregnancy), family responsibilities, sexual orientation, gender identity, gender expression, or status as a victim of domestic violence or sexual violence.

Employer Programs Addressing, Preventing and Remediying Gender-Based Violence and Harassment in the Workplace

Employer policies and procedures should include:

1. Implementation of a comprehensive prevention program that includes, at a minimum:
   a. A gender-based violence prevention policy:
      i. drafted with input from a committee convened by the employer consisting of employees from every level of the employer, including the ownership/leadership of the employer and the lowest paid employees, with equal representation of men and women, no less than half of whom are non-white;
      ii. provides a definition of gender-based violence and several specific examples that represent a range of actions and behaviors that constitute a violation of the policy and holds the employer accountable for gender-based violence committed by low-level supervisors, co-workers, customers and other third parties in addition to the owners of the employer, the chief operating officer, and upper level management;
iii. clearly describes how someone who believes they have experienced or witnessed gender-based violence may report it, to whom, with multiple avenues for reporting, including one that is anonymous and that the reports will be promptly and thoroughly investigated and addressed, and ensures that perpetrators will be held accountable, and the individual reporting will not be retaliated against doing so;

iv. identifies internal and external resources are available to an employee who believes they may be the victim of gender-based violence.

v. Clearly identifies the steps that the employer will take to remedy the impacts of the gender-based harassment, including action taken against individuals found to have violated the policy such as suspension or termination from employment, mandatory training, or demotion.

vi. include questions that assess learning, skill-building activities to assess understanding and application of content, and hypothetical scenarios about harassment with discussion questions.

vii. Any training must explain:

1. The definition of sexual harassment under Title VII of the federal Civil Rights Act of 1964 and any state and local applicable law
2. The statutes and case-law prohibiting and preventing sexual harassment;
3. The types of conduct that can be gender-based violence and harassment including sexual harassment;
4. The remedies available for victims of gender-based violence and harassment;
5. Strategies to prevent gender-based violence and harassment;
6. Supervisors’ obligation to report gender-based violence and harassment;
7. Practical examples of gender-based violence and harassment;
8. The limited confidentiality of the complaint process;
9. Resources for victims of gender-based violence and harassment, including to whom they should report it;
10. How employers must correct gender-based violence and harassment;
11. What to do if a supervisor is personally accused of gender-based violence or harassment;
12. The elements of an effective anti-gender-based violence and harassment policy and how to use it;

b. Drafting and implementation of anonymous climate surveys a minimum of annually:
   i. disseminated to all full-time and part-time employees, independent contractors, volunteers, full-time and part-time employees
ii. for the purpose of learning whether employees are aware of the workplace policy, and if they feel safe to use the complaint procedures available, and if not why not and what other steps may be taken to address power inequalities in the workplace creating opportunities for gender-based violence to persist and

iii. using the information from the climate survey to update and alter the gender-based violence prevent program.

iv. Distribution of results of the climate surveys to of those individuals listed in #1 above, and a description of how the results will lead to substantive changes in how the employer addresses gender-based violence.

c. Integration of review and consideration of how managers handle complaints of gender-based violence into job descriptions, performance evaluations, and merit-based employment decisions.

d. Development and implementation of mandatory in person trainings with trainers educated in the root causes of gender-based violence in the workplace that are mandatory for all employees – including all leadership - upon hire and at least annual after that provide information and opportunities to discuss the root causes of gender-based violence in society and ways to develop spaces and structures to address it in the workplace; provide employees with opportunities to problem solve in common situations and specifically incorporates bystander intervention techniques.

e. Development and implementation of annual, mandatory in person effective trainings for all employees including all leadership that helps employees and supervisors recognize gender-based violence in their specific workplace, and understand their rights and responsibilities.

f. Policies and procedures that do not require that the individual who reports gender-based violence to sign a confidentiality agreement prohibiting their ability to speak about the gender-based violence as a condition of employment or in order to access protection from the employer including but not limited to monetary compensation and requires monitoring of the terms of settlement agreements

g. Annual publication and dissemination within the workplace including the highest level of the employer, such as the Board of Directors or executive committee and the public of the existence, resolution, and any consideration paid for the settlement of claims regarding gender-based violence that individuals have reported against employees of the employer in the past year, including the results of any investigations and a description of any remedies and/or punishment.
h. A policy that lets the victim of the gender-based violence who is a party to any settlement agreement with the employer related to the allegation of gender-based violence to determine whether they want a confidentiality agreement in the settlement agreement.

Respectfully submitted,

Robert N. Weiner
Chair, Section of Civil Rights and Social Justice
August 2018
1. **Summary of Resolution(s).** The resolution urges federal, state, local, territorial, tribal governments and international institutions to develop and adopt legislation and implement regulations to eliminate, prevent and correct the means by which individuals, by virtue of their actual or perceived sex (including pregnancy), family responsibilities, sexual orientation, gender identity, gender expression, or status as a victim of domestic or sexual violence are subjected to gender-based violence, including sexual harassment, in the workplace.

It further urges all employers conducting business in the United States to adopt programs and procedures including policies to create workplaces free of gender-based violence, including sexual harassment, by addressing the structural inequalities that permit these violations of human rights to occur.

2. **Approval by Submitting Entity.** The Council of the Section of Civil Rights and Social Justice approved the Resolution on April 20, 2018.

3. **Has this or a similar resolution been submitted to the House or Board previously?** The House previously adopted a policy related to sexual harassment at the Midyear Meeting in Vancouver in February 2018.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** This policy is meant to complement and expand the policy adopted at MYM 2018, Resolution 302. That policy was limited to HR workplace policies and this policy addresses domestic and international policy and law as well as workplace programs to address policies but also includes trainings, educational structures, etc. This is significantly broader, building from that policy to recommend changes to law and to adopt programs in workplaces.

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) As a result of #MeToo, many states are considering amendments to their state laws to address these issues, and many state houses and federal Congress have drafted legislation to improve responses to and protections from sexual harassment.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.
8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. Disclosure of Interest. (If applicable) There are no known conflicts of interest.

10. Referrals. By copy of this form, the Report with Recommendation will be referred to the following entities:

- Section of Administrative Law and Regulatory Practice
- Commission on Women in the Profession
- Section of Business Law
- Section of Civil Rights and Social Justice
- Commission on Domestic & Sexual Violence
- Commission on Sexual Orientation and Gender Identity
- Section of Labor and Employment Law
- Rule of Law Initiative
- Section of International Law
- Center for Human Rights
- Solo, Small Firm and General Practice Division

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

Robin Runge, Chair
CRSJ Working Group on Sexual Harassment and Assault in the Workplace
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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges federal, state, local, territorial, tribal governments and international institutions to develop and adopt legislation and implement regulations to eliminate, prevent and correct the means by which individuals, by virtue of their actual or perceived sex (including pregnancy), family responsibilities, sexual orientation, gender identity, gender expression, or status as a victim of domestic or sexual violence are subjected to gender-based violence, including sexual harassment, in the workplace.

It further urges all employers conducting business in the United States to adopt programs and procedures including policies to create workplaces free of gender-based violence, including sexual harassment, by addressing the structural inequalities that permit these violations of human rights to occur.

2. Summary of the Issue that the Resolution Addresses

Recent events, including media coverage of the sexual harassment and assault of female and male workers for many years by high-profile male power-brokers in Hollywood, in the media, and in restaurants and disclosure by thousands of women in social media of as a part of #metoo have led to a public reckoning about the limits of our existing legal and policy structures to prevent and remedy these behaviors.

Heightened public awareness of the incidents and scope of gender-based violence in the world of work and its impact is necessary in order for change to happen. But so is international and domestic law and policy that addresses societal, cultural, and economic structures that create and perpetuate the high rates of gender-based violence at work. It is not enough to make examples of a few famous serial harassers and assailants. Employers, governments, and international institutions must take responsibility as well by addressing the power dynamics and structural inequalities that have permitted this violence to occur in the past. The recent backlash against the impunity of sexual harassers provides a rare opportunity to create effective mechanisms for preventing and remedying gender-based violence on the job.

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

As we approach a systemic and comprehensive response to gender-based violence in workplace, it is required that we take an intersectional approach if we are truly going to create effective responses and structures to address gender-based violence for all workers. This policy proposes that an intersectional

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approach is necessary. This policy also expands upon the 2018 MYM policy as it is broader, building from that policy to recommend comprehensive changes to law, and to programs in workplaces.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

No minority views or opposition have been identified.
1 RESOLVED. That the American Bar Association urges providers of domestic and international dispute resolution to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities ("diverse neutrals") and to encourage the selection of diverse neutrals; and

6 FURTHER RESOLVED, That the American Bar Association urges all users of domestic and international legal and neutral services to select and use diverse neutrals.
The American Bar Association has set forth four Goals of equal weight and importance to supporting the ABA Mission. Goal III, adopted in 2008, is to “eliminate bias and enhance diversity.”1 It is derived from and expanded on former Goal IX, which, as amended, was “to promote the full and equal participation in the profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities.” Goal III (and former Goal IX) recognizes that clients and the public are better served when organizations are diverse and inclusive at every level.2 Goal III also recognizes the well-established business case for diversity and inclusion, and demonstrates that clients, the legal profession and society are best served when lawyers reflect the broader community in which they serve.3

It is well established that, despite significant efforts, the legal profession as a whole lags behind other professions regarding diversity and inclusion. As of 2012, African Americans and Hispanics comprised 16.5% of accountants and auditors, 18.9% of financial managers, 12.3% of physicians and surgeons, but only 5.4% of attorneys.4 Women, members of racial and ethnic groups, members of LGBTQ groups, and attorneys with

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1 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 Of course, definitions of diversity differ around the world and include categories such as religious diversity, age diversity, regional diversity, cultural diversity, and geographic diversity, as well as categories of underrepresented groups on a country-by-country basis. See White & Case, 2015 International Arbitration Survey at 16-18. Without prejudice to any potentially positive impact on diversity and inclusion, this resolution seeks only to address diversity as set forth in Goal III, as amplified by former Goal IX.


4 Raising the Bar: An analysis of African American and Hispanic/Latinx diversity in the legal profession, Microsoft Study, (2013). For an event broader view of diversity in many professions, see Demographic Summary, Elizabeth Chambliss, ILP Review (2014) at 13 (‘Aggregate minority representation [defined as African American, Asian American, Hispanic and Native American] among lawyers is significantly lower than minority representation in most other management and professional jobs. Basing on Department of Labor statistics, minority representation among lawyers was 14.4% in 2013, compared to 27.8% among accountants and auditors, 38.2% among software developers, 24.3% among architects and engineers, 31.9% among physicians and surgeons, and 25.8% within the professional labor force as a whole.’) See also The Diversity Crisis: What is Wrong with This Picture?, American Lawyer, May 29, 2014.

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disabilities continue to be underrepresented in the legal profession. Data as a whole show some progress over time—as of December 2016, minorities represented 16% of law firm associates, partners and counsel and 35% of all law firm attorneys were female. However, data at more senior levels of the profession and for certain diverse groups present a bleaker picture. In the words of the 2017 Vault/MCCA Law Firm Diversity Report, even as firms have become more diverse and minority representation is at an all-time high, "the demographic shifts are both incremental and uneven" and "composition of the partnership ranks highlights the slow rate of change."[4]

Even though one in four law firm associates is a person of color, more than 90 percent of equity partners are white. Among women, the figures are especially stark: women of color represent 13 percent of associates but less than 3 percent of equity partners.[7] In support of implementing Goal III to eliminate bias and enhance diversity, in August 2016 the House of Delegates of the American Bar Association adopted Resolution 113 urging that “all providers of legal services, including law firms and corporations expand and create opportunities at all levels of responsibility for diverse attorneys,” and further urging “clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys.”

In support of implementing Goal III to eliminate bias and enhance diversity, in August 2016 the House of Delegates of the American Bar Association adopted Resolution 113 urging that “all providers of legal services, including law firms and corporations expand and create opportunities at all levels of responsibility for diverse attorneys,” and further urging “clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys.”

This Resolution addresses elimination of bias and enhancing diversity in Dispute Resolution—a segment of “legal” services that has been described as “arguably the least diverse corner of the profession.”[9] As set forth below, the available data show that diversity within Dispute Resolution significantly lags the legal profession as a whole. Despite significant efforts on the part of institutional providers of dispute resolution services to increase the diversity of their rosters, see n. 11 infra, diverse neutrals remain underrepresented (the “roster issue”). The roster issue is compounded by the fact that qualified diverse neutrals are less likely to be selected due to the network-based and confidential nature of the profession, which, in combination, results in selection of neutrals taking place in relative obscurity, enabling implicit bias to play a greater role in selection (the “selection problem”). This lack of transparency also undermines potential efforts to address the selection problem. By leaving recommendations and referrals largely in the hands of outside counsel and established neutrals, it reduces the role that clients can play in addressing the problem by including Dispute Resolution in their larger efforts to improve diversity in the legal profession. In addition, the lack of transparency reduces

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public awareness of lack of diversity in Dispute Resolution, and thus also reduces the incentive of stakeholders such as outside counsel, institutional service providers and established neutrals to take proactive steps without client pressure. By raising awareness of the lack of diversity in Dispute Resolution, the proposed resolution will encourage all stakeholders to take action.

I. Data demonstrate that diversity within Dispute Resolution is significantly below that of the legal profession as a whole.

It is to be expected that diversity and inclusion issues faced by the legal profession as a whole would be largely reflected in subsets of the profession. Unfortunately, for the Dispute Resolution community of diverse mediators, arbitrators, and other dispute resolution practitioners (collectively, “diverse neutrals”), “ADR has been a stubborn enclave of homogeneity” and simply achieving the “incremental and uneven” advances achieved by the legal profession as a whole would be a great leap forward. Despite significant efforts by organizations and individuals within the Dispute Resolution community to address the lack of diversity, the Dispute Resolution profession lags significantly behind the legal profession as a whole.

A. Representation of diverse groups on the rosters of dispute resolution providers is significantly lower than representation of diverse groups in the legal profession as a whole.

Due to the confidentiality and privacy issues that are integral to most dispute resolution processes, data on the diversity of neutrals within Dispute Resolution are scarce. In fact, yearly statistics of the type collected for the legal profession as a whole are almost non-existent.

10 Id.


12 For over a decade, certain Dispute Resolution institutions and diverse neutrals, cognizant of the diversity issues, have worked to improve diversity in the profession. For example, in 2006, the International Institute of Conflict Prevention and Resolution (the “CPR Institute”) convened the National Task Force on Diversity in ADR and, in 2007, the Diversity Task Force, created an ADR Diversity Survey to assist corporations in holding their law firms accountable for improving diversity in Dispute Resolution. In 2013, CPR created a “Diversity Matters Pledge,” allowing companies and individuals to recognize the value of diversity and inclusion not only in their workforce, but also providers of services including arbitration and mediation. The American Arbitration Association established its Leon Higginbotham Fellowship in the early 2000's to train and promote diverse neutrals, and requires its case managers to create neutral candidate lists for parties that are at least 20% diverse. See also nn. 14, 22 and 32, infra.

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The data that can be found consistently reveal that representation of women and members of racial and ethnic groups on rosters of neutrals is below that of the legal profession as a whole.

As of 2015, FINRA became the only dispute resolution service provider that gathers and publishes comprehensive demographic data regarding its roster on a year-over-year basis. FINRA has made a strong commitment to enhancing diversity on its roster. However, FINRA itself describes this process as "incremental," in part because in 2015, its roster as a whole, based on responses by FINRA neutrals to an outside survey, was 75% male and 86% Caucasian. Less comprehensive data from other dispute resolution service providers show lower levels of diversity. JAMS, a nationwide provider of dispute resolution services, reports on its website that 22% of the neutrals on its roster are women and 9% are persons of color. The American Arbitration Association, another major ADR provider, reported that women and minorities comprised 25% of its roster in 2017. In a 2012 survey, the National Arbitration and Mediation (NAM), another nationwide ADR provider, found that its roster was 16% female and 14% nonwhite. In 2016, the New York-based CPR Institute reported that its roster of more than 550 neutrals worldwide was approximately 15% female and 14% nonwhite.

Viewed in the context of the Vault/MCCA Law Firm Diversity Survey, the roster data available from FINRA, JAMS, AAA, NAM and CPR indicate that gender and racial/ethnic diversity of institutional providers of dispute resolution services is likely to be less than one-half that of law firms.

As a result of FINRA's efforts to increase the diversity of its roster, the FINRA survey results show that 15% of the new arbitrators who joined the roster in 2016 were women and 14% were members of racial and ethnic minorities (28% of the 2015 roster and 33% were women). Our Commitment to Achieving Arbitrator and Mediator Diversity at FINRA https://www.finra.org/arbitration-and-mediation/diversity-and-finra-arbitrator-recruitment.

According to the Vault/MCCA Survey, reliable data for attorneys with disabilities in the legal profession as a whole are unavailable and that is also the case for Dispute Resolution. The Business of ADR—And Lack of Diversity, indisputably.org, October 5, 2016 ("Statistics are hard to come by and most ADR organizations are reluctant to provide data on their panels.")

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15 Id.

16 https://www.jamsadr.com/diversity/.

17 AAA 2017 B2B Dispute Resolution Infographic.

18 Hancock at 12.

19 Id.

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21 Id.
B. Qualified diverse neutrals are less likely to be selected.

The challenges faced by diverse neutrals go beyond significant underrepresentation on rosters. Available data demonstrate that, even when they succeed in being added to rosters, qualified women and members of racial and ethnic groups are selected to serve as neutrals at levels below their representation in the profession. For example, in its 2015 Key Statistics, the AAA reported that 26% of arbitration cases had a diverse arbitrator. Low as that number is, if you look behind the aggregate numbers to the distribution of cases for which diverse neutrals are selected, the problem is actually worse:

[Available statistics mask the true extent of the problem. Even if providers have a diverse roster of people to choose from, what matters is who ultimately wins the work from attorneys and clients. Many sources agreed that, within the realm of business disputes, there is a small pool of ‘repeat players’ who are predominantly white and male.]

In July 2017, a report by the Commercial & Federal Litigation Section of the New York State Bar Association noted, in particular, the low rate of selection of female neutrals for high-value cases:

It should come as no surprise that much has been written about the lack of diversity among ADR neutrals, especially for high-value cases. As a 2017 article examining gender differences in dispute resolution practice put it, ‘the more high-stakes the case, the lower the odds that a woman would be involved.’ [Citation omitted.] Data from a 2014 ABA Dispute Resolution Section survey indicated that for cases with between one and ten million dollars at issue, 82% of neutrals and 89% of arbitrators were men. [Citation omitted.] Another survey estimated that women numbers of men appointed are Caucasian, there are few statistics on minority ethnic and racial representation on international tribunals. http://www.blplaw.com/media/download/FINAL-Arbitration_Survey_Report.pdf. In recognition of the under-representation of women on international arbitral tribunals, members of the international arbitration community drew up an “Equal representation in Arbitration” pledge (“the Pledge”) to take action. The Pledge seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon as practically possible, with the ultimate goal of full parity. This Pledge has been signed by the Section on Dispute Resolution, as well as the Section of International Law and the Section of Litigation. http://www.arbitrationpledge.com/about-the-pledge.

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The 2014 survey by the ABA’s Section on Dispute Resolution is particularly revealing. Data from that survey show an inverse relationship between the amount of money in dispute and the proportion of women selected as a neutral. Second, the survey also shows that selection rates for male neutrals are exceptionally high (and, conversely, low for female neutrals) for corporate and commercial matters (82% male) and class actions (79% male). In contrast, only 42% of neutrals involved in cases that were primarily nonmonetary were male. This selection problem has at least two major ripple effects. First, it exacerbates the roster issue because it is difficult to increase the diversity of rosters when potential recruits are aware that they are less likely to be selected, particularly for the higher paying cases. It simply may not be economically rational to invest in the requisite training and developing the experience to become a neutral in the face of reduced opportunity to build an economically viable practice. Second, low levels of diversity in neutral selection “show the profession falling significantly short of federal courts,” which can call into question the legitimacy of the private justice process.

Neutrals in both arbitration and mediation serve a role that is often a substitute for (and sometimes annexed to) the judicial process. Therefore, it becomes an issue of fairness that the decision-makers or facilitators should be representative of the individuals, institutions and communities that come before them. 24

25 See Gina Viola Brown and Andrea Kupfer Schneider, Gender Differences in Dispute Resolution Practice, Report on the ABA Section of Dispute Resolution Practice Survey, (January 31, 2014), at Chart 17.
26 Hancock at 5 (“Diversity is especially palpable in high-stakes disputes where neutrals can command rates topping $25,000 a day.”)
27 Brown and Schneider at 14-16.
28 Hancock at 7; See also Laura Kaster, Why and How Corporations Must Act Now to Improve ADR Diversity, Corporate Disputes (January-March 2015) (“[S]tate and federal courts, which are still struggling to improve, have close to 30 percent women (although fewer minority) judges.”)
29 David H. Burt and Laura A. Kaster, Why Bringing Diversity to ADR is a Necessity, ACC Docket (October 2013) at 41. See also ADR Conversations – Increased Diversity in ADR Essential to Keep Up With Evolving Global Marketplace, JAMS Dispute Resolution Alert Winter 2012, at 4 (“When a dispute is resolved in the court system, the jury and the judge available to resolve the dispute are diverse. The private justice system that provides mediation and arbitration services must be just as, if not more, diverse if it is to maintain credibility.”); see also Volpe at 122 (“Studies show that individuals involved in dispute resolution processes feel more comfortable when they share some aspect of their identity with those guiding the process.”) See also What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short- and Long-Term Outcomes, Maryland Judiciary Administrative Office of the Courts, Court Operations. (2016), What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short- and Long-Term Outcomes, Annapolis, MD. Author (“Having at least one ADR practitioner in the session who matches the race of the responding participant was positively associated with participants reporting that they listened and understood each other in the ADR session and jointly controlled the outcome and an increase in a sense of self-efficacy (ability to talk and make a difference) and an increase in the sense that the court cares from before to
For these reasons, the individual and societal impacts of the low level of diversity in Dispute Resolution cannot be remedied by addressing the roster issue alone. Simply putting the underrepresentation of diverse neutrals on paper and qualified diverse neutrals are practicing today and can be easily identified. To improve diversity in Dispute Resolution, it is essential to create an environment in which we can address the drivers behind the low levels of selection of diverse neutrals.

II. A network-based culture, reinforced by implicit bias and cloaked in confidentiality, reduces selection of diverse neutrals.

Commentators have identified two issues in particular that appear to be primary drivers of low levels of selection of diverse neutrals for cases. First, the practical reality is that Dispute Resolution is largely a network-based profession in that: (1) many neutrals are chosen or at least vetted through the networks of equity law firm partners, and (2) established networks are often asked to make referrals to other neutrals. In both cases, the networks are largely white and male, and the recommendations and referrals subject to implicit bias. Second, the confidentiality and privacy that are integral elements of most dispute resolution processes reduce public awareness of the scope of the problem, most notably awareness on the part of the stakeholders in the best position to bring about change—clients.

after the ADR session. Here it is important to note that participants were never asked about their opinion on the role of race or the ADR practitioner’s race. Participants were asked their race, ADR practitioners were asked their race, and based on these answers, a variable was created identifying if there was a match. This was included in the analysis and was found to be significant in these two areas, even after holding constant for other factors in the case, including ADR practitioner strategies.

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A. The network-based culture broadens the impact of implicit bias.

Neutral appointment and selection processes vary by dispute resolution providers, and are often customized by the parties. Regardless of the formal process applicable to a dispute, neutrals are predominantly hired based on the consent of the parties. Thus, they are often informally vetted and selected through a classic informal “old boy network” through which colleagues consult one another for recommendations.

Companies largely continue to outsource both the drafting of dispute resolution clauses and the actual neutral selection to outside counsel, abdicating these fundamental strategic decisions to others. Far too much reliance is placed on established networks, word-of-mouth, and the recommendations of the same “usual suspects,” leading to a reluctance to try someone new and an attendant loss of opportunity to broaden the company’s roster of preferred neutrals. It is natural and indeed common for people to recommend and select those with whom they are most familiar. However, it has been suggested that “[i]n this dynamic, flows of information travel from a sense among attorneys that retired judges and veteran litigators, a largely older, white and male cohort, are the most palatable figures to clients when pursuing a dispute outside of the courtroom.” Unfortunately, this tendency is reinforced by implicit biases to which we are all subject and that often lead even well-meaning individuals to pass over those who are “different.” The network-based culture and implicit bias, operating in tandem, are key drivers of the low levels of diverse neutrals actually selected for better-paying commercial matters—levels that are much lower than diversity in Dispute Resolution, as well as diversity in the legal profession as a whole.

Legal work by recruiting partners from a large number of firms to review a legal memo in a “writing analysis survey.” All of the partners were given the same memo, in which Nextion inserted errors. Half of the reviewers were told that the memo was written by a white man named Thomas Meyer and half were told that it was written by a black man named Thomas Meyer. The reviews gave the memo supposed written by the white Thomas Meyer an average rating of 4.1 out of 5, and generally praised his work. Reviewers gave the memo written by the black Thomas Meyer an average rating of 3.2 out of 5, and criticized the memo as average at best and needing a lot of work.

Hancock at 1.0.

While implicit bias is an issue for all diverse groups, it has been suggested that the risk of implicit bias increases at lower levels of representation. See Isaacson at 1 (“Take minorities, for instance. As seen in the graph below, the threat of implicit bias for minority groups is even higher than it is for women, due to their lack of representation.”)

See also 2018 International Arbitration Survey at 20 (survey responses show how important it is for parties and their in-house or external counsel to be part of a sophisticated network of peers so that all relevant information is potentially just a few phone calls away.)

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B. Confidentiality and lack of transparency inhibit effective solutions to the lack of diversity in Dispute Resolution.

The effects of a network-based culture and implicit bias are compounded by the confidentiality and privacy that are important elements of mediation, arbitration and other dispute resolution processes. Confidentiality (often cited as the reason for the lack of data) inherently reduces public awareness of the low level of diversity and inclusion in Dispute Resolution, and thus, public pressure for change. But the problem extends beyond lack of public awareness. The tendency of companies to outsource neutral selection to outside counsel creates a functional lack of transparency to clients regarding diversity issues in Dispute Resolution. That lack of transparency, in turn, undermines the ability of clients to act as agents of change. Consequently, clients often fail to focus on enhancing opportunities for diverse neutrals as part of their broader and influential efforts to enhance diversity in the legal profession. This is particularly harmful because inside counsel have a special ability to require greater diversity—for example, through the use of tools such as Outside Counsel Guidelines. Greater client focus and willingness to require change are essential to driving the changes necessary to improving diversity in Dispute Resolution:

Achieving real progress will not only require continued attention from providers in terms of recruiting and supporting women and minority mediators and arbitrators, but also clients who are willing to ask questions that perhaps they haven’t in the past. This includes questions from corporate counsel to their law firms and from outside counsel to ADR providers. It will take willingness for clients to go beyond using the same people from the same short list. It will take ensuring that there is a sufficient pipeline of women and minorities that know what it takes to prepare for a career as a successful mediator or arbitrator.

37 Smalls at 2.

ADR Conversations – Increased Diversity in ADR Essential to Keep Up With Evolving Global Marketplace’, JAMS Dispute Resolution Alert (Winter 2012), at 4 (“As legal departments enter into professional relationships with law firms and other legal vendors, they include diversity as a criterion for engagement, and the policy should be extended to requiring consideration and selection of mediators and arbitrators with diverse backgrounds.”); see also Mark Smalls, A Fresh Look at Diversity in ADR, Law360 (December 13, 2012) (“One need only look at the pressure that various corporate clients put on their outside counsel in recent years regarding hiring, promotion and case assignments to see how paying attention to diversity can lead to securing (or losing) business.”)

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38 Smalls at 2.
Conclusion

To enhance diversity and inclusion in Dispute Resolution, it is essential to shine a spotlight on the low level of diverse representation on neutral rosters and the special challenges created by the combination of the network-based culture within the profession, implicit bias, and the confidentiality that tends to obscure the degree to which Dispute Resolution lags behind the legal profession as a whole. By explicitly linking ABA Goal III to Dispute Resolution, this Resolution provides precisely the spotlight needed to encourage active engagement on the part of all stakeholders with the ability to move the needle to increase representation of diverse neutrals on rosters, and to enhance their likelihood of success in the selection process.

Respectfully Submitted,

Section Chair, Ben Davis
Dispute Resolution Section
August, 2018
1. **Summary of Resolution:** The resolution urges (a) providers of domestic and international dispute resolution to expand their rosters with diverse and to encourage the selection of diverse neutrals; and (b) users of domestic and international legal and neutral services to select and use diverse neutrals.

2. **Approval by Submitting Entity:** This Resolution and Report was formally approved by a vote of the Section of Dispute Resolution Council during its meeting in Washington, D. C. on February 9, 2018.

3. **Has this or a similar resolution been submitted to the House or the Board Previously?** This specific resolution has not been previously submitted. In 2016, however, the HOD adopted a resolution for the ABA to urge (a) all providers of legal services, including corporations and law firms, to expand and create opportunities at all levels of responsibilities for diverse attorneys; and (b) clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys. In addition, in 1986, the HOD adopted a resolution for the ABA to “take concrete actions with regard to the hiring, recruitment, promotion and advancement of minority lawyers.” The instant resolution is the logical progression of the 1986 and 2016 resolutions passed by the HOD and is necessary to further advance diversity and inclusion in Dispute Resolution.

4. **What Existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** The relevant policies are referenced in the Background section of this Report: specifically, Goal II, “improving our profession,” and Goal III, “eliminate bias and enhance diversity.” Adopted in 2008, Goal III objectives are to: “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.” The Section of Dispute Resolution’s proposed policy resolution supports ABA Goals II and 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.

The Dispute Resolution Section is developing tools for systematic collection of data addressing the issues set forth in the Report in order to provide a foundation to identify, develop, and implement more effective approaches to enhancing diversity. In addition, the Section intends to seek opportunities to collaborate with both the Commission on the Status of Women in the Profession and the Commission on Racial and Ethnic Diversity to better assure that diversity in Dispute resolution is an integral element of efforts to enhance diversity in the legal profession as a whole.

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

9. Disclosure of Interest. (If applicable) N/A

10. Referrals.
All SDFs and All Commissions
National Bar Association
Hispanic National Bar Association
National Asian Pacific Bar Association
National Native American Bar Association

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution focuses on expanding representation of diverse neutrals on the rosters of providers of domestic and international dispute resolution and encourages users of domestic and international dispute resolution legal and neutral services to promote and support the selection thereof. The Resolution is a continuation of the policies adopted previously by the American Bar Association addressing the need for diversity in the selection and use of diverse individuals in the provision of professional dispute neutral services in Resolution 113 and in furtherance of Goal III.

2. Summary of the Issue that the Resolution Addresses

This Resolution encourages and supports the selection of diverse dispute neutrals.

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

This proposed policy position addresses the issue through the encouragement and support of hiring diverse dispute neutrals by lawyers, law firms, and dispute resolution service providers.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

The Section of Dispute Resolution is unaware of any minority views or opposition, either internal or external, to this proposed policy.
RESOLVED, That the American Bar Association reaffirms its commitment to advance the rule of law, including its core values of the integrity and independence of the judiciary and the legal profession, and the right of access to justice at every level of government, by taking concrete actions through its diverse entities to expose and condemn abuses of the judiciary and legal profession; and

FURTHER RESOLVED, That the American Bar Association condemns the harassment of judges, lawyers, other members of the legal profession, and their extended families throughout the world for serving in their designated capacities; and

FURTHER RESOLVED, That the American Bar Association urges all governments to abide by their obligations to uphold an international order based on the rule of law; to respect human rights and fundamental freedoms recognized by national and international law; to refrain from any attack on the independence of the judiciary, legal profession, and systems of justice; to promptly investigate and hold accountable those who perpetrate such attacks; and to ensure adequate remedies, including protective measures, reinstatement of licenses, and damages, to victims of such attacks; and

FURTHER RESOLVED, That the American Bar Association is committed to collaborate with the United Nations and other global institutions and non-governmental organizations:

- to advance the adoption and implementation of the aforementioned principles in national legislation in countries where those principles have not yet been fully implemented;
- to defend and support judges, lawyers, and other members of the legal profession when they experience persecution or when their independence is threatened;
- to focus national and international attention on instances of such actual and threatened persecution through the press and other media, and
- to promote accountability of countries regarding the protection of an independent judiciary and bar.

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- to focus national and international attention on instances of such actual and threatened persecution through the press and other media, and
- to promote accountability of countries regarding the protection of an independent judiciary and bar.
The American Bar Association has a strong policy to protect the independence, impartiality and fairness of judges, lawyers and prosecutors, worldwide. Some may then ask why this Resolution is necessary. The answer is that today the judiciaries and legal professions of many countries are threatened with abuse, retaliation and even jailing for exercising their ethical and professional responsibilities. This resolution goes beyond merely condemning the abuse of judges and lawyers in many countries where it is occurring. The resolution enjoins all entities of the ABA to take concrete steps wherever and whenever abuses are encountered. If the ABA does not speak up for the judiciaries and lawyers being oppressed, who will?

Globally, lawyers, judges, prosecutors, and other members of the legal profession are on the frontlines of efforts to hold human rights violators accountable, to combat corruption, to promote the basic rights of individuals and communities, and to ensure access to justice and fair and impartial adjudication of the rights for all. As a result, these individuals are often at risk of intimidation, threats, and assaults upon their persons and their roles in society. Generally, these attacks fall into two categories. The first category concerns those abuses committed with the official sanction of the State, from frivolous criminal charges to laws infringing upon the independence of the profession and the judiciary. The second category includes those attacks, from online harassment to violence, that occur without official State sanction but with apparent impunity in violation of the States’ obligations to ensure respect for the Rule of Law, access to justice, and accountability for human rights violations. The ABA is committed to supporting members of the legal profession who face threats and retaliation while fulfilling their professional obligations. The ABA is also committed to engaging other stakeholders in the global community, including governments, civil society, and multinational organizations, to raise awareness of threats to lawyers and judges around the world.

A. Essential Nature of Protection of an Independent Judiciary and Bar

The independence and impartiality of the judiciary as an institution and the independence of individual judges and lawyers are indispensable to ensuring peaceful societies, justice and sustainable development. The ability of an independent judiciary and lawyers to hear and to represent the accused and the harmed is an essential part of promoting the Rule of Law, equal access to justice, public access to information, and the protection of fundamental freedoms. Independent judiciaries are necessary for good governance, the effective and fair administration of justice, and the protection of individual rights. The separation of the judiciary from other branches of government protects against abuses of power and institutional and individual injustices.

Lawyers and judges have obligations to promote the Rule of Law and basic rights. They must be able to exercise their professional duties independently without fear, intimidation, hindrance, harassment, improper interference, or unjustified exposure to civil, penal, or other liability. Inappropriate attempts to pressure judges and lawyers to compromise their commitments to their professional duties deny their larger role in society. Independent

Globally, lawyers, judges, prosecutors, and other members of the legal profession are on the frontlines of efforts to hold human rights violators accountable, to combat corruption, to promote the basic rights of individuals and communities, and to ensure access to justice and fair and impartial adjudication of the rights for all. As a result, these individuals are often at risk of intimidation, threats, and assaults upon their persons and their roles in society. Generally, these attacks fall into two categories. The first category concerns those abuses committed with the official sanction of the State, from frivolous criminal charges to laws infringing upon the independence of the profession and the judiciary. The second category includes those attacks, from online harassment to violence, that occur without official State sanction but with apparent impunity in violation of the States’ obligations to ensure respect for the Rule of Law, access to justice, and accountability for human rights violations. The ABA is committed to supporting members of the legal profession who face threats and retaliation while fulfilling their professional obligations. The ABA is also committed to engaging other stakeholders in the global community, including governments, civil society, and multinational organizations, to raise awareness of threats to lawyers and judges around the world.

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Lawyers and judges have obligations to promote the Rule of Law and basic rights. They must be able to exercise their professional duties independently without fear, intimidation, hindrance, harassment, improper interference, or unjustified exposure to civil, penal, or other liability. Inappropriate attempts to pressure judges and lawyers to compromise their commitments to their professional duties deny their larger role in society. Independent
bar associations shield against such pressures and are a necessary safeguard for the independence of the judiciaries and the legal profession and to protect and promote basic rights and ensure access to justice. In addition, protections from improper pressure and intimidation must extend to human rights defenders and other advocates who are not formal legal practitioners but who serve the role of promoting and protecting human rights in their communities, including community-based leaders and advocates documenting and demanding accountability for violations of the law and basic rights and who in many instances work under the direction of public interest lawyers. Governments should take steps to ensure the protection of the rights to freedom of expression, association, and peaceful assembly to promote and protect human rights and fundamental freedoms.

B. The ABA is Committed to Advance the Rule of Law

One of the ABA’s primary goals, Goal IV, is to advance the Rule of Law. The fifth stated objective of this goal is to preserve the independence of the legal profession and judiciary. Many policies related to this Resolution are referred to in General Information Form attached, but we draw on them to highlight some of the current ABA policies that support three international standards for judicial independence: (1) the UN Basic Principles on the Independence of the Judiciary, (2) the Bangalore Principles of Judicial Conduct, and (3) the International Bar Association Minimum Standards for Judicial Independence. The ABA first endorsed these principles by ABA Resolution 110E, adopted in 2007. ABA Resolution 400A, adopted in 2017, retained the ABA’s support for these international standards as current policy upon recommendation by the ABA Rule of Law initiative.

Current international guidelines and standards expressing support for the independence and integrity of the legal profession and judicial systems are based on widely recognized human rights instruments. Among those instruments, the ABA has embraced the principles proclaimed in the Universal Declaration of Human Rights (UDHR), as reflected in several policy statements, ABA Presidential statements, and the celebrations of its 70th anniversary at the ABA 2018 Paris Sessions in June 2018. The ABA also has adopted policies in support of two primary documents that further elaborate on the UDHR: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). ABA policies adopted in 1979 supported their ratification, subject to several understandings, declarations, and reservations. These documents enshrine the principles of equality before the law, a right to a fair and public trial, protection from arbitrary arrest or detention, and the role of effective courts.

In addition, more than once, the ABA spoke out to express concern and support for the judiciary and legal profession in various countries where judges and lawyers have been under attack, including in Turkey (16A10B), Pakistan (08M10D), and Colombia (90M8C).

The ABA President has issued many letters and statements of concern, most recently addressing such attacks in Kenya, China, Afghanistan and Pakistan, Syria, Poland, Maldives and a more general statement of concern about lawyers being threatened in January, 2018, to name a few.

The ABA’s Section of International Law has presented many programs and publications seeking to educate their members about these issues. The Center for Human Rights, through its trial monitoring program and otherwise, has sought to make sure the world knows that the ABA is watching and reporting on treatment of judges and lawyers in such proceedings. The Rule of Law Initiative supports judges and lawyers around the globe through programs that reinforce the laws and institutions that guarantee a strong and independent bench and bar.

The Resolution to which this Report is attached builds on such stated policy and activity to push for the ABA to redouble its efforts through its entities to work with other international organizations, such as the United Nations and World Justice Project, to bring to light the continuing attacks on the bench and bar, to see that governments are held accountable for such attacks, and to bring to the forefront of international discourse the critical importance of an independent judiciary and bar in affording access to justice. As many judges and lawyers and their friends, families and allies, remain in danger, being tortured, detained, intimidated and killed, the ABA must urgently step forward as a leader in the global community to seek to hold countries to their commitments under existing international law. The ABA is positioned to bring these failings to light and work with other national and international organizations to raise awareness and seek sanctions against those who flaunt their international obligations.

C. Attacks on Judges and Lawyers

In every region of the world, judges and lawyers who pursue the Rule of Law are facing frivolous criminal charges, retaliatory disciplinary proceedings, illegal surveillance, online smear campaigns, and physical threats, incarceration and assassinations. In the majority of these cases, the State is implicated as either the sponsor of the retaliation or in its failure to prevent or punish when members of the legal profession have become targets for retaliation. Where these attacks occur with impunity, the Rule of Law and the independence of the legal profession and the judiciary are at stake.

Frivolous criminal charges

Criminal charges that either have no basis in fact or that are, on their face, a violation of fundamental freedoms are a common tactic to discredit and isolate advocates. Alarmingly, States criticized for such proceedings often rely upon the Rule of Law as a defense. It is therefore vital that the legal profession be vigilant and call to account where the nature of the charges or the proceedings themselves clearly violate basic principles of fairness and independence of the legal profession and the judiciary are at stake.

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fundamental freedoms, including freedom of expression and association. For example, in China, a stark crackdown began in July of 2015 when Chinese police rounded up 300 lawyers, legal assistants, and other human rights activists and other human rights activists in a single night. Since then, hundreds of lawyers have faced interrogation, detention, criminal charges, and enforced disappearance. An emblematic example is the case of Wang Yu and Bao Longjun, married attorneys who were arrested on charges of subversion and then disappeared, along with their 16-year old son. They have since been "released" on probation and are held under house arrest in Mongolia. They remain under constant surveillance with little access to former friends and colleagues. Wang Yu was the inaugural recipient of the American Bar Association’s International Human Rights Award in recognition of her work to represent some of China’s most underserved and marginalized communities in their struggle to access justice and to expand legal pathways to justice for women and girls.

Similar criminal cases have occurred against lawyers and judges over the past five years in every region of the world, including the countries Algeria, Egypt, Turkey, Russia, Venezuela, Thailand, Saudi Arabia, Iran, Angola, Swaziland, Morocco, Sudan, Bahrain, Kuwait, Azerbaijan, Tajikistan, and Colombia, among others.

In these criminal cases, lawyers and judges who have committed themselves to the legal profession’s most fundamental principles, including access to justice, the right to a fair trial, and the independence of the judiciary, have been penalized through the abuse of the very processes they have fought to preserve and trusted as a means to realize basic rights. It is a tragic irony that no persecution of lawyers and judges through frivolous criminal charges happens without other lawyers and judges’ complicity. Colleagues in the profession have failed to prevent the misuse of the criminal justice system or have maliciously used the State’s powers to investigate and prosecute in order to silence opposition and undermine basic rights in breach of their ethical obligations.

Retaliatory disciplinary proceedings, including disbarment

Slightly less severe than formal criminal charges, another common tactic to discredit and retaliate against lawyers and judges has been the targeted use of professional disciplinary action.


procedures, including disbarment and removal from the bench. In Azerbaijan, China, Uzbekistan, Kazakhstan, and Belarus, among others, there have also been disbarments in apparent retaliation against human rights lawyers and criminal defense attorneys representing even more strikingly political prisoners. In a recent, in Turkey, thousands of judges, prosecutors and lawyers have been dismissed or debarrled as part of a concerted campaign to expand executive powers and frustrate the independence of judges and lawyers. Similarly, where judges enforce fair trial rules and preserve the rights of those facing criminal charges or speak out on attempts to undermine the independence of the judiciary, they have been removed from the bench or faced other forms of discipline. For example, in Turkey, one of the first organizations banned in the wake of the attempted coup was an independent association of judges and prosecutors, known by its Turkish acronym YARSAV. Its membership and leaders had been vocally critical of various recent reforms to the judiciary enacted in recent years. These reforms and “purges” appear to be aimed at increasing executive control of the judiciary and procedures, including disbarment and removal from the bench. In Azerbaijan, China, Uzbekistan, Kazakhstan, and Belarus, among others, there have also been disbarments in apparent retaliation against human rights lawyers and criminal defense attorneys representing even more strikingly political prisoners. In a recent, in Turkey, thousands of judges, prosecutors and lawyers have been dismissed or debarrled as part of a concerted campaign to expand executive powers and frustrate the independence of judges and lawyers. Similarly, where judges enforce fair trial rules and preserve the rights of those facing criminal charges or speak out on attempts to undermine the independence of the judiciary, they have been removed from the bench or faced other forms of discipline. For example, in Turkey, one of the first organizations banned in the wake of the attempted coup was an independent association of judges and prosecutors, known by its Turkish acronym YARSAV. Its membership and leaders had been vocally critical of various recent reforms to the judiciary enacted in recent years. These reforms and “purges” appear to be aimed at increasing executive control of the judiciary and


ensuring loyalty to the ruling party, including through high profile dismissals and transfers of judges and prosecutors involved in a government corruption investigation.\textsuperscript{18}

**Surveillance and Smear Campaigns**

Surveillance can be used for blackmail or to manipulate public opinion, increases the risk of physical attacks, impairs lawyers’ ability to offer legal counsel, and is a form of intimidation when known to occur. Smear campaigns aimed at undermining the credibility of lawyers and judges are similarly employed. This can be particularly damaging where the smear campaigns are likely to lead to violence against the lawyer, such as where they are named as foreign agents or portrayed as undermining national unity. For example, in Mexico, well-known journalists and high-profile anticorruption and human rights advocates have been targeted by sophisticated spyware that was sold to the Mexican government on the condition that it be used only to investigate criminals and terrorists.\textsuperscript{19} The targets of the surveillance included lawyers at the human rights organization Centro Prodh, which represents the victims in a case of 43 disappeared students and other high-profile cases.\textsuperscript{20}

**Violence**

Over the past several years, there have been threats, assaults, and assassinations of lawyers in every region of the world. Many were representing particularly vulnerable communities or seeking accountability for grave human rights violations. Such assaults are always criminal and yet many perpetrators continue to intimidate and threaten with impunity, as explained by Alan Lowenthal, et al., Letter to Ambassador of Mexico to the United States (Mar. 23, 2018), \textbf{\url{https://www.hrw.org/news/2017/06/20/mexico-investigate-spyware-attack}}; and see also Mexico: Investigate Spyware Attack (June 20, 2017), \textbf{\url{https://www.hrw.org/news/2017/06/20/mexico-investigate-spyware-attack}}. In Colombia, impunity for violence has also been tragically high numbers of lawyers assassinated, including over 70 persons, mostly lawyers, who died in a targeted suicide bombing at a hospital in Quetta in 2016.\textsuperscript{21} In Colombia, impunity for violence has also been tragically high numbers of lawyers assassinated, including over 70 persons, mostly lawyers, who died in a targeted suicide bombing at a hospital in Quetta in 2016.\textsuperscript{21}


contributed to wide-scale threats of violence against lawyers and other advocates working with vulnerable communities impacted by corruption and ongoing conflict among government, militia, and drug cartels, particularly in rural areas. In the past five years, lawyers and other defenders have been murdered in apparent retaliation for their work in the Philippines, Kenya, Mexico, Honduras, Guatemala, Sudan, Myanmar, Iraq, Turkey, Libya, China, Ukraine, and Russia, among other countries.

Annex A available at this [link](https://www.madre.org/sites/default/files/PDFs/Colombia%20UPR%20Report%20ENGLISH.pdf) represents a sampling of some of the incidences on record since 2015.

D. International Law and Accepted Norms to Protect the Bench and Bar

International law, in particular human rights instruments, and the major frameworks for global sustainable development stress the fundamental principles of access to justice, and the protection of the independence and integrity of the judiciary and the legal profession. The UDHR was adopted by the United Nations General Assembly in 1948 as a common standard for the protection of human rights and has been incorporated into customary international law and, hence, represents an obligation of all countries. It includes a right to a fair and public hearing by an independent and impartial tribunal, in the determination of a person’s rights and obligations and of any criminal charge alleged. Inspired by the UDHR, International Covenants and Conventions were adopted to further these goals.

Covenants and Conventions

Article 14 of the International Covenant on Civil and Political Rights requires that everyone accused of a criminal offense be guaranteed a fair trial by an independent and impartial judiciary and access to counsel. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to a fair and public hearing by an independent and impartial tribunal established by law and “to defend himself in person or through legal assistance of his own choosing.”

Lack of Comprehensive Protection of Rights Defenders and Their Families


26 G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966), and http://www.ohchr.org/en/professionalinteroperability/pages/ccpr.aspx (“Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law” and “to defend himself in person or through legal assistance of his own choosing.”).


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Other International Standards

Fundamental to the independence of the legal profession is the obligation of governments to develop and maintain their legal systems so as to ensure that they are and remain independent, to protect the judges, lawyers and human rights defenders who work within that profession and to hold accountable those who persecute them. International guidelines and standards endorsed by various United Nations bodies emphasize respect for the independence, impartiality, and administration of justice; stress the need to ensure the integrity of the judiciary and self-governing legal profession; and reaffirm the vital role that judges and lawyers play in promoting the cause of justice and the Rule of Law. They require that judges be free of “restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.” They call upon governments to provide for the functioning of the legal profession and to promote, protect, and uphold fundamental freedoms and human rights recognized by national and international law.

The United Nations Basic Principles on the Independence of the Judiciary is advisory only, but its principles are essential to the impartial and fair treatment of all who avail themselves of their national judicial systems. Those principles include (i) no inappropriate or unwarranted interference by others; (ii) tribunals that do not use the duly established procedures of the legal process should not displace the jurisdiction belonging to any other nature.”

https://www.echr.coe.int/Documents/Convention_ENG.pdf (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”).
27 Organization of African Unity, African Charter on Human and Peoples’ Rights arts. 7, 26, June 27, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, https://www.cidh.oas.org/basicos/english/basic3.american%20Convention.html (“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.”.)
28 Including the Basic Principles on the Role of Lawyers, the Guidelines on the Role of Prosecutors, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and the Standard Minimum Rules for the Treatment of Prisoners, among others.
30 Id.
to the ordinary courts or judicial tribunals; (iii) the State must provide adequate resources to enable the judiciary to properly perform its functions; and (iv) judges should be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence. Several regional governance bodies include similar principles in their standards and guidelines.31

The United Nations Basic Principles of the Role of Lawyers emphasizes that "professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest."32 Paragraph 24 goes on to say that such associations shall "exercise its functions without external interference." Moreover the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment emphasize both assistance from counsel and the ability to communicate and consult with counsel, as necessary parts of protecting such persons.33

The Bangalore Principles of Judicial Conduct34 draws our attention to six values: independence; impartiality; integrity; propriety; equality and competence and diligence. The preamble notes that such competence, independence and impartiality are essential if the courts are to fulfill their role in upholding constitutionalism and the Rule of Law. Governments must honor these principles or their judicial systems will fail to afford access to justice and the Rule of Law.

The Sustainable Development Goals

Reflecting the international community’s strong commitment to these long-standing principles, they are prominent in the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs).35 The SDGs provide a framework for


international action by the public and private sectors at all levels to achieve seventeen universal goals by 2030. All UN Member States agree to mobilize efforts to develop strategies, establish national plans and frameworks, implement those plans, and measure and report on progress. Although not legally binding, the SDGs represent strong commitments by governments to enable economic, social, and environmental development and to strengthen and uphold commitments to national and international law. The Rule of Law is a crosscutting topic permeating the SDGs, and its integrated and indivisible nature with good governance is embodied in Goal 16, which recognizes justice and Rule of Law as integral to good governance and calls upon governments to support these principles with plans and implementation.34

Human Rights Defenders

The Declaration on Human Rights Defenders, officially known as the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, was adopted by UN General Assembly Resolution 53/144 of December 9, 1998, during the 50th anniversary of the UDHR37. It reaffirms existing human rights standards, outlines the duties of governments to protect the human rights and fundamental freedoms of all persons, and stresses the right of persons to exercise the freedom of expression, association, and peaceful assembly to promote and protect human rights and fundamental freedoms. Lawyers and judges play a unique role in safeguarding basic rights, promoting good governance and supporting sustainable development. Like human rights defenders around the world, their work becomes exponentially more dangerous when they act to hold corrupt actors and human rights abusers accountable. For this reason, efforts to support human rights defenders must take into consideration the risks faced by lawyers who represent human rights defenders, as well.

E. Conclusion and Recommendations

The American Bar Association must work through its entities to collaborate with the United Nations and other global institutions and non-governmental organizations. Together, they must focus on the adoption and implementation of the aforementioned principles in national legislation in countries where those principles have not yet been fully implemented. They must defend and support those judges, lawyers and other members of the legal profession who experience persecution or face threats to their independence. They must focus national and international attention on instances of such actual and threatened persecution through the press and other media. They must promote accountability of countries regarding the protection of an independent judiciary and bar.

34 Id. Goal 16 of the Sustainable Development Goals is dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels. Two specific targets mentioned in this Goal are the Rule of Law and anti-corruption.  
The American Bar Association should

1) Ensure that all ABA entities weigh and take appropriate actions in all activities with governments that abuse those in the legal and judicial professions.

2) Coordinate advocacy efforts on behalf of individual lawyers and judges, including direct engagement with States and other stakeholders through individual meetings, communications, and participation in relevant conferences, to raise awareness of threats to lawyers and judges and State obligations to support, defend and protect the independence of the judiciary and legal profession.

3) Coordinate support efforts, including a system to help lawyers and judges in exile to access pro bono counsel and other resources. The ABA President should task a committee of members to explore the establishment of a respite program that would place persecuted lawyers and judges with firms, law schools, and help identify other appropriate fellowship or sponsorship opportunities. One potential model for such a program is the Scholars at Risk Fund, at the International Institute for Education.

4) Continue to raise awareness through public statements, reports, and events, as appropriate in individual cases. The ABA should adopt a transparent set of criteria for the issuance of ABA Rule of Law letters.

5) Observe trials and selection and disciplinary proceedings to raise awareness of any fair trial violations or arbitrary selection and discipline proceedings against lawyers and judges.

6) Urge states to fulfill existing obligations (a) to respect and promote the independence of the judiciary and legal profession and (b) to ensure that lawyers and judges are able to exercise their fundamental rights and fulfill their professional obligations without fear of frivolous criminal charges, arbitrary detention, physical assault, or other form of intimidation.

7) Urge the UN and regional human rights bodies to:
   a) Release urgent alerts where lawyers and judges are under threat and engage directly with the relevant States to address threats to the Rule of Law and members of the profession.
   b) Prioritize data collection and monitoring of specific attacks on lawyers and judges to mirror similar data collection for other at-risk advocates, such as journalists.
   c) Adequately staff and fund special mandates dedicated to promoting the rights of human rights defenders and the independence of the profession, including

   - 1) Ensure that all ABA entities weigh and take appropriate actions in all activities with governments that abuse those in the legal and judicial professions.
   - 2) Coordinate advocacy efforts on behalf of individual lawyers and judges, including direct engagement with States and other stakeholders through individual meetings, communications, and participation in relevant conferences, to raise awareness of threats to lawyers and judges and State obligations to support, defend and protect the independence of the judiciary and legal profession.
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     b) Prioritize data collection and monitoring of specific attacks on lawyers and judges to mirror similar data collection for other at-risk advocates, such as journalists.
     c) Adequately staff and fund special mandates dedicated to promoting the rights of human rights defenders and the independence of the profession, including
but not limited to the UN Special Rapporteur on Human Rights Defenders and
the UN Special Rapporteur on the Independence of Judges and Lawyers.

d) Facilitate or require States to put in place precautionary measures when
necessary, including but not limited to the provision of bodyguards and other
security measures.

e) Hold States accountable to their binding international human rights obligations
to ensure that lawyers and judges are able to exercise their fundamental rights
and fulfill their professional obligations without fear of frivolous criminal
charges, arbitrary detention, physical assault, or other form of intimidation.

Respectfully submitted,

Steven M. Richman
Chair, Section of International Law
August 2018
1. Summary of Resolution

This Resolution addresses the recent and continuing attacks around the globe on judges and lawyers. It identifies the principles the ABA supports regarding independence of the judiciary and the bar and their right, and the right of human rights defenders, to freedom from such attacks. It reaffirms the ABA's condemnation for such attacks, calls on countries to stop attacks and calls on the ABA to work with other international organizations to uphold accountability of countries regarding the protection of an independent judiciary and bar.

2. Approval by Submitting Entity

This Resolution was approved by the Section of International Law Council on April 21, 2018.

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 Association policy would be affected by the adoption of this Resolution, but it will reaffirm HOD Resolution 16A10B, 08M10D, and 90M8C.

The following Association policies are relevant to this Resolution:

- HOD Resolution 16A10B, supporting the independence of the judiciary and the legal profession in Turkey, opposing any state’s detention of individuals without charge or access to counsel and calling upon the government of the Republic of Turkey to take certain actions.
- HOD Resolution 08M10D, expressing support for the Pakistani bar and bench, calling upon the President of Pakistan to restore Pakistan's constitution as it existed before the November 3, 2007, emergency decree, to reinstate Pakistan’s Supreme Court justices and high court judges who were removed from office and refused to take oaths of loyalty to the executive branch and to release all judges, lawyers and other people who were wrongly arrested during the state of emergency.
- HOD Resolution 06M111, adopting the Statement of Core Principles of the legal profession.

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- HOD Resolution 06M111, adopting the Statement of Core Principles of the legal profession.
HOD Resolution 90M8C, expressing support for the lawyers, judges and public officials of Colombia in the fight against narcotics trafficking, urging the President and Congress to provide assistance to help stem the flow of drugs which threatens both Colombia and the US and resolving to provide support to the judicial system of Colombia.

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

N/A

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

The Report includes recommended actions. Our first step following adoption would be assembling a working group to make contact with the United Nations and the World Justice Forum to assess additional steps we can take together to address this topic.

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

We do not anticipate direct or indirect costs associated with this Resolution, but we do expect expenditure of volunteer time to promote this agenda.


None.

10. Referrals.

ABA UN Representatives and Observers Committee
Center for Human Rights
Civil Rights and Social Justice
Commission on Veteran's Legal Services
Commission on Disability Rights
Commission on Homelessness and Poverty
Commission on Immigration
Criminal Justice Section
Government and Public Sector Lawyers
Health Law
Judicial Division
Litigation
Racial & Ethnic Diversity
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

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12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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Executive Summary

1. **Summary of Resolution**

This Resolution addresses the recent and continuing attacks around the globe on judges and lawyers. It identifies the principles the ABA supports regarding independence of the judiciary and the bar and their right, and the right of human rights defenders, to freedom from such attacks. It reaffirms the ABA's condemnation for such attacks, calls on countries to stop attacks and calls on the ABA to work with other international organizations to promote accountability of countries regarding the protection of an independent judiciary and bar.

2. **Summary of the issue which the Resolution addresses**

This Resolution addresses the issue of the mounting number of attacks on the judiciary and bar throughout the world.

3. **An explanation of how the proposed policy position will address the issue**

This Resolution urges the ABA to play a greater role in stopping attacks on the judiciary and bar by seeking to have countries held accountable under existing international legal obligations. Such challenges on the international stage pressure countries to change, while criticism directed only at one country may be dismissed as interference with domestic policy. This Resolution pushes for greater monitoring of and attention to this issue on a global scale. It emphasizes the urgency of drawing more attention to this mounting problem.

4. **A summary of any minority views or opposition internal and/or external to the ABA which have been identified**

None known.
RESOLVED, That the American Bar Association recognizes the important role that non-lawyer human rights defenders, journalists and others play in protecting justice and the rule of law, and deplores attacks on those professions, as well as on individuals, aimed at silencing or intimidating human rights voices.
Recognition of the Work of Other Human Rights Defenders and Journalists

The Resolution recognizes that the legal profession does not act alone in defense of justice and the Rule of Law. Many times, individuals, groups and organizations acting to promote and protect universally recognized human rights and fundamental freedoms stand with the legal profession on the front lines to defend the Rule of Law. Pursuant to the Declaration on Human Rights Defenders, everyone has the right, either individually or in association with others, to solicit, receive and use resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means.1 This right is consistent with the Charter of the United Nations and other international obligations of signatory countries in the field of human rights and fundamental freedoms.2 The contributions of these human rights defenders often involve risks comparable to or greater than the risks to legal professionals. In light of these well-understood risks, the Declaration calls upon each country to “take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise” of such rights.3

Human rights defenders are essential to the promotion of the rule of law and realization of human rights. For example, environmental activists and indigenous leaders – 197 of whom were killed in 2017 alone in retaliation for their work4 – help ensure the enforcement of environmental laws. Journalists who report on corruption in government agencies that impede the enforcement of the law are also facing unprecedented threats. Last year was the deadliest year recorded for journalists.5 Already in 2018, 35 journalists have been killed for their work and over a hundred have been imprisoned, according to Reporters without Border.6 Human rights defenders of all kinds – including minority rights activists, democracy activists and anti-corruption campaigners – are all essential to holding governments accountable under a just rule of law. Their well-being is inexorably linked to the ability of lawyers and judges to perform their functions free from improper pressure or influence.

1 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art. 13.
2 Id., art. 12, sec. 2.
3 Id., art. 12, sec. 2.
5 Jason Rezaian, 2017 was the most dangerous year ever for journalists. 2018 might be even worse, WASHINGTON POST (February 1, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/02/01/2017-was-the-most-dangerous-year-ever-for-journalists-2018-might-be-even-worse/?utm_term=.cdfbbe56bd0c.
Recognizing the linkage between different kinds of human rights defenders, the Declaration on Human Rights Defenders also provides that everyone has the right, individually and in association with others, to the lawful exercise of his or her occupation or profession. This Resolution establishes the position of the American Bar Association against attacks on all such human rights defenders and those who indirectly support the Rule of Law.

Respectfully submitted,

Steven M. Richman
Chair, Section of International Law
August 2018

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\[7 \text{Id., art. 11.}\]
1. **Summary of Resolution**

This Resolution is a companion resolution to Resolution 106A, and it recognizes the important role that non-lawyer human rights defenders play in protecting the independence of the judiciary and bar, justice and the rule of law. It also condemns attacks on such individuals.

2. **Approval by Submitting Entity**

This Resolution was approved by the Section of International Law Council on April 21, 2018, as part of companion Resolution 106A.

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 Association policy would be affected by the adoption of this Resolution, but it will reaffirm HOD Resolution 16A10B, 08M10D, and 90M8C.

The following Association policies are relevant to this Resolution:

- HOD Resolution 16A10B, supporting the independence of the judiciary and the legal profession in Turkey, opposing any state’s detention of individuals without charge or access to counsel and calling upon the government of the Republic of Turkey to take certain actions.
- HOD Resolution 08M10D, expressing support for the Pakistani bar and bench, calling upon the President of Pakistan to restore Pakistan’s constitution as it existed before the November 3, 2007, emergency decree, to reinstate Pakistan’s Supreme Court justices and high court judges who were removed from office and refused to take oaths of loyalty to the executive branch and to release all judges, lawyers and other people who were wrongly arrested during the state of emergency.
- HOD Resolution 06M111, adopting the Statement of Core Principles of the legal profession.
- HOD Resolution 90M8C, expressing support for the lawyers, judges and public officials of Colombia in the fight against narcotics trafficking, urging the President and Congress to provide assistance to help stem the flow of drugs which threatens both Colombia and the US and resolving to provide support to the judicial system of Colombia.
5. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A.


N/A.

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

The Report to companion Resolution 106A describes recommended actions, which we expect would also impact and lend support to human rights defenders who are not judges or lawyers. Our first step following adoption would be assembling a working group to make contact with the United Nations and the World Justice Project to assess additional steps we can take together to address this topic.

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

We do not anticipate direct or indirect costs associated with this Resolution, but we do expect expenditure of volunteer time to promote this agenda.


None.

10. Referrals.

ABA UN Representatives and Observers Committee  
Center for Human Rights  
Civil Rights and Social Justice  
Commission on Veteran’s Legal Services  
Commission on Disability Rights  
Commission on Homelessness and Poverty  
Commission on Immigration  
Criminal Justice Section  
Government and Public Sector Lawyers  
Health Law  
Judicial Division  
Litigation  
Racial & Ethnic Diversity  
Racial & Ethnic Justice  
Rule of Law Initiative  
Science & Technology
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

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12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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EXECUTIVE SUMMARY

1. Summary of Resolution
This Resolution addresses the recent and continuing attacks around the globe on human rights defenders who support the independence of the judiciary and bar. It is a companion resolution to Resolution 106A. It reaffirms the ABA's condemnation for such attacks and the important role that such human rights defenders play in justice and the rule of law.

2. Summary of the issue which the Resolution addresses
This Resolution addresses the issue of the mounting number of attacks on human rights defenders, in conjunction with attacks on the judiciary and bar throughout the world.

3. An explanation of how the proposed policy position will address the issue
This Resolution notes the important role that such human rights defenders play in maintaining the independence of the judiciary and bar, and protecting justice and the rule of law. It expresses the ABA's condemnation of such attacks. By the ABA adopting a specific resolution on this topic, it emphasizes the urgency of drawing more attention to this mounting problem.

4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified
None known.
RESOLVED, That the American Bar Association urges state, local, tribal, and territorial emergency management agencies, organizations that operate disaster relief shelters, and organizations working to prevent intimate partner violence and sexual violence to: (1) collaborate to protect individuals from intimate partner violence and sexual violence; and (2) ensure that shelter personnel have appropriate training to identify victims of intimate partner violence and sexual violence and respond to victims’ unique needs during and following a disaster;

FURTHER RESOLVED, That the American Bar Association urges these agencies and organizations to collaborate with the Federal Emergency Management Agency (“FEMA”) to: (1) plan for safe sheltering and transportation of identified victims of intimate partner violence and sexual violence during and following a disaster; and (2) facilitate access to appropriate services for identified victims in the immediate and continuing aftermath of a disaster; and

FURTHER RESOLVED, That the American Bar Association urges Congress to appropriate funds for FEMA to provide (1) programs that facilitate training and education for emergency management personnel to address intimate partner violence and sexual violence, including identifying victims, during and following a disaster and (2) programs that facilitate access to appropriate services for identified victims of intimate partner violence and sexual violence during and following a disaster.
I. Introduction

In 2017, Hurricanes Harvey, Maria, and Irma wreaked havoc across the southern United States and the Caribbean. California suffered devastating wildfires and mudslides. In the aftermath of these major disasters, and as we prepare for the inevitable next disaster, now is the time to discuss how to protect victims of intimate partner violence (“IPV”) and sexual violence when these disasters occur.

During and following a disaster, victims of IPV and sexual violence are especially vulnerable. Being forced to evacuate to a shelter may require a victim to evacuate to the same shelter to which their abuser has evacuated. An IPV victim may also be cut off from the resources that comprise her support system, such as family, therapists, and others who may be working with her to help her escape her abusive home situation. Staff members at disaster relief shelters are often not trained on how to deal with IPV and sexual violence incidents that occur inside shelters. Disasters displace people from their homes, sometimes permanently. The financial strain of a disaster can also be significant. According to the World Health Organization and other researchers, the stress, upheaval, and grief associated with losses that individuals experience due to disasters exacerbate IPV.

Following Hurricane Katrina, women who had been displaced by the storm reported a 3-fold increase in the prevalence of IPV and a 54% increase in the prevalence of sexual violence in comparison with local rates before the disaster. This phenomenon increased IPV following a disaster is not restricted to Hurricane Katrina: following the eruption of the Mount St. Helens volcano in 1980, reports of IPV increased by 46%; following the Deepwater Horizon BP oil spill in 2010, calls to the Louisiana statewide crisis hotline increased substantially, by as much as 81% just in New Orleans in the first three months.

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1 To avoid confusion between IPV and sexual violence survivors and disaster survivors, we will use “victim” throughout this Report to refer to those who suffer IPV and sexual violence.


3 The use of gender specific pronouns is not meant to exclude men as IPV victims.


6 See supra note 4; supra note 2 pp. 1-2.

7 Michael P. Anastario, Ryan Larrance, Lynn Lawry, Using Mental Health Indicators to Identify Postdisaster Gender-Based Violence among Women Displaced by Hurricane Katrina, 17 J. WOMEN’S HEALTH, no. 9, 2008, at 1438.

months after the spill, and Jefferson Parish had an 81% increase in the number of people requiring shelter. According to the Gender and Disaster Network, after Hurricane Andrew in 1992, calls to a community domestic violence hotline increased by 50% and “over one-third of 1400 surveyed residents reported that someone in their home had lost verbal or physical control in the two months since the hurricane.”

Complicating this already dangerous situation is the fact that emergency management in the United States is fragmented, with responsibilities divided progressively among different levels of government. Emergency management is intended to begin first with local governments, then state governments when local governments do not have adequate resources to handle the disaster, and finally progressing to the federal government if necessary. When a disaster first occurs, local government is to activate the local Emergency Operations Center and the Comprehensive Emergency Management Plan. The local government is also supposed to coordinate the response effort with public and private entities, including non-profit organizations, activate any response agreements with state and federal agencies, and request that the state emergency management agency provide assistance if needed. According to the Federal Emergency Management Agency (“FEMA”), because many disasters occur with little to no warning, “[t]he local government maintains control of all assets used in the response and recovery efforts, regardless of the source of those assets. Local governments must plan and prepare for this role with the support of the State and Federal governments.”

The state, tribal, or territorial government’s role in response to a disaster is triggered by a local government’s request for assistance. When a local jurisdiction does not have sufficient resources to respond to a disaster, it turns to the state government for assistance. State, tribal, or territorial governments also serve as the agents for local governments in obtaining federal disaster assistance because local government cannot directly access federal disaster relief programs. Once a state, tribe, or territory requests federal assistance, FEMA coordinates the implementation of the Federal Response Plan.

According to the Gender and Disaster Network, after Hurricane Andrew

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13 Id.
14 Id. at 3.4.
15 See 42 U.S.C. § 5170(a).
16 See id.
17 See id.

13 Id.
14 Id. at 3.4.
15 See 42 U.S.C. § 5170(a).
16 See id.
17 See id.
which coordinates the efforts of federal agencies and the American Red Cross to provide immediate assistance.\textsuperscript{18}

The Federal Response Plan is organized around twelve Emergency Support Functions ("ESFs") that represent the types of federal assistance available in a disaster.\textsuperscript{19} Federal agencies and the American Red Cross are responsible for managing the ESFs while coordinating with the state agencies that have related responsibilities.\textsuperscript{20} The sixth ESF, mass care, is defined as the responsibility to "manage and coordinate food, shelter, and first aid for victims; provide bulk distribution of relief supplies; operate a system to assist family reunification."\textsuperscript{21} The American Red Cross is responsible for providing mass care, which includes disaster relief shelters, such as those for evacuees.\textsuperscript{22} The American Red Cross responds to 64,000 disasters per year, and is the primary non-governmental organization in the disaster response and preparedness field.\textsuperscript{23}

Following the declaration of a federal major disaster, the state selects a state coordinating officer who is responsible for "coordinating State and local disaster assistance efforts with those of the Federal Government."\textsuperscript{24} As the focus of recovery shifts to longer term needs, FEMA, the state government, and the local government continue to coordinate with respect to the federal government's provision of public assistance, which includes individual assistance to individuals who are affected by the disaster.\textsuperscript{25} This resolution addresses longer term recovery, and the needs of IPV and sexual violence victims in the weeks, months, and years following a major disaster, by urging FEMA to provide funding for programs that provide counseling and other appropriate assistance to IPV and sexual violence victims both during and following a disaster.

This fragmented response process requires coordination between the federal, state, tribal, territorial, and local governments, as well as private organizations mobilizing to respond, such as the American Red Cross. This need for coordination has driven this resolution's overall goal of urging disaster response stakeholders to communicate and coordinate with each other to address the unique needs of IPV and sexual violence victims.

\textsuperscript{20} Id.
\textsuperscript{21} Id. at 1.14.
\textsuperscript{22} Id.
\textsuperscript{24} 42 U.S.C. § 5143(c) (2012).
\textsuperscript{25} Supra note12 at 3.14.
II. The Need for Appropriate Training

IPV victims have unique needs and safety concerns, both during and in the wake of disasters. Even disaster relief shelters present a risk of danger. 30.8% of sexual assaults that were reported following Hurricanes Katrina and Rita in 2005 occurred in disaster relief shelters or other types of shelters. State and local emergency management personnel, as well as disaster relief shelter personnel, must have the appropriate training to handle IPV and sexual violence incidents that occur inside a shelter and to accommodate evacuees who are victims of IPV and sexual violence. Given the necessary level of coordination between the non-governmental organizations that operate disaster relief shelters and state and local emergency management agencies, personnel from each entity should be required to undergo training on intimate partner violence and sexual violence. That training should address the unique needs and safety concerns of victims of IPV and sexual violence, and how those needs and concerns should be addressed during an evacuation.

The World Health Organization ("WHO") reports that IPV and sexual violence increase during and following a disaster. WHO recommends that while a disaster is ongoing, rape victims should continue to have access to medical care, and IPV victims should continue to have access to counseling and other needed resources and assistance. Implementing these recommendations requires that the professionals who staff disaster relief shelters have the training, information, and awareness they need to appropriately handle IPV and sexual violence issues during a disaster. State and local emergency management officials must also have the training necessary to understand that IPV victims must continue to have access to counseling, legal advice, medical care, housing, and other services that they would normally have when a disaster has not occurred.

Pamela Jenkins, a professor at the University of New Orleans who is an expert on the intersection of domestic violence and disaster response and preparedness, told The New York Times that disaster relief workers should rely on staff members at domestic violence shelters because "they know what it means to get through with a vulnerable population in a disaster," and Brenda D. Phillips, the associate dean of Ohio University Chillicothe, where she oversees its emergency response training center, recommended that "domestic violence shelters leave fliers at emergency shelters to let people know where they can get help." Professors Jenkins and Phillips both recommend that the professionals who staff disaster relief shelters have the training, information, and awareness they need to appropriately handle IPV and sexual violence issues during a disaster. State and local emergency management officials must also have the training necessary to understand that IPV victims must continue to have access to counseling, legal advice, medical care, housing, and other services that they would normally have when a disaster has not occurred.

26 Supra note 2 at 2-4. 27 Hurricanes Katrina/Rita and Sexual Violence: Report on Database of Sexual Violence Prevalence and Incidence Related to Hurricanes Katrina and Rita, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER (July 2006). Supra note 2. 28 World Health Organization, IPV and sexual violence. That training should address the unique needs and safety concerns of victims of IPV and sexual violence, and how those needs and concerns should be addressed during an evacuation. 29 Supra note 2 at 2-4. 30 Maya Salam, Amid Hurricane Chaos, Domestic Abuse Victims Risk Being Overlooked, N.Y. TIMES (Sept. 12, 2017), https://www.nytimes.com/2017/09/12/us/domestic-violence-hurricanes.html. 31 Id.
“unique knowledge” of advocates for IPV survivors and individuals that work in the disaster response and preparedness fields “should be included in any evacuation, shelter, and long term recovery planning.”

Accordingly, disaster relief shelter personnel, emergency management personnel, and advocates should communicate with each other, disseminate best practices to each other, and coordinate disaster preparedness efforts. Emergency management personnel and disaster relief shelter personnel must be informed regarding common types of IPV and sexual violence situations that could occur at shelters and in the aftermath of a disaster, such as lack of access to counseling, lack of safe housing, and general lack of resources that make it more difficult for an IPV victim to either escape their abusive situation or to endure it. Although most shelter personnel are volunteers, it would be straightforward to include, as part of the training that shelter personnel volunteers already receive, additional training on how to recognize IPV and sexual violence, and how to assist victims if those types of violence occur inside a shelter. This resolution urges these stakeholders to collaborate with organizations working to prevent IPV and sexual violence to ensure that disaster relief shelter personnel have adequate and appropriate training to respond to the unique needs of victims of IPV and sexual violence in the wake of a disaster. An interagency task force already exists for the purpose of “purpose of coordinating the implementation of pre-disaster hazard mitigation programs administered by the Federal Government.”

The task force includes “(1) relevant Federal agencies; (2) State and local government organizations (including Indian tribes); and (3) the American Red Cross.”

Our resolution essentially urges a similar idea, except that agencies fighting IPV and sexual violence would also be included in the conversation.

The cost of that work should be low. This type of training is low-cost, fairly straightforward to plan, and is cost effective. Trainings can occur over Skype or other internet video applications. These types of trainings will also necessarily be local, with the only non-local participants likely to be those from FEMA, the American Red Cross or other non-governmental entities. Lack of funding to travel to trainings should not prevent out-of-town individuals from attending remotely. Many of the trainings can likely be held at the offices of the state and local emergency management agencies, or in the office of a community partner. Possible funding could come from FEMA, since the Stafford Act authorizes the President to make grants to states not to exceed $50,000 per year for ‘the cost of improving, maintaining and updating State disaster assistance plans.’ Other types of FEMA funding are intended for exactly this type of preparedness planning.

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42 U.S.C. § 5133(b) (2012) (providing for “technical and financial assistance to States and local governments to assist in the implementation of predisaster hazard mitigation measures that are cost-effective and are designed to reduce injuries, loss of life, and damage and destruction of property.”).
Resolution’s call for funding from Congress is not for single line-item appropriation; the funding can come from grants for sheltering services, so that FEMA has more flexibility to disburse the funds as needed to establish these training programs. Without proper training and communication ahead of time, it will be impossible for local and state governments, FEMA, and the non-governmental organizations that run disaster relief shelters to adequately prepare to keep IPV and sexual violence victims safe during and following the next disaster. This resolution urges these stakeholders to do that important work.

III. The Need for Safe Sheltering and Transportation

When an IPV victim is evacuated to the same disaster relief shelter as her abuser, or when an IPV victim is forced to evacuate with her abuser, there is a safety risk that must be planned for. Similarly, if an incident of sexual violence is perpetrated inside a disaster relief shelter, there must be plans in place for the victim to be in a safe location. This resolution calls for collaboration between the necessary stakeholders to address these safety risks by planning for the safe sheltering and transportation of IPV and sexual violence victims during and following a disaster. To successfully plan, state, local, tribal, and territorial emergency management agencies will need to communicate with FEMA, organizations that operate disaster relief shelters, and with organizations working to prevent IPV and sexual violence. Advance planning for the safe sheltering and transportation of IPV and sexual violence victims is critically important given the chaos and increased risk of intimate partner violence during and following disasters.

For IPV victims, it is necessary for all of the necessary stakeholders in disaster response and preparedness to plan for safe sheltering and transportation because the availability of safe shelter is crucial to an IPV victim’s survival in leaving an abusive situation, or if she has already left.40 When an IPV victim decides to leave, there is a substantial likelihood of physical violence and retaliation. Up to 70% of women who are killed by domestic abusers are killed in the process of leaving or just after they depart.39

Particularly in the context of an ongoing disaster, the safety risk to IPV victims when they are evacuated to the same location as their abuser is significant. According to Beth Meeks, who was the Executive Director of the Louisiana Coalition against Domestic Violence, “There are women who have successfully been hiding from an abuser who are now in a very exposed situation. . . . Offenders have a lot of tentacles, their friends or family will see a victim, and report back to the offender.”40 Accordingly, there is substantial risk to an IPV victim if she is forced to evacuate to the same disaster relief shelter as her abuser during a disaster.

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40 Supra note 5.
Victims of sexual violence also experience danger inside a disaster relief shelter. 30.8% of sexual assaults that were reported following Hurricanes Katrina and Rita in 2005 occurred in disaster relief shelters or other types of shelters. If a woman is raped inside a disaster relief shelter, or otherwise suffers sexual violence, she should not have to stay in the disaster relief shelter with the person who committed that violence, or who could commit that violence again.

These safety risks are why FEMA, state, local, tribal, and territorial emergency management agencies, and organizations that run disaster relief shelters must collaborate with agencies that address IPV and sexual violence to develop plans to either safely transport victims away from a disaster relief shelter if their safety requires it, or to safely shelter them in place. The Louisiana Coalition Against Domestic Violence reported several horrifying instances of abuse within disaster relief shelters following Hurricane Katrina. Without safe shelter within the disaster relief shelter or safe transportation away from the shelter, victims do not have any safe place they can go if they experience abuse inside the shelter. Pamela Jenkins and Brenda Phillips recommend that “[e]mergency-shelter providers . . . design intake strategies to identify those at risk in a confidential manner, and can facilitate moving those at risk into a safer environment.”

Additionally, IPV shelters must also have plans in place to be able to safely and confidentially evacuate to a disaster relief shelter or another shelter if their own building’s safety would be compromised during a disaster. According to Pamela Jenkins and Brenda Phillips,

> Emergency managers can assist domestic violence providers with designing shelter evacuation plans, transportation routing, and educational materials. Ideally emergency planners will involve domestic-violence service providers on boards, response teams, and in training opportunities – and vice versa – because the emergency management community needs the insights of providers. Further the preparedness phase is a good time to develop mutual aid agreements that spell out where to send those in shelters, how to provide evacuation transportation assistance, how their services will be continued by regional partners, and vice versa.44

Our resolution helps address this need by urging the necessary stakeholders to collaborate, communicate, and work together to address these safety risks before a disaster occurs. Failing to provide safe shelter for IPV and sexual violence victims when a disaster strikes compounds the risk of abuse. In particular, it is important that emergency management agencies and non-governmental organizations like the

41 Supra note 27.
43 Supra note 38 at 63.
44 Id. at 64.
American Red Cross take the lead in providing these services and creating a model for other entities to follow. Collaborating on safe shelter and transportation for IPV and sexual violence victims is also an essential component of the coordination and training called for by the resolution. Emergency management agencies and other entities that run disaster relief shelters, like the American Red Cross, should leverage their expertise and coordinate with other experts to develop a comprehensive plan for making sure that IPV and sexual violence victims can either be safely sheltered or safely transported away from a disaster relief shelter in a manner that makes financial sense and that is appropriate during an emergency. Staff should be trained to identify signs of IPV and sexual violence, to make appropriate referrals to the proper resources available, to set criteria for determining how and when to utilize private space within a shelter if safe transportation away is not possible, and should also be trained to appropriately and sensitively make victims aware of the available options. While there are undoubtedly challenges to accomplishing this goal, given the essential nature of the need and the lack of success of the current approach, the collective effort, training, and coordination that this Resolution urges are the necessary first step.

IV. The Need for Continuing Access to Services

In light of the well-documented evidence that IPV increases immediately following a disaster, there is an urgent need to ensure that IPV victims continue to receive access to counseling and other appropriate services that they need, such as assistance with housing. Victims of sexual violence may also require access to appropriate services following a disaster, such as counseling. IPV victims have unique concerns, safety risks, and needs that require the continued provision of services following a disaster. Because internet and electricity may be out for weeks or months at a time following a disaster, FEMA and state, local, territorial, and tribal emergency management agencies must plan in advance to assist IPV victims in regaining access to services following a disaster. These same stakeholders must plan to assist victims of sexual violence. That violence may occur inside a disaster relief shelter or immediately following a disaster, but those victims may still require access to appropriate services. That planning should occur in coordination with non-governmental organizations, including those in the IPV prevention field, that have experience in the provision of services, or that have established referral networks that can be reactivated quickly following a disaster.

A. Access to Mental Health Services

There are programs that provide access to crisis counseling to disaster survivors, but IPV victims require more in the immediate wake of a disaster. For example, FEMA

46 Supra notes 5, 7, and 8; see also Emily W. Harville ET AL., Experience of Hurricane Katrina and reported intimate partner violence, 28 J. Interpersonal Violence, no. 4, 2011, 833-45 (“[C]ertain experience of the hurricane are associated with an increased likelihood of conflict, as well as increased likelihood of violent methods of conflict resolution. This is consistent with some previous work and supports the work that suggests stressors can contribute to IPV.”) (internal citations omitted).

47 Supra note 38 at 56-60.

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has a Crisis Counseling Assistance and Training Program, and the American Red Cross runs a Disaster Mental Health Volunteer program that also focuses on crisis counseling.\(^{47}\) FEMA’s program provides two different types of funding for up to 60 days of services immediately following a disaster declaration and for up to nine months following a disaster declaration.\(^{48}\) Notably, FEMA’s crisis counseling program provides individual crisis counseling, which FEMA differentiates from “traditional mental health services.”\(^{49}\) While mental health services involve discussion of various treatment options and setting of treatment goals, crisis counseling focuses on ways to manage stress and allows counselors to identify individuals “who may need referrals to behavioral health treatment.”\(^{50}\) Because crisis counselors do not establish a long-term, ongoing treating relationship with the survivors they serve, crisis counseling is different from the kind of mental health counseling and other services that IPV victims and sexual violence victims may need. While crisis counseling programs are necessary, in part because they may provide referrals to ‘traditional’ mental health care providers, they should be supplemented with additional access to mental health care for IPV and sexual violence victims following a disaster.\(^{51}\)

This resolution urges emergency management agencies at every governmental level to ensure that IPV and sexual violence victims are not forgotten once they leave a disaster relief shelter following a disaster. Because IPV increases following a disaster, there must be a network of resources already in place, and there must be communication channels to provide that information to IPV victims. Those who experience sexual violence during and immediately following a disaster will also benefit from these resources and access to appropriate services. Communicating these resources to IPV and sexual violence victims will improve safety in communities that have already been devastated by a disaster.

### B. Access to Safe Housing

Immediately following a disaster, after IPV victims have left the disaster relief shelter, they also require safe housing separate from their abuser.\(^{52}\) This is especially crucial following a disaster where the abuser might have destroyed the place a victim was living before the disaster and disrupted the social support she would have normally relied upon.\(^{53}\) Following Hurricane Katrina, two researchers found that “[w]ithout family nearby

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\(^{49}\) Id.

\(^{50}\) Id.

\(^{51}\) See supra note 38 at 64-65 (acknowledging the need for appropriate counseling for IPV and disaster survivors).

\(^{52}\) Id.

\(^{53}\) Id. at 58-59.

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and given the haphazard repopulation of the city, women find themselves isolated. With eighty percent of the city flooded, the housing shortage emerges as one of the salient factors in a woman’s choice to leave. Over and over again, survivors worry about where they would go and if they could continue to live with families and friends.54

A safe and secure place to escape abuse is therefore of paramount importance. As the National Coalition Against Domestic Violence notes: “[T]he truth is, bringing an end to abuse is not a matter of the victim choosing to leave; it is a matter of the victim being able to safely escape.”55 Some victims will have the financial or social resources to safely escape their abuser. However, IPV victims are often shunned by social or family connections and cut off from financial resources as part of an abuser’s control. Lack of support from family and friends, which also deprives IPV victims of safe shelter, is a common reason many do not leave their abusers.56 In addition, over 90% of IPV victims experience economic abuse.57 Their abuser may control their financial resources or may have depleted the victim’s financial resources, resulting in debt and other barriers to economic self-sufficiency for the victim.58

The significant difficulty IPV victims experience trying to find safe shelter after they leave their abusers is compounded by the fact that shelter availability and space is limited. As of 2012, there were fewer than 1,500 domestic violence shelter programs in the United States.59 Thousands of IPV victims and their children are turned away from shelters every year.60 Even worse, domestic violence shelters may be closed immediately following a disaster because of physical damage or because staff may be unavailable to operate the shelter. For example, in the wake of catastrophic flooding in 2016, flooding closed six of the Louisiana’s sixteen domestic violence shelters and additional services were disrupted as staff dealt with their own disaster related challenges.61 This can have devastating consequences for victims of abuse. In one study, IPV victims who were surveyed stated that without access to a shelter, they would face homelessness, the loss of their children, continued abuse, the risk of death, uncertainty, or they would be forced to take desperate actions.62

54 Id. at 59.
58 Id.
60 Id.
61 Supra note 5.
Disasters create unique vulnerabilities for IPV victims. Disasters lead to more violence overall, and in particular they lead to an increase in IPV.63 The destruction of housing exacerbates this vulnerability. This Resolution urges emergency management agencies and relevant private actors to collaborate and plan together to ensure that IPV victims do not have to make the wrenching, dangerous choice to remain with their abuser to ensure access to safe shelter. Better communication, collaboration, and planning can ensure that the necessary referral relationships are in place so that an IPV victim can efficiently receive the information she needs to find a safe place to go after an disaster relief shelter closes. Because an IPV victim must have access to information about safe housing before an disaster relief shelter closes, emergency management agencies, the entities that run disaster relief shelters, and other non-governmental organizations have to work together to provide that information and ensure that access to housing. This Resolution urges these entities to do that necessary work.

C. The Need for Funding

Consistent with IPV victims and sexual violence victims’ unique need for access to services following a disaster, this Resolution also urges Congress to appropriate funding to FEMA to fund programs that provide access to counseling, housing, and other necessary services. This call for funding is consistent with FEMA’s already existing crisis counseling program; the funds for this new program would simply ensure direct provision of mental health services to IPV and sexual violence victims who are also disaster survivors, and would ensure that IPV victims do not have to return to their abuser because they have do not have a different, safe alternative. With this additional funding, FEMA can continue to work with state, territorial, tribal, and local emergency management agencies to provide this access to services, which is work FEMA already does. This Resolution simply calls for additional funding to meet this unique need, using already existing frameworks to provide continuing access to services following a disaster.

V. Conclusion

Planning to prevent IPV and sexual violence during and following a major disaster is an overlooked but critical component of disaster response and preparedness. This Resolution calls on emergency management agencies and other key actors to collaborate, communicate, and prepare for the unique needs of IPV and sexual violence victims in their disaster planning. The American Bar Association can and should urge these stakeholders to do everything possible to ensure that when there is another disaster, IPV and sexual violence victims are not forgotten.

Respectfully submitted,
Dana M. Hrelic
Chair, Young Lawyers Division
August 2018

63 Supra note 4.
This resolution urges federal, state, local, tribal and territorial emergency management agencies to provide proper training to staff and volunteers to respond to unique needs of intimate partner violence ("IPV") and sexual violence victims during and after a disaster. The resolution also urges emergency management agencies and the non-governmental entities running disaster relief shelters to plan for the safe sheltering and transportation of IPV and sexual violence victims during and following a disaster. Additionally, the resolution urges Congress to appropriate funds to the Federal Emergency Management Agency ("FEMA") for training and education for emergency management personnel and disaster relief shelter personnel regarding IPV and sexual violence. Finally, the resolution urges Congress to appropriate funds to FEMA for programs that will ensure that IPV and sexual violence victims have continued access to counseling and other services in the immediate wake of a disaster.

2. Approval by Submitting Body.

The ABA Young Lawyers Division ("YLD") Council, which is authorized by Sections 4.1 and 5.1 of the ABA YLD Bylaws to act on the Division's behalf with respect to policy making, has approved this resolution.

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?

At the 2015 Midyear Meeting, the ABA passed Resolution 110 which urged federal, state, local, tribal, and territorial governments to identify and address the needs of vulnerable populations when planning for and responding to disasters. This resolution also urged Congress and state legislatures to fund departments and entities that respond to and assist disaster survivors. Finally, Resolution 110 urged lawyers to participate in community-wide disaster planning activities to determine and address policy, practices, and regulations invoked during a disaster.

This resolution expands upon Resolution 110 by focusing on IPV and sexual violence victims and their unique needs when a disaster occurs. This resolution enhances Resolution 110 and ensures that IPV and sexual violence victims are protected during and after a disaster.

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.**
   After adoption, the Young Lawyers Division will work with the Governmental Affairs Office to determine the most effective way to advocate for this resolution in front of legislators.

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

9. **Disclosure of Interest.**
   None.

10. **Referrals.**
    - Criminal Justice Section, Co-Sponsor
    - Center on Children and the Law
    - Section of Civil Rights and Social Justice
    - Committee on Disaster Response and Preparedness, Co-Sponsor
    - Standing Committee on Legal Aid and Indigent Defendants, Co-Sponsor
    - Commission on Domestic and Sexual Violence, Co-Sponsor
    - Section of Family Law, Supporter
    - Judicial Division
    - Law Student Division
    - Government and Public Sector Lawyers Division
    - Standing Committee on Gun Violence, Supporter
    - Commission on Homelessness and Poverty
    - Standing Committee on Legal Assistance for Military Personnel
    - Section of Litigation
    - Standing Committee on Pro Bono and Public Service/Center for Pro Bono
    - Tort, Trial, and Insurance Practice Section
    - Commission on Youth at Risk
11. Contact Name and Address Information. (Prior to the meeting, please include name, address, telephone number and e-mail address.)

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

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EXECUTIVE SUMMARY

1. Summary of Resolution.
This resolution urges federal, state, local, tribal and territorial emergency management agencies to provide proper training to staff and volunteers to respond to unique needs of intimate partner violence ("IPV") and sexual violence victims during and after a disaster. The resolution also urges emergency management agencies and the non-governmental entities running disaster relief shelters to plan for the safe sheltering and transportation of IPV and sexual violence victims during and following a disaster. Additionally, the resolution urges Congress to appropriate funds to the Federal Emergency Management Agency ("FEMA") for training and education for emergency management personnel and disaster relief shelter personnel regarding IPV and sexual violence. Finally, the resolution urges Congress to appropriate funds to FEMA for programs that will ensure that IPV and sexual violence victims have continued access to counseling and other services in the immediate wake of a disaster.

2. Summary of the issue which the Resolution addresses.
Disasters uniquely impact IPV victims because they must obtain safe housing away from their abusers, all while the disaster has thrown their support systems into disarray by scattering their friends, family, and other resources they would normally rely upon. Disasters also increase the incidence of IPV. Individuals also suffer sexual violence during and immediately following a disaster, whether it is inside a disaster relief shelter or after an evacuation is over.

During and after a disaster, IPV and sexual violence victims face barriers to obtaining services and aid. First responders are stretched thin and electricity, the internet, and phone lines may be down. Service providers are themselves trying to evacuate, protect their homes, and then return following the disaster. Lack of continuing access to appropriate services following a disaster leads to IPV victims returning to or remaining with their abuser, and leads to victims of sexual violence not receiving services that they may need, such as counseling. This resolution urges emergency management agencies and the non-governmental entities that run disaster relief shelters, such as the American Red Cross, to plan for IPV and sexual violence victims during a disaster by ensuring that they have a safe place to evacuate and by ensuring that they have continued access to necessary services when they leave the disaster relief shelter.

3. An explanation of how the proposed policy position will address the issue.
This resolution urges emergency management agencies to provide proper training to staff and volunteers to assist IPV and sexual violence victims during a disaster. This resolution will allow the Young Lawyers Division to advocate to Congress and other legislators for increased appropriations to emergency management agencies to provide the necessary training and resources to protect IPV and sexual violence victims during and after a disaster.

EXECUTIVE SUMMARY

1. Summary of Resolution.
This resolution urges federal, state, local, tribal and territorial emergency management agencies to provide proper training to staff and volunteers to respond to unique needs of intimate partner violence ("IPV") and sexual violence victims during and after a disaster. The resolution also urges emergency management agencies and the non-governmental entities running disaster relief shelters to plan for the safe sheltering and transportation of IPV and sexual violence victims during and following a disaster. Additionally, the resolution urges Congress to appropriate funds to the Federal Emergency Management Agency ("FEMA") for training and education for emergency management personnel and disaster relief shelter personnel regarding IPV and sexual violence. Finally, the resolution urges Congress to appropriate funds to FEMA for programs that will ensure that IPV and sexual violence victims have continued access to counseling and other services in the immediate wake of a disaster.

2. Summary of the issue which the Resolution addresses.
Disasters uniquely impact IPV victims because they must obtain safe housing away from their abusers, all while the disaster has thrown their support systems into disarray by scattering their friends, family, and other resources they would normally rely upon. Disasters also increase the incidence of IPV. Individuals also suffer sexual violence during and immediately following a disaster, whether it is inside a disaster relief shelter or after an evacuation is over.

During and after a disaster, IPV and sexual violence victims face barriers to obtaining services and aid. First responders are stretched thin and electricity, the internet, and phone lines may be down. Service providers are themselves trying to evacuate, protect their homes, and then return following the disaster. Lack of continuing access to appropriate services following a disaster leads to IPV victims returning to or remaining with their abuser, and leads to victims of sexual violence not receiving services that they may need, such as counseling. This resolution urges emergency management agencies and the non-governmental entities that run disaster relief shelters, such as the American Red Cross, to plan for IPV and sexual violence victims during a disaster by ensuring that they have a safe place to evacuate and by ensuring that they have continued access to necessary services when they leave the disaster relief shelter.

3. An explanation of how the proposed policy position will address the issue.
This resolution urges emergency management agencies to provide proper training to staff and volunteers to assist IPV and sexual violence victims during a disaster. This resolution will allow the Young Lawyers Division to advocate to Congress and other legislators for increased appropriations to emergency management agencies to provide the necessary training and resources to protect IPV and sexual violence victims during and after a disaster.
4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified.

No minority or opposing views have been identified.
RESOLVED, That the American Bar Association urges Congress to enact the Presidential Tax Transparency Act (H.R. 305) and the President-Elect Release of Tax Return Act (H.R. 1938); and

FURTHER RESOLVED, That the American Bar Association supports efforts in the states and the District of Columbia to incentivize certain candidates for the Office of President of the United States to disclose their recent federal income tax returns to the extent any such laws are permitted by the United States Constitution.
Like private citizens, candidates for the Office of President of the United States are protected by law from the unauthorized disclosure of their federal income tax returns. Nevertheless, since the early 1970s, most serious presidential candidates voluntarily chose to release their federal income tax returns to the public. "The practice of presidential tax disclosures serves several key functions," such as "provid[ing] the public with important insights into the president’s or presidential candidate’s potential conflicts of interest, particularly with respect to personal conflicts of interest related to reform of the tax system." Moreover, such disclosures also "instill[] public confidence in the honesty, integrity, and transparency of a presidential administration."4

Because voluntary disclosure is simply a norm rather than a legal requirement, presidential candidates are not required to release their federal income tax returns to the public or any other authority, even if successfully elected to the office. As a result, Congress, as well as dozens of state legislatures, are considering various proposals to either require or incentivize such disclosures. This resolution supports the efforts of federal and state governments to require or incentivize such disclosure, to the extent such action is permitted by the United States Constitution.

II. CURRENT FEDERAL EFFORTS

Beginning with Buckley v. Valeo, Supreme Court of the United States has recognized the power of the federal government to regulate the conduct of elections for federal office, including establishing appropriate reporting and disclosure requirements. While recognizing that compelled disclosures may implicate First Amendment rights, the United States Supreme Court nevertheless held that requiring the release of information providing “where political campaign money comes from and how it is spent by the candidate” is constitutional, since it may “aid the voters in evaluating those who seek federal office,” serves to “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity,” and provides the "essential means of gathering the data necessary to detect violations of [campaign] contribution limits."7 These same considerations would insulate federal legislation mandating disclosure of federal income tax returns from constitutional challenge, especially since—unlike the information at issue in Buckley—federal tax returns are protected by law from the unauthorized disclosure of their federal income tax returns. Nevertheless, since the early 1970s, most serious presidential candidates voluntarily chose to release their federal income tax returns to the public. The practice of presidential tax disclosures serves several key functions," such as "provid[ing] the public with important insights into the president’s or presidential candidate’s potential conflicts of interest, particularly with respect to personal conflicts of interest related to reform of the tax system." Moreover, such disclosures also "instill[] public confidence in the honesty, integrity, and transparency of a presidential administration."4

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4 Id.
5 For purposes of this report, the phrase “state” also encompasses the District of Columbia, which although not a state is granted three electoral votes in presidential elections. See U.S. CONST. amend. XXIII.
7 Id. at 66-67.
confidential solely by virtue of a federal statute, to which Congress has already codified numerous exceptions.\footnote{See 26 U.S.C. § 6103.}

Currently, there are several bi-partisan proposals pending in Congress to require certain presidential candidates to release their federal tax returns. On one side of the spectrum, the Presidential Tax Transparency Act (H.R. 305) would compel major party nominees to file their three most recent federal income tax returns with the Federal Election Commission, which would then be made available to the public after making appropriate redactions. More narrowly, the President-Elect Release of Tax Return Act (H.R. 1938) would require the President-Elect to disclose each federal income tax return for the last four taxable years to the chairs and ranking minority members of the House Administration Committee and the Senate Rules Committee. Both proposals also amend the Internal Revenue Code to permit the Internal Revenue Service to provide the tax returns to the appropriate authorities in the event the candidate fails to comply.

These two proposals require the disclosure of federal tax returns for different purposes. While the Presidential Tax Transparency Act, by requiring public disclosure of all major party nominees, furthers the first 

\textit{Buckley} interest—aiding the voters in evaluating the candidates for office—the President-Elect Release of Tax Return Act instead focuses on deterring actual corruption and finding a means to detect violations of the law, in that the information is not publicly disclosed but provided only to congressional leaders. This resolution takes no position between the two approaches, since both are clearly authorized by the constitutional rule established by the Supreme Court of the United States in \textit{Buckley} and represent an improvement over the status quo.

\section*{III. CURRENT AND POTENTIAL STATE EFFORTS}

Because federal legislation specifically provides that federal tax returns are confidential except in certain prescribed circumstances,\footnote{26 U.S.C. § 6103.} the Supremacy Clause of the United States Constitution precludes state governments from obtaining and releasing a presidential candidate’s federal tax returns without the candidate’s consent. Over the past year, legislation has been introduced in a majority of state legislatures that would incentivize candidates to voluntarily disclose their federal tax returns.\footnote{See Laurence H. Tribe et al., Candidates Who Won’t Disclose Taxes Shouldn’t be on the Ballot, CNN.com, http://www.cnn.com/2017/04/14/opinions/state-laws-requiring-tax-return-disclosure-lead-tribe-painter-sien/index.html (Apr. 14, 2017).} Most commonly, such proposed legislation would require a presidential candidate to publicly release his or her federal tax returns as a prerequisite to being placed on the state’s election ballot.\footnote{514 U.S. 779 (1995).} Some have argued that such state legislation may violate the decision of the Supreme Court of the United States in \textit{U.S. Term Limits v. Thornton},\footnote{514 U.S. 779 (1995).} to the extent that a financial disclosure requirement may be construed by the courts as a new substantive

\footnote{See 26 U.S.C. § 6103.} Currently, there are several bi-partisan proposals pending in Congress to require certain presidential candidates to release their federal tax returns. On one side of the spectrum, the Presidential Tax Transparency Act (H.R. 305) would compel major party nominees to file their three most recent federal income tax returns with the Federal Election Commission, which would then be made available to the public after making appropriate redactions. More narrowly, the President-Elect Release of Tax Return Act (H.R. 1938) would require the President-Elect to disclose each federal income tax return for the last four taxable years to the chairs and ranking minority members of the House Administration Committee and the Senate Rules Committee. Both proposals also amend the Internal Revenue Code to permit the Internal Revenue Service to provide the tax returns to the appropriate authorities in the event the candidate fails to comply.

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qualification for office as opposed to a procedural ballot access measure. It is not likely that such a challenge would be successful, since a financial disclosure requirement would not exclude entire classes of individuals from seeking office based on things that cannot be changed—as was the case in U.S. Term Limits—but is more closely analogized to paying a filing fee or complying with a petition signature requirement. Moreover, the Supreme Court has already approved of more stringent regulations—including the federal Hatch Act, which prohibits certain federal employees from running in partisan elections, and various state resign-to-run laws—because prospective candidates may choose between complying with the statutory requirement or foregoing election.

In any case, unlike elections for United States Congressmen and Senators—the offices at issue in U.S. Term Limits—to which states are only constitutionally permitted to establish time, place, and manner regulations, the United States Constitution delegates the selection of presidential electors to the states, and the Supreme Court has even held that states need not even need to hold elections for the presidency at all. Thus, states could reduce the likelihood of a constitutional challenge by tailoring such proposals to prohibit presidential electors from casting their votes for a candidate who failed to comply with disclosure requirements, just as states have passed legislation mandating presidential electors to vote for the popular vote winner.

Nevertheless, federal legislation providing for disclosure of presidential candidate tax returns is preferable to action by individual states. A federal solution would provide a uniform, nationwide mechanism for such disclosures that is unlikely to face meaningful constitutional challenge. Moreover, even if a state law conditioning ballot access or the casting of electoral votes on voluntary disclosure of federal tax returns was enacted and were to survive a constitutional challenge, a candidate who is unlikely to win that state’s electoral votes could simply decide to simply forego placement on that state’s ballot, which may harm the voters in that state by depriving them of the ability to vote for the candidate of their choice. However, to the extent Congress fails to act on this matter, action by the states—even if not the ideal solution—is preferable to maintaining the status quo.

IV. CONCLUSION

It is the among the missions of the American Bar Association to increase public understanding and respect for the rule of law and the legal process, and to hold governments accountable under the law. Requiring those seeking the highest political office in the United States—and arguably the world—to disclose their federal income tax

qualification for office as opposed to a procedural ballot access measure. It is not likely that such a challenge would be successful, since a financial disclosure requirement would not exclude entire classes of individuals from seeking office based on things that cannot be changed—as was the case in U.S. Term Limits—but is more closely analogized to paying a filing fee or complying with a petition signature requirement. Moreover, the Supreme Court has already approved of more stringent regulations—including the federal Hatch Act, which prohibits certain federal employees from running in partisan elections, and various state resign-to-run laws—because prospective candidates may choose between complying with the statutory requirement or foregoing election.

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IV. CONCLUSION

It is the among the missions of the American Bar Association to increase public understanding and respect for the rule of law and the legal process, and to hold governments accountable under the law. Requiring those seeking the highest political office in the United States—and arguably the world—to disclose their federal income tax
returns furthers this purpose by providing for transparency and accountability in American
government, as well as providing voters with the ability to assess candidates on factors
ranging from their charitable giving to their potential conflicts of interest. As a prominent
advocate for democracy and the rule of law, the American Bar Association must assert a
leadership role in encouraging Congress and—if necessary—state governments to
exercise their constitutional authority to formally codify the long-standing disclosure
practice.

Respectfully submitted,

Dana M. Hrelic, Chair
Young Lawyers Division
August 2018
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Young Lawyers Division
Submitted By: Dana M. Hrelic, Chair, ABA Young Lawyers Division

1. Summary of Resolution(s). The resolution supports efforts in Congress to require disclosure to appropriate authorities of recent federal income tax returns for certain candidates for the Office of President of the United States, and, in the absence of federal action, supports efforts in the states and the District of Columbia to incentivize voluntary disclosures by candidates (to the extent such laws are permitted by the United States Constitution).

2. Approval by Submitting Entity. Approved by the Assembly of the ABA Young Lawyers Division on February 3, 2018.

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.

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)
   - H.R. 305 – Motion to discharge from the Committee on Ways and Means and Oversight and Government Reform filed on April 5, 2017.
   - H.R. 1938 – Introduced in the House on April 5, 2017, and referred to the Committee on Ways and Means and Oversight and Government Reform.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
   A copy of the resolution would be forwarded to Congressional leaders.

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

N/A

10. Referrals.

Coalition on Racial & Ethnic Justice
Commission on Disability Rights
Commission on Hispanic Legal Rights & Responsibilities
Commission on Racial & Ethnic Diversity in the Profession
Commission on Sexual Orientation and Gender Identity
Commission on Women
Criminal Justice Section
Judicial Division
Law Student Division
National Conference of Bar Presidents
Section of Civil Rights and Social Justice
Section of State & Local Government Law
Section of Taxation
Senior Lawyers Division
Solo, Small Firm and General Practice Division
Standing Committee on Election Law
Tort Trial and Insurance Practice Section

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

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Chair, ABA Young Lawyers Division
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860.522.8338
dhrelic@hdblfirm.com

Casey C. Kannenberg
Assembly Speaker, ABA Young Lawyers Division
Hall, Prangle & Schoonveld, LLC
475 17th Street, Suite 800
Denver, CO 80202
303.383.4085
ckannenberg@hpshall.com

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Commission on Disability Rights
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Commission on Sexual Orientation and Gender Identity
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Hall, Prangle & Schoonveld, LLC
475 17th Street, Suite 800
Denver, CO 80202
303.383.4085
ckannenberg@hpshall.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  
Barran Liebman LLP  
601 SW 2nd Ave  
Ste 2300  
Portland, OR 97204-3159  
503.276.2156  
aschpak@barran.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution supports efforts in Congress to require disclosure to appropriate authorities of recent federal income tax returns for certain candidates for the Office of President of the United States, and, in the absence of federal action, supports efforts in the states and the District of Columbia to incentivize voluntary disclosures by candidates (to the extent such laws are permitted by the United States Constitution).

2. Summary of the Issue that the Resolution Addresses

The practice of presidential tax disclosures serves several key functions, including providing the public with important insights into the presidential candidate’s potential conflicts of interests. Although a voluntary norm had emerged for major presidential candidates to release their federal income tax returns, it is not a legal requirement. This resolution would express support for various proposals being considered in Congress and the states to either require or incentivize such disclosures going forward.

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

The policy, if ultimately adopted by the House of Delegates, would urge Congress (or, in the alternative, the states) to enact legislature requiring such disclosure.

4. Summary of Minority Views

None.
RESOLVED, That the American Bar Association reaccredit for an additional five-year term the following designated specialty certification programs for lawyers:

1. The Legal Professional Liability program of the American Board of Professional Liability Attorneys, of Atlanta, Georgia; and
2. The Medical Professional Liability program of the American Board of Professional Liability Attorneys, of Atlanta, Georgia.
Background

The Standing Committee on Specialization makes this recommendation within the framework of three previous resolutions passed by the House of Delegates. 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.

The adoption of the accreditation 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 such organizations that meet those standards. The 1992 resolution affirmed that a national accreditation mechanism administered by the Association according to uniform standards would be an efficient and effective means of dealing with a multiplicity of organizations that are offering, or planning to offer, certification programs.

At the 1999 Annual Meeting, the House extended the initial period of accreditation from three to five years. In addition, the House lengthened the period of reaccreditation from every third year to every fifth year.

Standards - Summary of Key Provisions

The Standards for Accreditation of Specialty Certification Programs for Lawyers are organized into eight sections. Sections 1 through 3 deal with purpose, definitions and authority; Section 4 sets out the specific requirements that an organization must meet in order to be accredited; Sections 5 and 6 deal with re-accreditation and revocation of accreditation; Section 7 provides authority to the Standing Committee on Specialization to implement the Standards; and Section 8 deals with amendment procedures.

Sections 1 and 2 – Policy Statement and Definitions: Section 1 says:

This document establishes standards by which the American Bar Association will accredit specialty certification programs for lawyers in particular fields of law. The Standards require that an accredited organization demonstrate that lawyers certified by it possess an enhanced level of skill and expertise as well as substantial involvement in the specialty area of certification, and that accredited organizations foster professional development. The Standards are designed to enable the Association to evaluate thoroughly the objectives, standards and procedures of Applicants and to facilitate public access to appropriate legal services.

Section 2 defines certain terms used recurrently throughout the Standards.

Section 3 - Authority: This section declares that the House of Delegates has the sole authority to grant or deny each application for accreditation and reaccreditation.
Section 4 - Accreditation Requirements: The purposes of the certifying organization must include the identification of lawyers possessing an enhanced level of skill and expertise, and the development and improvement of the professional competence of lawyers. Such organization's organizational, financial resources, as well as the experience, background and education of key personnel, must be adequate to carry out its certification program on a continuing basis in a manner consistent with the Standards.

A majority of those persons reviewing applications for certification of lawyers as specialists in a particular area of law must be lawyers who have substantial involvement in the specialty area. An organization's certification requirements must be applied uniformly and without discrimination.

The Standards require that each specialty area in which certification is offered must be described in terms which are understandable to the potential users of such legal services and which will not lead to confusion with other specialty areas. Each specialty certification program sponsored by a certifying organization must be evaluated separately with the Specialization Committee retaining authority to approve, modify or reject any proposed specialty definition.

A lawyer certified as a specialist must show substantial involvement in the specialty area during the three-year period immediately preceding application to the certifying organization, devoting to the specialty no less than 25 percent of the total practice of a lawyer engaged in a normal full-time practice.

The Standards also require a minimum of five favorable references, a written examination, a minimum of 36 hours of continuing legal education in the specialty area in the three-year period preceding the lawyer's application, and that the lawyer be admitted to practice in good standing in one or more jurisdictions.

A certifying organization must establish and maintain an appeal procedure that provides lawyers who are denied certification an opportunity for review of the decision by an impartial decision-maker. The Standards require that certified lawyers apply for recertification within a period no longer than five years and that certifying organizations are required to maintain a procedure for revocation of certification. Certifying organizations must also require lawyers to report their disbarment or suspension from the practice of law in any jurisdiction.

Sections 5 and 6 - Accreditation Period, Reaccreditation and Revocation: The period of accreditation is five years. Prior to the end of the accreditation period, accredited organizations are required to apply for reaccreditation, which may be granted upon a showing of continued compliance with the Standards. Accreditation may be revoked if an applicant organization ceases to exist or ceases to operate its certification program in compliance with the Standards.

Sections 7 and 8 - Authority to Implement and Amendment: The Standards give the Specialization Committee authority to interpret the Standards, adopt rules, procedures and a fee schedule, consider and evaluate applications, make recommendations to the House of Delegates as to the approval of applications, and recommend the revocation of accreditation. The Standards became
effective upon their adoption by the House of Delegates. The power to approve an amendment to the Standards is vested in the House of Delegates.

Applicant for Reaccreditation

Applicant Organization: American Board of Professional Liability Attorneys

Specialty Areas: Legal Professional Liability
Medical Professional Liability

The American Board of Professional Liability Attorneys (ABPLA) is a non-profit organization located in Atlanta, Georgia and was incorporated in 1977.

The purpose of the American Board of Professional Liability Attorneys is assist consumers and other lawyers in identifying qualified, competent and experienced professional liability specialists and to establish a program of training directed toward these specialties among newly admitted attorneys who evince the initiative, desire and necessary drive to complete a prescribed course of supervised training and postgraduate education in preparation for eligibility for the examination leading to certification by the American Board of Professional Liability Attorneys.

Reaccreditation and Evaluation Procedures

In evaluating the programs recommended for reaccreditation, the Specialization Committee followed the procedures it adopted on March 2, 1993, as amended on April 24, 1993, June 27, 1995, January 5, 1996, July 8, 1999, July 21, 2001, November 1, 2002, and November, 2006. A copy of relevant portions of the "Standards" and "Governing Rules" used by the Specialization Committee in evaluating applications for reaccreditation are attached to this report in the Appendix.

The organization filed an application for reaccreditation with the Specialization Committee in the fall of 2017. The application was accompanied by payment of a reaccreditation fee for the specialty certification program for which the applicant sought reaccreditation.

To insure that each of the programs continues to comply with ABA Standards, the Specialization Committee requires that the following documents accompany applications for reaccreditation:

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

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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 last examination 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. The examinations were made available, on a confidential basis, for review by a person appointed by the Specialization Committee an Examination Reviewer.

The Accreditation Review Panels, recruited from and appointed by the Specialization Committee, consisted of a chair and two other members, as well as the appointed Examination Reviewer. Applicants were provided notice, in writing, of the names and affiliations of the members of the Accreditation Review Panel and the examination reviewer. The reaccreditation procedures provide certifying organizations the opportunity to object for cause to the appointment of examination reviewer. The names and brief biographies of Accreditation Review Panel members and their designated Examination Reviewers are listed below:

**Accreditation Review Panelists**

**Barbara Howard, Chair - Medical Professional Liability Program** – (Cincinnati OH)
Ms. Howard is the current appointed Chair of the ABA Standing Committee on Specialization, and served as the Chair of the Reaccreditation Review panel for the Medical Professional Liability program. Ms. Howard is the founder and owner of the law firm Barbara J. Howard Co., L.P.A. She is certified by the Ohio State Bar Association as a Family Relations Law Specialist.

**Shontrai Irving, Chair – Legal Professional Liability Program** – (Gary IN)
Mr. Irving is the immediate past appointed Chair of the ABA Standing Committee on Specialization, and remains a current member of the Specialization Committee. He served as the Chair of the Reaccreditation Review panel for the Legal Professional Liability program. Mr. Irving is professor of business law in the undergraduate business program at Purdue University Northwest in Gary, Indiana.

**James Wren, Member, Medical Professional Liability Program** (Waco TX)
Mr. Wren is currently a member of the Standing Committee on Specialization. He is Professor of Law at the Baylor University School of Law in Waco, Texas. He is certified in Civil Trial Advocacy by the National Board of Trial Advocacy and in Civil Trial Law and Personal Injury Trial Law by the Texas Board of Legal Specialization. He served on the Medical Professional Liability reaccreditation application review panel.

**Barbara Howard, Chair - Medical Professional Liability Program** – (Cincinnati OH)
Ms. Howard is the current appointed Chair of the ABA Standing Committee on Specialization, and served as the Chair of the Reaccreditation Review panel for the Medical Professional Liability program. Ms. Howard is the founder and owner of the law firm Barbara J. Howard Co., L.P.A. She is certified by the Ohio State Bar Association as a Family Relations Law Specialist.

**Shontrai Irving, Chair – Legal Professional Liability Program** – (Gary IN)
Mr. Irving is the immediate past appointed Chair of the ABA Standing Committee on Specialization, and remains a current member of the Specialization Committee. He served as the Chair of the Reaccreditation Review panel for the Legal Professional Liability program. Mr. Irving is professor of business law in the undergraduate business program at Purdue University Northwest in Gary, Indiana.

**James Wren, Member, Medical Professional Liability Program** (Waco TX)
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Steven Lesser, Member, Legal Professional Liability Program (Fort Lauderdale FL)
Mr. Lesser is a member of the Standing Committee on Specialization. He is a partner in the firm of Becker & Poliakoff in Fort Lauderdale, Florida, and is certified in Construction Law by the Florida State Bar. He served on the Legal Professional Liability reaccreditation application review panel.

Meg Hyatt – Member, both Legal Professional Liability and Medical Professional Liability Program (Tucson AZ) is the Executive Director of the National Elder Law Foundation, an organization that sponsors and administers the Elder Law certification program, an ABA-accredited program. Ms. Hyatt served on both the Medical Professional Liability and Legal Professional Liability reaccreditation application review panels.

Examination Reviewers

Eugene Schiltz (Chicago IL) Mr. Schiltz is a founding partner at Crotty & Schiltz L.L.C. in Chicago. He has been practicing as a litigator in courts throughout the country for over thirty years. His practice concentrates on complex business litigation, with an emphasis on legal and accountant malpractice, commercial fraud, breach of fiduciary duty, breach of contract, and related commercial torts. Mr. Schiltz argued and prevailed before the Illinois Appellate Court in the leading Illinois case on accountant privilege issues, Chestnut Corporation v. Prestine, Brinati, Gamer, et al. Mr. Schiltz has also worked on several other major class action, consumer fraud and accountant and legal malpractice lawsuits, including the Kansas Public Employee Retirement System litigation and the Reliance Acceptance Group litigation. With respect to the prosecution of the claims in the KPERS litigation, Mr. Schiltz acted as a chief of staff and was integrally involved in all aspects of the case, including developing litigation strategies and case theories.

Mr. Schiltz served as the examination reviewer for the Legal Professional Liability certification program.

Colin O’Neil (Waco TX) Mr. O’Neil is a partner in the firm of Fulbright Winniford P.C. in Waco, Texas. He has tried over 120 lawsuits during that time, which have ranged from complex medical malpractice suits and personal injury claims to business disputes. His practice areas include civil litigation, defense litigation, personal injury and medical malpractice. He teaches the Health Care Litigation course at Baylor University School of Law.

Mr. O’Neil served as the examination reviewer for the Medical Professional Liability certification program.

In addition to reviewing the applicant’s reaccreditation application materials, members of the Accreditation Review Panel considered the information on the reaccreditation evaluation forms and comments provided by the examination reviewer who evaluated the written examinations on 108A
5

Steven Lesser, Member, Legal Professional Liability Program (Fort Lauderdale FL)
Mr. Lesser is a member of the Standing Committee on Specialization. He is a partner in the firm of Becker & Poliakoff in Fort Lauderdale, Florida, and is certified in Construction Law by the Florida State Bar. He served on the Legal Professional Liability reaccreditation application review panel.

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Mr. O’Neil served as the examination reviewer for the Medical Professional Liability certification program.

In addition to reviewing the applicant’s reaccreditation application materials, members of the Accreditation Review Panel considered the information on the reaccreditation evaluation forms and comments provided by the examination reviewer who evaluated the written examinations on 5
a confidential basis. Based upon this review, the Accreditation Review Panel concluded that the applicant’s programs continue to comply with the ABA Standards.

The procedures authorize the Specialization Committee, in making a final recommendation regarding reaccreditation of the program, to consider the final reports of the Accreditation Review Panels, the application and supporting documents originally submitted by the certifying organizations and any further materials which the organization submits for consideration.

The Specialization Committee formally considered the final report of the Accreditation Review Panel at its teleconference meeting on May 1, 2018, and determined that the Legal Professional Liability and Medical Professional Liability programs of the American Board of Professional Liability Attorneys’ certification program each continue to comply with the requirements of the ABA Standards for Accreditation of Specialty Certification Programs for Lawyers. The Standing Committee therefore recommends to the House of Delegates that the programs be granted reaccreditation for a five year period.

Respectfully submitted,

Barbara J. Howard, Chair
Standing Committee on Specialization
August 2018
APPENDIX
(Excerpted provisions of the Standards for Accreditation of Specialty Certification Programs For Lawyers and Governing Rules of the ABA Standing Committee on Specialization)

AMERICAN BAR ASSOCIATION ACCREDITATION OF SPECIALTY CERTIFICATION PROGRAMS FOR LAWYERS

STANDARDS

SECTION 1: POLICY STATEMENT

1.01 This document establishes standards by which the American Bar Association will accredit specialty certification programs for lawyers in particular fields of law. The Standards require that an accredited organization demonstrate that lawyers certified by it possess an enhanced level of skill and expertise as well as substantial involvement in the specialty area of certification, and that accredited organizations foster professional development. The Standards are designed to enable the Association to evaluate thoroughly the objectives, standards and procedures of Applicants and to facilitate public access to appropriate legal services.

SECTION 2: DEFINITIONS

2.01 As used in these Standards:

(A) "Applicant" means a certifying organization which applies to the American Bar Association for accreditation or re-accreditation under these Standards.

(B) "Association" means the American Bar Association.

(C) "Certifying Organization" means an organization, bar association, group, or other entity which certifies or intends to certify lawyers as specialists, including the Association or subdivision thereof.

(D) "Standards" means the American Bar Association Standards For Accreditation Of Specialty Certification Programs For Lawyers.

(E) "Standing Committee" means the Standing Committee on Specialization of the Association.

SECTION 3: AUTHORITY

3.01 The authority to grant and withdraw accreditation and to grant re-accreditation is vested in the Association.
3.02 Accreditation under these Standards of any Certifying Organization by the Association is not intended to, and shall not be interpreted to, preempt nor usurp the authority of states to regulate the practice of law, the certification of lawyers as specialists or the approval of organizations which certify lawyers as specialists.

SECTION 4: REQUIREMENTS FOR ACCREDITATION OF CERTIFYING ORGANIZATIONS

In order to obtain accreditation by the Association for a specialty certification program, an Applicant must demonstrate that the program operates in accordance with the following standards:

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.

(C) An Applicant shall propose to the Standing Committee a specific definition of each specialty area in which it seeks accreditation to certify lawyers as specialists. The Standing Committee shall approve, modify or reject any proposed definition and shall promptly notify the Applicant of its actions.

4.06 Certification Requirements -- An Applicant shall require for certification of lawyers as specialists, as 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.

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(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.

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(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.

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 and evidence of good standing.

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.
SECTION 6: REVOCATION OF ACCREDITATION

6.01 A certifying organization's accreditation by the Association may be revoked upon a determination that the organization has ceased to exist, or has ceased to operate its certification program in compliance with these Standards.

SECTION 7: AUTHORITY TO IMPLEMENT STANDARDS

7.01 Consistent with these Standards, the Standing Committee shall have the authority to:

(A) Interpret these Standards;
(B) Adopt rules and procedures for implementing these Standards, and amend such rules and procedures as necessary;
(C) Adopt an appropriate fee schedule to administer these Standards;
(D) Consider applications by any certifying organization for accreditation or re-accreditation under these Standards, evaluate those requests in accordance with the Standards and recommend approval by the Association of such requests when it deems the organization has met the requirements as set forth in these Standards; and
(E) Recommend the revocation of accreditation in accordance with the provisions of Section 6.01 of these Standards.

SECTION 8: ADOPTION AND AMENDMENT

8.01 These Standards become effective upon their adoption by the House of Delegates of the Association.

8.02 The power to approve an amendment to these Standards is vested in the House of Delegates; however, the House will not act on any amendment until it has first received and considered the advice and recommendations of the Standing Committee.

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

The recommendation requests that the American Bar Association grant reaccreditation to the Medical Professional Liability and Legal Professional Liability programs of the American Board of Professional Liability Attorneys. These programs have been reviewed under procedures adopted by the Standing Committee on Specialization in accordance with the Standards for such programs adopted and authorized by the House of Delegates in February 1993.

2. **Approval by Submitting Entity**

At its teleconference meeting on May 1, 2018, the Standing Committee on Specialization voted unanimously that it submit this recommendation to the House of Delegates for consideration at the 2018 Annual Meeting.

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

Yes. These specialty certification programs were accredited by the House of Delegates at the 1995 Mid-Year Meeting, and reaccredited at the 1998, 2003, 2008, and 2013 Midyear. A resolution extending the period of these programs’ accreditation period for six months was presented and approved at the 2018 Midyear Meeting, lest the 5-year accreditation period lapse pending the Specialization Committee’s review of the application.

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

The ABA Standards for Accreditation of Specialty Certification Programs for Lawyers. At its August 1992 meeting 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 ABA Standards for Accreditation of Specialty Certification Programs for Lawyers, and delegated to the Standing Committee the task of evaluating organizations that apply to the Association for accreditation.

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.
6. Status of Legislation
   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 program is reaccredited by the House of Delegates.

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

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

9. Disclosure of Interest
   None.

10. Referrals
    The Resolution was referred, prior to its submission to the House of Delegates, for consideration by the councils of the Sections on Litigation and Tort and Insurance Practice.

11. Contact Person (Prior to the Meeting)
    Barbara J. Howard
    Chair, Standing Committee on Specialization
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12. Contact Person (Who will present the Report to the House)

Barbara J. Howard  
Chair, Standing Committee on Specialization  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

That the American Bar Association grant reaccreditation to the Medical Professional Liability program and the Legal Professional Liability program of the American Board of Professional Liability Attorneys.

2. Summary of the Issue the Resolution Addresses

To respond to a need to regulate lawyer specialist 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. Explanation of How Proposed Policy Position Will Address 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 or Opposition

The Standing Committee on Specialization approved the proposed recommendation unanimously. No opposition has been identified.
RESOLVED, That the American Bar Association accredits the Truck Accident Law program of the National Board of Truck Accident Attorneys, a division of the National Board of Trial Advocacy, of Wrentham, Massachusetts, for a five-year term as a designated specialty certification program for lawyers.
Background of Accreditation Resolutions

The United States Supreme Court held in *Peel v. Attorney Registration and Disciplinary Comm’n of Illinois*, 496 U.S. 91 (1990), that states may not constitutionally prohibit a truthful communication by a lawyer that he or she is certified as a specialist by a *bona fide* organization. Following the *Peel* decision, several legal specialty groups began developing programs to certify attorneys as specialists, or to reorganize existing programs to the constitutional regulatory demands articulated in *Peel*.

An August, 1992, ABA House resolution (1992-AM-128) revised Model Rule of Professional Conduct 7.4 (“Communication of Fields of Practice and Specialization”). It now provides: “(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication” (emphasis added). This created a need for the Association to develop accreditation standards to ensure that (a) private organizations that certify lawyers as specialists are “bona fide,” and (b) their certification programs are robust. A national accreditation mechanism administered by the Association according to uniform standards, it was believed, would be an efficient and effective means of dealing with a multiplicity of organizations that were offering, or planning to offer, certification programs.

Importantly, lawyers may practice in a field of law without certification. Rule 7.4 applies only to a claim by an attorney that he or she is certified as a specialist, and requires that such claim be truthful, and that the certification be *bona fide*.

At the 1993 Midyear Meeting, the House adopted Standards for Accreditation of Specialty Certification Programs For Lawyers (the “Standards”) and delegated to the Standing Committee on Specialization the task of developing and conducting a process to accredit (and re-accredit) legal specialist certification programs sponsored by private national organizations. At the 1999 Annual Meeting, the House extended the initial period of accreditation approved in the Standards from three years to five.

In many states today, specialist certification programs must be accredited by the Association, approved by state regulatory authorities, or both, before lawyers may publicize their certification.

Section 4 of the Standards requires that a certifying organization applying for accreditation by the Association demonstrate to the Standing Committee on Specialization its program’s compliance with several requirements to help guarantee the *bona fides* of the organization and its program. The Standards say that accreditation shall be granted if the certifying organization shows that the program complies with the Standards’ detailed accreditation requirements.1 This is

1 Those accreditation requirements are set out below as an Appendix to this Report.

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consistent with Peel, which provided that a claim by an attorney that he or she is certified as a legal specialist by an organization is not misleading if the organization and its program have rigorous standards.

Pursuant to the Association’s current accreditation Standards and procedures, the Standing Committee has reviewed, and hereby unanimously recommends the approval of, an application submitted by the National Board of Truck Accident Attorneys, a division of the National Board of Trial Advocacy (“NBTA”) for accreditation of its Truck Accident Law specialist certification program. The Standing Committee has determined that the NBTA is a bona fide organization and that the Truck Accident Law program it will sponsor through the Board of Truck Accident Attorneys meets all of the Association’s Standards.

Organization Description

The NBTA was founded in 1977 to provide board certification for attorneys. It was initially located in Boston, before moving to Wrentham, Massachusetts. The NBTA is dedicated to bettering the quality of trial advocacy in our nation’s courtrooms and helping consumers find experienced and highly qualified trial lawyers. NBTA was housed, and fully supported by the Association of Trial Lawyers of American (now American Association of Justice) until 1987 when it became an independent non-profit corporation.

Several of the NBTA’s programs are accredited by the American Bar Association to certify lawyers in the specialty areas of civil trial law, criminal trial law, family trial law, civil pretrial practice law and social security disability advocacy law. The driving force behind the NBTA’s Board of Directors consists of nationally known trial lawyers, educators and judges. There are now more than 2400 lawyers who are certified by the NBTA. The number of NBTA board certified lawyers has been steadily growing consistent with the trend toward specialization in the legal profession and consumer demand for a system of verifiable non-profit methods by which consumers can locate and select from highly qualified and experienced lawyers.

The NBTA created the National Board of Truck Accident Attorneys in 2016 for the purpose of organizing and overseeing a specialist certification program in the field of litigation arising from commercial vehicle accidents. The essential attributes of that program are described below.

Truck Accident Law Program Description

Practice Definition

According to the application submitted to the Specialization Committee, Truck Accident Law “deals with the procedural, substantive, and practical issues unique to collision cases involving commercial tractor trailers, busses and other commercial motor vehicles and all of the people and entities in the transportation cycle.”

There are now more than 2400 lawyers who are certified by the NBTA. The number of NBTA board certified lawyers has been steadily growing consistent with the trend toward specialization in the legal profession and consumer demand for a system of verifiable non-profit methods by which consumers can locate and select from highly qualified and experienced lawyers.

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Practice Definition

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Definition of "Substantial involvement" in the practice of Truck Accident Law

The ABA Standards require that applicants to each certification program demonstrate "substantial involvement" in the particular practice area, and also require that that "substantial involvement" be confirmed by independent, unrelated peer reviewers who are familiar with the certification applicant’s practice.

According to the application submitted to the Specialization Committee, among the required elements of "substantial involvement" in Truck Accident Law are:

1. The applicant must make a satisfactory showing of substantial involvement relevant to truck accident law by
   (a) being substantially involved in at least 25 litigated matters that have been brought to conclusion (settlement or verdict) in the past 7 years including at least 12 litigated truck accident cases. Substantially involved means serving as counsel of record of having been retained for a fee or fee interest as a consulting attorney to handle trucking law aspects of a case;
   (b) substantially be involved in at least 3 current open litigation cases involving truck accident law;
   (c) substantially participated in at least 5 jury trial cases that went to verdict.
   This is a general experience criterion and therefore the cases do not have to have involved truck accident law
   (d) examination of at least 30 witnesses, including at least 10 liability expert witnesses (standard of care, accident reconstruction, conspicuity, human factors, biomechanics, or the like). These examinations can be at trial or in deposition. In the alternative, demonstrate primary authorship of at least 15 trucking law specific motions/briefs that were filed in litigation cases
   (e) the applicant shall also have actively participated in one hundred contested matters involving the taking of testimony (cases included in your substantial involvement may not be included as part of your contested matters). This may include trials (jury or non-jury); evidentiary hearings or depositions; and motions heard before or after trial ….”

Accreditation and Evaluation Procedures for the Truck Accident Law 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. In order to ensure that every accredited program continues to comply with Association Standards, the Standing Committee required that the following accompany all reaccreditation applications:

1. The applicant must make a satisfactory showing of substantial involvement relevant to truck accident law with at least thirty percent of his or her time spent practicing truck accident law, during the three years preceding the filing of the application.
2. Within the applicant’s career, the applicant must make a satisfactory showing of substantial involvement relevant to truck accident law by
   (a) being substantially involved in at least 25 litigated matters that have been brought to conclusion (settlement or verdict) in the past 7 years including at least 12 litigated truck accident cases. Substantially involved means serving as counsel of record of having been retained for a fee or fee interest as a consulting attorney to handle trucking law aspects of a case;
   (b) substantially be involved in at least 3 current open litigation cases involving truck accident law;
   (c) substantially participated in at least 5 jury trial cases that went to verdict.
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   (d) examination of at least 30 witnesses, including at least 10 liability expert witnesses (standard of care, accident reconstruction, conspicuity, human factors, biomechanics, or the like). These examinations can be at trial or in deposition. In the alternative, demonstrate primary authorship of at least 15 trucking law specific motions/briefs that were filed in litigation cases
   (e) the applicant shall also have actively participated in one hundred contested matters involving the taking of testimony (cases included in your substantial involvement may not be included as part of your contested matters). This may include trials (jury or non-jury); evidentiary hearings or depositions; and motions heard before or after trial ….”
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, examinations 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 certifications, 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 include non-discrimination provisions requiring that a program not condition the grant of certification to a lawyer on the lawyers “membership 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)].

The Standing Committee confirms that the Truck Accident Law application contained the requisite materials and met the requisite standards.

Accreditation Application and Examination Review Panelists

The Accreditation Review Panel appointed by the Standing Committee on Specialization consisted of a chair and two other members, as well as the appointed examination reviewer. Those Accreditation Review Panel members and examination reviewer were:

Steven Lesser (Fort Lauderdale, FL), Chair, Truck Accident Law Application Review Panel. Mr. Lesser is a member of the Standing Committee on Specialization. He is a partner in the firm of Becker & Poliakoff in Fort Lauderdale, Florida, and is certified in Construction Law by the Florida State Bar. He served as the Chair of the Truck Accident Law accreditation application review panel.

Steven Oberman (Knoxville, TN), Member, Truck Accident Law Application Review Panel. Mr. Oberman is a founding member of Oberman & Rice in Knoxville, Tennessee, and is a criminal defense lawyer focusing in, among other areas, the defense of DUI cases. He is certified by the National College for DUI Defense in DUI Defense Law, and is a former Dean of the National College for DUI Defense, and member of its Board of Directors.

In addition, the Standards include non-discrimination provisions requiring that a program not condition the grant of certification to a lawyer on the lawyers “membership 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)].

The Standing Committee confirms that the Truck Accident Law application contained the requisite materials and met the requisite standards.
Virginia Landry (Laguna Hills, CA), Member, Truck Accident Law Application Review Panel. Ms. Landry is sole practitioner in the Los Angeles area, focusing on criminal defense and the defense of DUI cases. She is certified by the National College for DUI Defense in DUI Defense Law, and is a Regent of the National College and has been a member of its Board of Directors since 2011.

Examination Reviewer: David Sullivan (Chicago, IL), Mr. Sullivan is a partner in the Chicago law firm of Schuyler, Roche & Crisham PC. He focuses his practice on, among several areas, the defense of intermodal carriers in connection with serious, multi-vehicle trucking accidents, professional liability defense, product liability defense, and complex commercial litigation at both the trial court and appellate court levels.

Respectfully submitted,

Barbara J. Howard, Chair
Standing Committee on Specialization
August 2018
Appendix – ABA Standard for Accreditation of Specialty Certification Programs for Lawyers, Section 4

SECTION 4: REQUIREMENTS FOR ACCREDITATION OF CERTIFYING ORGANIZATIONS

In order to obtain accreditation by the Association for a specialty certification program, an Applicant must demonstrate that the program operates in accordance with the following standards:

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 Reliability 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.

4.07 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.
(C) An Applicant shall propose to the Standing Committee a specific definition of each specialty area in which it seeks accreditation to certify lawyers as specialists. The Standing Committee shall approve, modify or reject any proposed definition and shall promptly notify the Applicant of its actions.

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 area 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. On written request from an Applicant, the Standing Committee may allow the Applicant to certify up to twelve lawyers who create and grade the initial version of the examination required under this paragraph, and that they otherwise meet the certification requirements described in paragraphs (A), (B), (D), (E), and (F).

(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.

(4) Writing published books or articles concerning the specialty area.
4.07 Impartial Review -- The Applicant shall maintain a formal policy providing lawyers who are denied certification an opportunity for review by an impartial decision maker.

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

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

The Resolution grants accreditation to the Truck Accident Law certification program of the National Board of Truck Accident Attorneys, a division of The National Board of Trial Advocacy for a 5-year term.

2. **Approval by Submitting Entity.**

At its May 1, 2018, teleconference meeting the Standing Committee on Specialization considered the application of the National Board of Truck Accident Attorneys, a division of the National Board of Trial Advocacy, and voted unanimously to submit a resolution to the House of Delegates for consideration at the 2018 Annual Meeting accrediting the Truck Accident Law certification program.

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?**

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 program is accredited by the House of Delegates.

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

There are no costs associated with the accreditation of specialty certification programs as proposed in the recommendation.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

The Resolution was referred for consideration to the Sections of Litigation, Tort and Insurance Practice, Business Law, and Health Law.

11. Contact Person (Prior to the Meeting)

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution will grant accreditation to the Truck Accident Law certification program of the National Board of Truck Accident Attorneys, a division 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.

4. Summary of Minority Views

No opposition has been identified.
RESOLVED, That the American Bar Association urges federal, state, territorial, and tribal governments to reduce potential harm that individuals may inflict on themselves or others by enacting statutes, rules, or regulations allowing individuals to temporarily prevent themselves from purchasing firearms. Such measures should include, at minimum, the following provisions that:

1. any person may voluntarily and confidentially request that his or her own name be added to the Index of the National Instant Criminal Background Check System, an equivalent state background system, or to both, to prevent future firearm purchases; and

2. the statute, rule, or regulation provide a procedure with appropriate safeguards whereby the person may have his or her name removed from the system.
REPORT

I. Introduction

In 2014, Cheryl Hanna was 48 years old, a successful Vermont law professor, and married with two children.\(^1\) Hanna was also privately battling depression. She had twice voluntarily admitted herself to a hospital for psychiatric treatment. Soon after her second hospitalization, she legally bought a handgun and used it the next day to kill herself.

If Hanna had had the option of voluntarily restricting herself from buying a gun, she would have done so. Her suicidal impulses were the motivation for her voluntary hospitalizations. She had sat in her car in the parking lot of a gun shop a couple weeks before her death, contemplating the very course of action she eventually couldn’t resist. When asked about the policy urged by this Resolution, Hanna’s husband, Paul Hennings, said: “I think she would have signed up for this in the last two months of her life. I know she had her good days. And I think she would have done that.”\(^2\)

Cheryl Hanna’s story is tragically common and is by no means limited to people with mental illness. More than 30,000 Americans each year are shot to death, roughly two-thirds at their own hands. Hundreds, or even thousands, of these firearm deaths involve recently purchased weapons.\(^3\) Allowing individuals to restrict their own access to firearms could prevent many of these deaths.\(^4\)

This option would appeal to anyone who fears suicide, whether those fears are the product of substance abuse, unstable relationships, domestic abuse, homelessness, anger management problems, or mental illness. The proposal is voluntary and imposes only a temporary restriction on gun purchase, so it is fully consistent with the Second Amendment. The American Bar Association should continue its long tradition of being at the forefront of policy-making to curb gun deaths.

II. The Proposal Would Save Lives

Suicide is an underappreciated public health crisis. Every day, gun suicide claims almost exactly the same number of lives as were lost in the worst mass shooting in modern American history, the Las Vegas massacre: 59.\(^5\) That translates into 21,386 gun suicides a year, almost exactly the same number of lives as were lost in the worst mass shooting in modern American history.

\(^1\) The information about Cheryl Hanna comes from an interview with her husband, Paul Hennings, as first reported in Fredrick E. Vars, A gun registry that could prevent suicide, Washington Post, January 16, 2017, at https://www.washingtonpost.com/opinions/a-no-guns-list-that-could-prevent-suicide/2017/01/13/3b87d1f2-b5cd-11e7-95f9-17ed92129376_story.html?utm_term=b7b7cb7b1df.


\(^5\) The information about Cheryl Hanna comes from an interview with her husband, Paul Hennings, as first reported in Fredrick E. Vars, A gun registry that could prevent suicide, Washington Post, January 16, 2017, at https://www.washingtonpost.com/opinions/a-no-guns-list-that-could-prevent-suicide/2017/01/13/3b87d1f2-b5cd-11e7-95f9-17ed92129376_story.html?utm_term=b7b7cb7b1df.
victims each year, almost double the number of gun homicides. Apart from mass shootings, homicides and suicides with a gun are often ignored, though the death toll is tragically high.

Like Hanna, many people at high risk for suicide would take advantage of the option to restrict their own ability to purchase a firearm. People with serious mental illness are just one example. Some studies suggest that over 90% of those who die by suicide had a diagnosable mental illness. As many as half of those who die by suicide had contact with a mental health professional during their lifetime.

In a survey of 200 people seeking psychiatric care, nearly half (46%) said they would sign up for the proposal. High sign-up rate suggests that perhaps millions of individuals at relatively high risk for suicide would volunteer nationwide.

People without mental health problems are free to register as well. Data show that many would. In an on-line survey with 262 respondents, 29% said they would sign up for the proposal with a seven-day delay removal option. Some of these individuals may be at high risk for suicide (for all the reasons outlined above or for other reasons), but others may not be. Of course, reducing even a low risk of suicide would likely save lives.

A delay in purchasing a firearm for even a few days has the potential to prevent, rather than merely postpone, many suicides. Waiting periods to purchase firearms reduce gun suicide. This means that significant numbers of people who do not just switch to another method or wait to get a firearm. This makes sense because many suicides are impulsive; one study of survivors of firearm suicide attempts found that a majority had suicidal thoughts for less than a day. Surviving one suicide attempt is almost always enough.

https://lasvegassun.com/news/2017/oct/05/coroner-releases-names-all-58-las-vegas-Shootings including the shooter, the death toll in Las Vegas was 59.

5 CDC, supra note 4.
8 Fredrick E. Vars et al., Willingness of Mentally Ill Individuals To Sign Up for a Novel Proposal To Prevent Firearm Suicide. 47 Suicide & Life-Threatening Behavior 483 (2018). The originator of this idea (who is the first author of the cited study) would sign up. Fredrick Vars has bipolar disorder, has been suicidal, and would like to put additional distance between himself and firearms.
10 Ian Ayres & Fredrick E. Vars (Feb. 2016), Amazon Mechanical Turk/Qualtrics survey data. [Data on file with authors].
11 In addition, there are good reasons to think registration by anyone would prevent homicide as well as suicide. A recent study found that waiting periods reduce gun homicides by roughly 17%. Michael Luca, Deepak Malhotra, & Christopher Poliquin, Handgun waiting periods reduce gun deaths, Proc. Nat’l Acad. Sci. (Oct. 11, 2017).
III. The Proposal Can Be Implemented at Low Cost in More Than One Way

The cost-per-life-saved of this proposal would be very low. The federal background check system (NICS) has been granted its requested appropriation and is operational. All licensed gun dealers are already required to check the confidential federal database before selling a firearm. All that is needed to implement the proposal at the federal level is a mechanism for securely adding and subtracting names. After an initial start-up investment, the process could be more or less automated.

Implementation at the state level would also be cost-effective. The federal background check system allows states to add to the federal database the names of individuals who are barred from purchasing a firearm by state law but not federal law. Each state could implement the proposal by creating its own sign-up mechanism for its own residents, then sending those names to the federal system.15

Washington state has recently enacted the proposal, demonstrating that implementation is feasible. A critical feature of the proposal is that participation is voluntary. The Washington bill has confidentiality protections, including a prohibition on discrimination based on one’s participation in the program. Bills in other states add a private cause of action for breaches of confidentiality. Keeping participation truly confidential greatly reduces the potential for coercion. Since participation cannot be verified, a party attempting to coerce someone into signing up would have no way of knowing if coercion worked. Of course, people must know about the program in order to take advantage of it. The bill introduced and passed out of committee in Alabama provides for “publicity and advertising campaign . . . that at a minimum provides the public with information about the list, how an individual may register to be added to the list, and contacts for additional information regarding the list.” Other bills require that information be available at firearm dealer locations and with health care providers.

States have begun exploring how the proposal to offer NICS self-registration could be implemented. The essential attributes are a voluntary and confidential way to suspend one’s ability to purchase firearms. The second element is a mechanism, with adequate safeguards, for changing one’s mind and regaining the ability to purchase firearms. Bills in different states take different approaches. Washington state requires in-person registration and withdrawal. California is considering an internet-based platform, allowing withdrawal in the first year only with a mental healthcare provider declaration and simply a 21-day delay period after the first year. It is important in every state to ensure that unauthorized people cannot register someone else. In addition to identity-verification

15 Registrants of an enacting state would be precluded from purchasing a weapon from a gun dealer anywhere in the country. However, because one state’s law only applies to its residents, each state would need its own registry system. That would be more expensive than a single federal system.

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measures, several bills include criminal penalties for false representations at sign-up.

IV. The Proposal Would Not Violate the Second Amendment

The Supreme Court in 2008 announced that the Second Amendment protects an individual’s right to keep and bear arms. But the Court made clear that that right is not unlimited. The Second Amendment case closest on the facts to the proposal is *Silvester v. Harris*. Plaintiffs in *Silvester* argued that California’s 10-day waiting period to purchase a firearm violated the Second Amendment. The Ninth Circuit rejected that argument. The court held first that the waiting period imposed a burden on Second Amendment rights, but not so great a burden as to justify more than intermediate scrutiny. The Court held that the waiting period passed intermediate scrutiny because it provided a cooling-off period to deter violence and suicide.

*Silvester* points to the first of four sufficient reasons why the proposal does not violate the Second Amendment. Restricting one’s own ability to purchase a firearm with an automatic but delayed revocation option is functionally equivalent to a self-imposed waiting period. If a mandatory waiting period does not violate the Second Amendment, which *Silvester* squarely holds, then neither does a less restrictive, optional waiting period.

The next closest line of cases involves firearm restrictions based on dangerousness. Restrictions of this kind have been upheld time and time again. An optional and temporary measure is less restrictive than a mandatory restriction premised on someone else’s judgment that the restricted party is “dangerous.” In other words, the proposal’s constitutionality follows a *fortiori* from the constitutionality of waiting periods and dangerous restrictions.

A third argument in favor of constitutionality rests on the proposition that “the Second Amendment’s guarantee of an individual right to keep or bear arms in self-defense should

17 Id. at 575.
18 *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016).
19 Id. at 827.
20 Id. at 827-29.
21 See, e.g., *Baer v. Lynch*, 636 Fed. Appx. 695, 698 (7th Cir. 2016) ("As to violent felons, the statute does survive intermediate scrutiny, we have concluded, because the prohibition on gun possession is substantially related to the government’s interest in keeping those most likely to misuse firearms from obtaining them.") (citations omitted); *United States v. Chovan*, 735 F.3d 1127, 1139-41 (9th Cir. 2013) (persons convicted of domestic violence misdemeanors); *United States v. Stegmeier*, 701 F.3d 574 (8th Cir. 2012) (fugitive felon); *United States v. Carter*, 669 F.3d 411 (4th Cir. 2012) (unlawful user of a controlled substance); *Hope v. State*, 163 Conn. App. 36, 43 (2016) (the challenged statute “does not implicate the Second Amendment, as it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes. It restricts for up to one year the rights of only those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others after affording due process protection to challenge the seizure of the firearms.").
include the freedom not to keep or bear them at all." Firearm self-restriction would provide a tool to strengthen this right not to bear arms—by binding oneself against impulsively buying arms in the future. The animating principle of the Second Amendment is self-defense. One ought to be able to defend oneself against suicide.

Finally, an individual who restricts their own ability to purchase firearms generally waives their Second Amendment rights. Waivers of constitutional rights "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Sign-up systems should include clear and prominent explanations.

IV. Conclusion

The proposal is a modest and inexpensive approach that could significantly lower the firearm death toll. This voluntary proposal does not violate the Second Amendment. The American Bar Association should advocate strongly for this legal step to combat the epidemic of firearm deaths.

Respectfully submitted,

Joshu Harris, Chair
Standing Committee on Gun Violence
August 2018

\[
\text{22 Joseph Blocher, The Right Not to Keep or Bear Arms, 84 Stanford Law Review 1, 4 (2012).}
\]

\[
\text{23 See McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (explaining that "individual self-defense is the central component of the Second Amendment right").}
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\[
\text{24 Vars, supra note 1.}
\]

\[
\text{25 Brady v. United States, 397 U.S. 742, 748 (1970).}
\]
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Gun Violence
Submitted By: Joshu Harris, Chair

1. Summary of Resolution(s). To reduce the risk of suicides and other deadly incidents, this resolution urges that individuals be allowed to: 1) voluntarily submit their names into databases used for gun background checks, and 2) remove themselves from those systems.

2. Approval by Submitting Entity. Approved by Committee at its midyear meeting on February 13, 2018 by conference call.

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? Numerous policies relate to categories of persons who should mandatorily be included in background check systems for firearm purchases, such as felons, fugitives, persons under indictment, persons adjudicated mentally incompetent, and minors (1965 and reaffirmed since), as well as felons and persons convicted of violent misdemeanors, spousal or child abuse, and persons subject to a protective order. 94A10E. Additionally, the ABA supports full implementation of the National Criminal Instant Background Check System so that it is accurate and complete. 11A10A. Most recently, the ABA endorsed gun violence restraining orders, whereby someone may petition a court to have a person deemed dangerous to oneself or others temporarily be barred from possessing a firearm and having the restraining order entered into federal and state background check systems. 17A118B. The proposed policy does not conflict, but complements, these existing policies. Indeed, it is unique because of its voluntary nature.

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

6. Status of Legislation. (If applicable) None pending on the federal level. Washington State recently enacted such a law. California has a bill that passed Assembly (AB-1927) and is awaiting first hearing in Public Safety Committee.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Implementation will be done through training, sharing of this and related information with civil society groups that address gun violence, and advocacy through the Government Affairs Office where opportunities (e.g. related proposed legislation introduced) arise.

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

10. Referrals.

Sections and Divisions:
- Criminal Justice
- State and Local Government
- Civil Rights and Social Justice
- Family Law
- Litigation
- TTIPS
- Health Law
- Young Lawyers
- Judicial
- Senior Lawyers
- Government & Public-Sector Lawyers
- Solo, Small Firm and General Practice Division

Commissions:
- Disability Rights
- Law and Aging
- Youth at Risk
- Domestic & Sexual Violence

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

Joshu Harris, Chair
1239 Crease St
Philadelphia, PA 19125-3901
(646) 621-4164

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Monte Frank
Pullman & Comley LLC
850 Main Street
Bridgeport, CT 06604
203-330-2262
mfrank@pullcom.com

Monte Frank
Pullman & Comley LLC
850 Main Street
Bridgeport, CT 06604
203-330-2262
mfrank@pullcom.com
1. **Summary of the Resolution**

   To reduce the risk of suicides and other deadly incidents, this resolution urges that individuals be allowed to: 1) voluntarily submit their names into databases used for gun background checks, and 2) remove themselves from those systems.

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

   Roughly two thirds of gun related deaths are suicides. Most suicides are impulsive acts and most successful suicides involve a firearm. This resolution allows persons who self-identify as being at risk of harming themselves (or in many cases others) to take proactive steps to lessen this likelihood.

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

   This resolution sets general standards, and provides wide latitude to states to enact laws to help a portion of an at-risk population insulate themselves against further harm.

4. **Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**

   None identified.
RESOLVED, That the American Bar Association approves the following programs: Skyline College, Paralegal Studies Program, San Bruno, CA; Oakton Community College, Paralegal Studies Program, Skokie, IL; South University, Legal Studies Program, Cleveland, OH; and South University, Paralegal and Legal Studies Programs, Virginia Beach, VA; Further Resolved, That the American Bar Association reapproves the following paralegal education programs: Pima Community College, Paralegal Program, Tucson, AZ; College of the Canyons, Paralegal Studies Program, Santa Clarita, CA; South University, Paralegal and Legal Studies Programs, Pima Community College, Paralegal Studies Program, Savannah, GA; College of DuPage, Paralegal Studies Program, Glen Ellyn, IL; Southern Illinois University, Paralegal Studies Program, Carbondale, IL; Illinois State University, Legal Studies Program, Normal, IL; Sullivan University, Institute for Paralegal Studies, Lexington, KY; Middlesex Community College, Paralegal Studies Program, Bedford, MA; Grand Rapids, MI; Columbus State Community College, Paralegal Studies Program, Columbus, OH; Edison State Community College, Paralegal Studies Program, Piqua, OH; Rose State College, Paralegal Studies Program, Oklahoma City, OK; Portland Community College, Paralegal Program, Portland, OR; Bucks County Community College, Paralegal Studies Program, Newtown, PA; Community College of Philadelphia, Paralegal Studies Program, Philadelphia, PA; Northampton Community College, Paralegal Program, Bethlehem, PA; Salt Lake Community College, Paralegal Studies Program, Salt Lake City, UT; Further Resolved, That the American Bar Association withdraws the approval of the following paralegal education programs: Robert Morris University, Paralegal Studies Program, Springfield, IL; Beckfield College, Paralegal Studies Program, Florence, KY; Elms College, Paralegal and Legal Studies Program, Chicopee, MA, at the requests of the institutions; and Further Resolved, That the American Bar Association extends the terms of approval until the February 2019 Midyear Meeting of the House of Delegates for the following programs: Faulkner University, Legal Studies Program, Montgomery, AL; South University, Paralegal and Legal Studies Programs, Montgomery, AL; Los Angeles City College, Paralegal Studies Program, Los Angeles, CA; University of New Haven, Legal Studies Program, West Haven, CT; St. Petersburg College, Paralegal Studies Program, Clearwater, FL; Georgia Piedmont Technical College, Paralegal Studies Program, Covington, GA; Herzing University, Legal Studies Program, Atlanta, GA; Wilbur Wright College, Paralegal Studies Program, Chicago, IL; Fayetteville Technical Community College, Paralegal Technology Program, Fayetteville, NC; Methodist College, Paralegal Studies Program, Covington, GA; Herzing University, Legal Studies Program, Atlanta, GA; Wilbur Wright College, Paralegal Studies Program, Chicago, IL; Fayetteville Technical Community College, Paralegal Technology Program, Fayetteville, NC; Methodist
University, Legal Studies Program, Fayetteville, NC; Union County College, Paralegal Studies Program, Cranford, NJ; Finger Lakes Community College, Paralegal Program, Canandaigua, NY; Monroe Community College, Paralegal Studies Program, Rochester, NY; SUNY Rockland Community College, Paralegal Studies Program, Suffern, NY; Pioneer Pacific College, Legal Assistant/Paralegal Program, Wilsonville, OR; South University, Paralegal and Legal Studies Programs, Columbia, SC; National American University, Paralegal Studies Program, Sioux Falls, SD; Brightwood College, Paralegal Studies Program, Nashville, TN; University of Tennessee Chattanooga, Legal Assistant Studies Program, Chattanooga, TN; American National University, Paralegal Program, Salem, VA.
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 programs identified below and found them to be operating in compliance with the Guidelines for the Approval of Paralegal Education Programs and is, therefore, recommending that approval be granted.

Skyline College, Paralegal Studies Program, San Bruno, CA
Skyline College is a community college accredited by the Western Association of Schools and Colleges. The College offers an Associate of Arts Degree in Paralegal Studies and a Certificate in Paralegal Studies.

Skyline College, Paralegal Studies Program, San Bruno, CA
Skyline College is a community college accredited by the Western Association of Schools and Colleges. The College offers an Associate of Arts Degree in Paralegal Studies and a Certificate in Paralegal Studies.
Oakton Community College, Paralegal Studies Program, Skokie, IL
Oakton Community College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science and a Post-Baccalaureate Certificate in Paralegal Studies.

South University, Legal Studies Program, Cleveland, OH
South University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor of Science in Legal Studies and an Associate of Science in Paralegal Studies.

South University, Paralegal and Legal Studies Programs, Virginia Beach, VA
South University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor Degree in Legal Studies and an Associate Degree 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:

Pima Community College, Paralegal Program, Tucson, AZ
Pima Community College is a two-year community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Post-Associate Certificate.

College of the Canyons, Paralegal Studies Program, Santa Clarita, CA
College of the Canyons is a two-year community college accredited by the Western Association of Schools and Colleges. The College offers an Associate of Arts Degree in Paralegal Studies.

South University, Paralegal and Legal Studies Programs, Royal Palm Beach, FL
South University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor of Science Degree in Legal Studies and an Associate of Science Degree in Paralegal Studies.

South University, Paralegal and Legal Studies Programs, Savannah, GA
South University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor of Science Degree in Legal Studies and an Associate of Science Degree in Paralegal Studies.

College of DuPage, Paralegal Studies Program, Glen Ellyn, IL
College of DuPage is a two-year community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Certificate of Paralegal Studies.

South University, Paralegal and Legal Studies Programs, Virginia Beach, VA
South University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor Degree in Legal Studies and an Associate Degree 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:

Pima Community College, Paralegal Program, Tucson, AZ
Pima Community College is a two-year community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Post-Associate Certificate.

College of the Canyons, Paralegal Studies Program, Santa Clarita, CA
College of the Canyons is a two-year community college accredited by the Western Association of Schools and Colleges. The College offers an Associate of Arts Degree in Paralegal Studies.

South University, Paralegal and Legal Studies Programs, Royal Palm Beach, FL
South University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor of Science Degree in Legal Studies and an Associate of Science Degree in Paralegal Studies.

South University, Paralegal and Legal Studies Programs, Savannah, GA
South University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor of Science Degree in Legal Studies and an Associate of Science Degree in Paralegal Studies.

College of DuPage, Paralegal Studies Program, Glen Ellyn, IL
College of DuPage is a two-year community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Certificate of Paralegal Studies.
Southern Illinois University, Paralegal Studies Program, Carbondale, IL
Southern Illinois University is a four-year university accredited by the Higher Learning Commission. The University offers a Bachelor of Science Degree in Paralegal Studies General and a Bachelor of Science Degree in Paralegal Studies Pre-Law Specialization.

Illinois State University, Legal Studies Program, Normal, IL
Illinois State University is a four-year university accredited by the Higher Learning Commission. The University offers a Post-Baccalaureate Certificate in Legal Studies with a Bachelor’s Degree, a Certificate in Legal Studies without a Bachelor’s Degree, a Certificate Minor in Legal Studies, a Bachelor of Arts Degree Interdisciplinary Major in Legal Studies, a Bachelor of Science Degree Interdisciplinary Major in Legal Studies, Bachelor of Arts Degree in Legal Studies and a Bachelor of Science Degree in Legal Studies.

Sullivan University, Institute for Paralegal Studies, Lexington, KY
Sullivan University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers an Associate of Applied Science Degree, a Bachelor of Science Degree and a Post-Baccalaureate Certificate.

Middlesex Community College, Paralegal Studies Program, Bedford, MA
Middlesex Community College is a two-year community college accredited by the New England Association of Schools and Colleges. The College offers an Associates of Science Degree in Paralegal Studies - Career, an Associate of Science Degree in Paralegal Studies – Transfer, and a Certificate in Paralegal Studies.

Grand Valley State University, Legal Studies Program, Grand Rapids, MI
Grand Valley State University is a four-year university accredited by the Higher Learning Commission. The University offers a Bachelor of Arts Degree, a Bachelor of Science Degree in Legal Studies and a Post-Baccalaureate Certificate in Legal Studies.

Columbus State Community College, Paralegal Studies Program, Columbus, OH
Columbus State Community College is a two-year community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Paralegal Studies Certificate.

Edison State Community College, Paralegal Studies Program, Piqua, OH
Edison State Community College is a two-year community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Post-Baccalaureate Certificate in Paralegal Studies.

Rose State College, Paralegal Studies Program, Midwest City, OK
Rose State College is a four-year college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies.

Portland Community College, Paralegal Program, Portland, OR
Portland Community College is a two-year community college accredited by the Northwest Association of Schools and Colleges. The College offers an Associate Degree of Applied Science and a Certificate in Paralegal Studies.

Southern Illinois University is a four-year university accredited by the Higher Learning Commission. The University offers a Bachelor of Science Degree in Paralegal Studies General and a Bachelor of Science Degree in Paralegal Studies Pre-Law Specialization.

Illinois State University, Legal Studies Program, Normal, IL
Illinois State University is a four-year university accredited by the Higher Learning Commission. The University offers a Post-Baccalaureate Certificate in Legal Studies with a Bachelor’s Degree, a Certificate in Legal Studies without a Bachelor’s Degree, a Certificate Minor in Legal Studies, a Bachelor of Arts Degree Interdisciplinary Major in Legal Studies, a Bachelor of Science Degree Interdisciplinary Major in Legal Studies, Bachelor of Arts Degree in Legal Studies and a Bachelor of Science Degree in Legal Studies.

Sullivan University, Institute for Paralegal Studies, Lexington, KY
Sullivan University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers an Associate of Applied Science Degree, a Bachelor of Science Degree and a Post-Baccalaureate Certificate.

Middlesex Community College, Paralegal Studies Program, Bedford, MA
Middlesex Community College is a two-year community college accredited by the New England Association of Schools and Colleges. The College offers an Associates of Science Degree in Paralegal Studies - Career, an Associate of Science Degree in Paralegal Studies – Transfer, and a Certificate in Paralegal Studies.

Grand Valley State University, Legal Studies Program, Grand Rapids, MI
Grand Valley State University is a four-year university accredited by the Higher Learning Commission. The University offers a Bachelor of Arts Degree, a Bachelor of Science Degree in Legal Studies and a Post-Baccalaureate Certificate in Legal Studies.

Columbus State Community College, Paralegal Studies Program, Columbus, OH
Columbus State Community College is a two-year community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Paralegal Studies Certificate.

Edison State Community College, Paralegal Studies Program, Piqua, OH
Edison State Community College is a two-year community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Post-Baccalaureate Certificate in Paralegal Studies.

Rose State College, Paralegal Studies Program, Midwest City, OK
Rose State College is a four-year college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies.

Portland Community College, Paralegal Program, Portland, OR
Portland Community College is a two-year community college accredited by the Northwest Association of Schools and Colleges. The College offers an Associate Degree of Applied Science and a Certificate in Paralegal Studies.
Bucks County Community College, Paralegal Studies Program, Newtown, PA
Bucks County Community College is a two-year community college accredited by Middle States Association of Colleges and Schools. The College offers an Associate of Arts Degree in Paralegal Studies and a Post-Baccalaureate Paralegal Certificate.

Community College of Philadelphia, Paralegal Studies Program, Philadelphia, PA
Community College of Philadelphia 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 and a Post Degree Certificate in Paralegal Studies.

Northampton Community College, Paralegal Program, Bethlehem, PA
Northampton 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.

Salt Lake Community College, Paralegal Studies Program, Salt Lake City, UT
Salt Lake Community College is a two-year community college accredited by the Northwest Association of Schools and Colleges. The College offers an Associate in Applied Science Degree in Paralegal Studies.

The following programs are recommended for withdrawal of ABA approval, at the request of the institutions:

Robert Morris University, Paralegal Studies Program, Springfield, IL
Robert Morris University is a four-year private university accredited by North Central Association of Colleges and Schools. The University offers an Associate of Applied Science Paralegal Degree.

Beckfield College, Paralegal Studies Program, Florence, KY
Beckfield College is a four-year private college accredited by the Accrediting Bureau of Health Education Schools. The College offers an Associate in Applied Science Degree, a Bachelor’s of Science Degree, a Post-Baccalaureate Certificate, a Legal Nurse Consultant Certificate and an Associate in Applied Science Degree with a Legal Nurse Consultant track.

Elms College, Paralegal and Legal Studies Program, Chicopee, MA
Elms College is a four-year private college accredited by the New England Association of Colleges and Schools. The College offers a Bachelor of Arts Degree in Paralegal Studies, a Bachelor of Arts Degree in Legal Studies, a Bachelor of Arts Degree in Social Services Paralegal, an Associate of Arts Degree in Paralegal Studies, a Certificate in Advanced Paralegal Studies and a Certificate in Legal Nurse Consulting.

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 2019 Midyear Meeting of the American Bar Association House of Delegates.
Faulkner University, Legal Studies Program, Montgomery, AL;
South University, Legal and Paralegal Studies Program, Montgomery, AL;
Los Angeles City College, Paralegal Studies Program, Los Angeles, CA;
University of New Haven, Legal Studies Program, West Haven, CT;
St. Petersburg College, Paralegal Studies Program, Clearwater, FL;
Georgia Piedmont Technical College, Paralegal Studies Program, Covington, GA;
Herzing University, Legal Studies Program, Atlanta, GA;
Wilbur Wright College, Paralegal Studies Program, Chicago, IL;
Fayetteville Technical Community College, Paralegal Technology Program, Fayetteville, NC;
Methodist University, Legal Studies Program, Fayetteville, NC;
Union County College, Paralegal Studies Program, Cranford, NJ;
Finger Lakes Community College, Paralegal Program, Canandaigua, NY;
Monroe Community College, Paralegal Studies Program, Rochester, NY;
SUNY Rockland Community College, Paralegal Studies Program, Suffern, NY;
Pioneer Pacific College, Legal Assistant/Paralegal Program, Wilsonville, OR;
South University, Legal/Paralegal Studies Program, Columbia, SC;
National American University, Paralegal Studies Program, Sioux Falls, SD;
Brightwood College, Paralegal Studies Program, Nashville, TN;
University of Tennessee Chattanooga, Legal Assistant Studies Program, Chattanooga, TN;
American National University, Paralegal Program, Salem, VA.

Respectfully submitted,
Lynn Crossett, Chair
Standing Committee on Paralegals
August 2018

Respectfully submitted,
Lynn Crossett, Chair
Standing Committee on Paralegals
August 2018
1. **Summary of Resolution(s).**

   This Resolution recommends that the House of Delegates grants approval to four programs, grants reapproval to eighteen paralegal education programs, withdraws the approval of 3 programs at the requests of the institutions, and extends the term of approval to several paralegal education programs.

2. **Approval by Submitting Entity.**

   May 8, 2018

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?**

   Action is timely.

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

   N/A

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

   Approved programs are notified of the action of the House of Delegates by the Standing Committee on Paralegals. The programs are monitored for compliance during the approval term by the Standing Committee.
8. **Cost to the Association.** (Both direct and indirect costs.)
   None

9. **Disclosure of Interest.** (If applicable.)
   N/A

10. **Referrals.**
    None

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address.)
    Jessica Watson
    Manager, Paralegal Programs
    Standing Committee on Paralegals
    American Bar Association
    321 North Clark Street
    Chicago, IL 60654
    (312) 988-5757
    E-Mail: Jessica.Watson@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.)
    Lynn Crossett
    Director, Legal Studies Program
    Texas State University
    601 University Drive, UAC 355E
    San Marcos, TX 78666-4616
    Telephone: (512) 245-2233
    Cell: (512) 749-7348
    E-Mail: lynncrossett@txstate.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution
The Standing Committee on Paralegals resolve(s) that the House of Delegates grant(s) approval to four programs, grants reapproval to eighteen programs, withdraws the approval of three programs, and extends the term of approval of twenty 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. The programs recommended for withdrawal of approval in the enclosed report have requested that approval be withdrawn.

3. Please Explain How the Proposed Policy Position will address the issue
The programs recommended for approval, reapproval, and withdrawal of approval 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 group.
RESOLVED, That the American Bar Association amends the ABA Guidelines for the Approval of Paralegal Education Programs dated August 2018 (insertions underlined; deletions struck through).

Removal of:

LIBRARY
G-601
The institution must have available a library adequate for its program of education of paralegals.

Addition of:

G-30312
The institution must have available a library adequate for its program of education of paralegals.

Renumbering of:

PHYSICAL PLANT
G-7601
The physical facilities of the institution must permit the accommodation of varying teaching methods and learning activities.

G-7602
Space, equipment and other instructional aids must be sufficient for the number of students enrolled in the program.

G-7603
Faculty, administrative and other staff should have office and work areas suitable for performing their duties.

AUTHORITY
G-8701
Consistent with the Guidelines, the Standing Committee on Paralegals is authorized to:

(a) Interpret the Guidelines;
(b) Adopt rules implementing the Guidelines;
(c) Adopt procedural rules for the initial application by institutions and approval of programs of education for paralegals and for the review and reinspection of approved programs; and
(d) Amend any rules from time to time. All interpretations and rules will be published and made available to all interested persons.

The Committee is authorized to consider any request for approval of a program of education for paralegals. If the Committee decision is that approval should be granted, it will so recommend to the ABA House of Delegates.

ADOPTION AND AMENDMENT

These Guidelines become effective upon their adoption by the House of Delegates, but the House of Delegates will not act on any amendment until it has first received the advice and recommendations of the Standing Committee on Paralegals.

The power to approve an amendment of the Guidelines is vested in the House of Delegates, but the House of Delegates will not act on any amendment until it has first received the advice and recommendations of the Standing Committee on Paralegals.
Background


The Standing Committee, through its Approval Commission, is continually working to update and modify the Guidelines to meet the challenge of creating improved standards for the education of paralegals. The amendments to the Guidelines can be summarized as reorganizing sections for clarity and subsequent remumbering.

These amendments are the work product of the Standing Committee and Approval Commission, in consultation with paralegal educators and other interested parties. They are intended to ensure that the ABA Guidelines continue to represent and promote high standards of quality in paralegal education.

Respectfully submitted,
Lynn Crossett, Chair
Standing Committee on Paralegals
August 2018
The Standing Committee on Paralegals recommends that the House of Delegates adopt amendments, dated August 2018, to the ABA Guidelines for the Approval of Paralegal Education Programs.

The Recommendation was approved by the Standing Committee at its meeting on March 2, 2018, with a technical amendment approved at its April 20, 2018 meeting.

This recommendation has not been previously submitted.


The Standing Committee at its meeting on March 2, 2018, with a technical amendment approved at its April 20, 2018 meeting, approved the Recommendation. All 267 ABA approved paralegal education programs are aware of the amendments and are awaiting their adoption by the House of Delegates.

Not Applicable.

Minimal costs will be incurred for dissemination of new Guidelines.
8. Disclosure of Interest. (If applicable.)
Not Applicable.

9. Referrals.
In December 2017 and January 2018, the Standing Committee circulated the proposed amendments to all ABA approved paralegal education programs and other interested parties for public comment. The Standing Committee considered all comments received prior to filing the amendments to the ABA Guidelines.

10. Contact Person. (Prior to the meeting.)
Lynn Crossett, Chair
Texas State University
601 University Drive, UAC 355
San Marcos, TX 78666-4616
Phone: (512) 245-2143
E-Mail: lc25@txstate.edu

Jessica Watson
Manager, Paralegal Programs
Standing Committee on Paralegals
American Bar Association
321 N Clark Street
Chicago, IL 60654
Phone: (312) 988-5757
E-Mail: Jessica.Watson@americanbar.org

11. Contact Person. (Who will present the report to the House.)
Lynn Crossett, Chair
Texas State University
601 University Drive, UAC 355
San Marcos, TX 78666-4616
Phone: (512) 245-2143
E-Mail: lc25@txstate.edu
EXECUTIVE SUMMARY

1. Summary of the Recommendation(s)
   The Standing Committee on Paralegals is recommending that the House of Delegates adopt amendments, dated August 2018, to the ABA Guidelines for the Approval of Paralegal Education Programs.

2. Summary of the Issue which the Recommendation(s) Address
   The amendments will update the ABA Guidelines for the Approval of Paralegal Education Programs by reorganizing the Guidelines for clarity.

3. An Explanation of How the Proposed Policy Position Will Address the Issue
   The adoption of the amendments will update the Guidelines for the Approval of Paralegal Education Programs so that they keep pace with current developments in paralegal education and reflect current policies.

4. A Summary of any Minority Views or Opposition which have been Identified
   No other positions on this recommendation have been taken by other Association entities, affiliated organizations or other interested groups.
AMERICAN BAR ASSOCIATION
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in adopting the amendments dated August 2018 to the Rules of the ABA Standards and Rules of Procedure for Approval of Law Schools, to restructure the work of the ABA accreditation process by eliminating the Council’s Accreditation and Standards Review Committees, and having all work completed by the Council.
I. Scope and Authority

Rule 1: Scope and Purpose

These Rules of Procedure govern the accreditation process as carried out by the Council, Accreditation Committee, Managing Director, and Appeals Panel. They establish processes relating to accreditation that further the purposes of the Standards and promote consistency, fairness, and transparency.

Rule 2: Council Responsibility and Authority with Regard to Accreditation Status

The Council has primary authority to determine compliance with the Standards. It has delegated certain authority to the Accreditation Committee as stated in Rule 3. The Council has authority to:

(a) grant or deny an application of a law school for provisional approval or full approval;
(b) withdraw provisional or full approval;
(c) grant or deny applications for acquiescence in a major change, as provided in the Standards;
(d) grant or deny applications for variances;
(e) grant or deny an application for approval of a foreign program, and the continuance of a foreign program as set forth in the Criteria for Foreign Summer and Intersession Programs offered by ABA-Approved Law Schools in a Location Outside the United States; the Criteria for Approval of Foreign Semester and Year-Long Programs; and the Criteria for Accepting Credit for Student Study at a Foreign Institution;
(f) approve or deny approval of a teach-out plan;
(g) impose sanctions and/or direct specific remedial action; and
(h) set fees for services and activities related to accreditation.

Rule 3: Accreditation Committee Responsibility and Authority

The responsibility and authority of the Accreditation Committee is delegated to it by the Council.

(a) The Committee has jurisdiction to make recommendations to the Council concerning:
   (1) an application for provisional or full approval;
Rule 4 5: Site Evaluations

An Appeals Panel has authority to consider appeals of the following decisions of the Council:

(a) Denial of provisional approval;
(b) Denial of full approval;
(c) Withdrawal of provisional or full approval.

II. Information

Rule 4 5: Site Evaluations

(a) A site evaluation of a law school or of a program is a comprehensive examination of the law school or program conducted by one or more persons qualified to conduct site evaluations who:

(2) withdrawal of provisional or full approval;
(3) an application for acquiescence in a major change under Rules 29(a)(1) through 29(a)(13);
(4) an application for a variance; and
(5) approval or denial of a teach-out plan.

(b) The Committee has jurisdiction to make decisions concerning all matters other than those specified in Rule 3(a), including:

(1) determining compliance with the Standards of any provisionally or fully approved law school in connection with a site evaluation, a complaint, a response to a request for information, a fact-finding report, interim monitoring of accreditation status, or any other circumstance as provided in these Rules;
(2) granting or denying an application for approval of a foreign program, and the continuance of a foreign program as set forth in the Criteria for Foreign Summer and Intersession Programs Offered by ABA-Approved Law Schools in a Location Outside the United States; the Criteria for Approval of Foreign Semester and Year-Long Programs; and the Criteria for Accepting Credit for Student Study at a Foreign Institution; and
(3) granting or denying an application for acquiescence in a major change under Rule 29(a)(14) through 29(a)(17).

(c) The Committee has jurisdiction to impose sanctions and/or direct specific remedial action, or to recommend to the Council that it impose sanctions and/or direct specific remedial action, in accordance with Rules 16 to 18.

(d) The Committee has the authority to create subcommittees and task forces as it deems appropriate. Subcommittees do not have the authority to take action on behalf of the Accreditation Committee but have the authority to make recommendations where appropriate.

Rule 3 4: Appeals Panel Authority

An Appeals Panel has authority to consider appeals of the following decisions of the Council:

(a) Denial of provisional approval;
(b) Denial of full approval;
(c) Withdrawal of provisional or full approval.

II. Information

Rule 4 5: Site Evaluations

(a) A site evaluation of a law school or of a program is a comprehensive examination of the law school or program conducted by one or more persons qualified to conduct site evaluations who:
(1) Review documents relating to the law school or program;

(2) Perform an on-site evaluation of the law school or program; and

(3) Prepare a factual report to be used by the Committee Council for purposes of making decisions or recommendations relating to accreditation status of the law school or program.

(b) Site evaluations of law schools shall be conducted according to the following schedule:

(1) A site evaluation of a fully approved law school shall be conducted in the third year following the granting of full approval and every second tenth year thereafter.

(2) A site evaluation of a provisionally approved law school shall be conducted in accordance with subsection (g) below.

(3) A site evaluation shall be conducted upon application by a law school for provisional approval.

(c) The Council or Committee may order additional site evaluations of a law school when special circumstances warrant.

(d) In extraordinary circumstances, a site evaluation of a law school may be postponed upon the request of the law school. In such cases, the postponement shall be at the discretion of the Managing Director in consultation with the chair of the Committee Council and shall not exceed one year.

(e) When a site evaluation of a law school is required under the Standards or these Rules, the Managing Director shall make the following arrangements:

(1) Schedule the site evaluation during the regular academic year, at a time when classes in the program of legal education are being conducted.

(2) Appoint a qualified site evaluation team of sufficient size to accomplish the purposes of the site evaluation, and appoint a chair of the site evaluation team;

(3) Provide the site evaluation team all relevant documents relating to the accreditation history and Accreditation Committee and Council action regarding the law school;

(4) Provide the site evaluation team with any third-party comments received by the Managing Director’s Office regarding the law school’s compliance with the Standards;

(5) Provide the site evaluation team all complaints received under Rule 43.38 and not previously dismissed by the Managing Director or the Accreditation Committee; and

(6) Provide the site evaluation team with any necessary or appropriate directions or instructions.

(1) Review documents relating to the law school or program;

(2) Perform an on-site evaluation of the law school or program; and

(3) Prepare a factual report to be used by the Committee Council for purposes of making decisions or recommendations relating to accreditation status of the law school or program.

(b) Site evaluations of law schools shall be conducted according to the following schedule:

(1) A site evaluation of a fully approved law school shall be conducted in the third year following the granting of full approval and every second tenth year thereafter.

(2) A site evaluation of a provisionally approved law school shall be conducted in accordance with subsection (g) below.

(3) A site evaluation shall be conducted upon application by a law school for provisional approval.

(c) The Council or Committee may order additional site evaluations of a law school when special circumstances warrant.

(d) In extraordinary circumstances, a site evaluation of a law school may be postponed upon the request of the law school. In such cases, the postponement shall be at the discretion of the Managing Director in consultation with the chair of the Committee Council and shall not exceed one year.

(e) When a site evaluation of a law school is required under the Standards or these Rules, the Managing Director shall make the following arrangements:

(1) Schedule the site evaluation during the regular academic year, at a time when classes in the program of legal education are being conducted.

(2) Appoint a qualified site evaluation team of sufficient size to accomplish the purposes of the site evaluation, and appoint a chair of the site evaluation team;

(3) Provide the site evaluation team all relevant documents relating to the accreditation history and Accreditation Committee and Council action regarding the law school;

(4) Provide the site evaluation team with any third-party comments received by the Managing Director’s Office regarding the law school’s compliance with the Standards;

(5) Provide the site evaluation team all complaints received under Rule 43.38 and not previously dismissed by the Managing Director or the Accreditation Committee; and

(6) Provide the site evaluation team with any necessary or appropriate directions or instructions.
(f) In connection with a site evaluation of a law school, the Managing Director shall direct the law school to provide the following documents to the site evaluation team before the site evaluation:

(1) All completed forms and questionnaires, as adopted by the Council; and

(2) In the case of a law school applying for provisional or full approval, the completed application for provisional or full approval.

(g) Site evaluations for provisionally approved law schools shall be conducted as follows:

(1) In years two and four, and upon application for full approval, the law school shall be inspected in accordance with the rules for site evaluation of fully approved law schools.

(2) The Accreditation Committee Council has the discretion to order a site evaluation in any other year. The Accreditation Committee Council may direct that the additional site evaluation be limited in scope.

(h) Following a site evaluation, the site evaluation team shall prepare a written report on facts and observations that will enable the Committee Council to determine compliance with the Standards or other issues relating to the accreditation status of the law school. A site evaluation report shall not contain conclusions regarding compliance with Standards or make recommendations for action by the Committee or the Council.

(i) The Managing Director shall review the report submitted by a site evaluation team and ensure that it complies with (h). The Managing Director shall then transmit the report to the president and the dean in order to provide an opportunity to make factual corrections and comments. The law school shall be given at least 30 days to prepare its response to the report, unless the law school consents to a shorter time period. The 30 day period shall run from the date on which the Managing Director transmits the report to the law school.

(j) Following receipt of the law school’s response to the site evaluation report, the Managing Director shall forward a copy of the report with the law school’s response to members of the Accreditation Committee Council and the site evaluation team.

(k) Site evaluations regarding foreign programs shall be conducted as provided under:

(1) Criteria for Foreign Summer and Intersession Programs Offered by ABA-Approved Law Schools;

(2) Criteria for Approval of Semester and Year-Long Study Abroad Programs Established by ABA-Approved Law Schools.

Rule 56: Interim Monitoring of Accreditation Status

(a) The Accreditation Committee Council shall monitor the accreditation status of law schools on an interim basis between site evaluations. In its interim monitoring of a law school’s accreditation status, the Committee Council shall use a law school’s annual questionnaire report and other information available to the Committee or the Council.
submissions, other information requested by the Council Committee, and information otherwise deemed reliable by the Council Committee for its review.

(b) In conducting interim monitoring of law schools, the Council Committee shall consider at a minimum:

(1) Resources available to the law school;
(2) Efforts and effectiveness in facilitating student career placement;
(3) Bar passage; and
(4) Student admissions including student credentials, size of enrollment, and academic attrition.

Rule 6.7: Acquisition of Additional Information by the Accreditation Committee and Council
At any time in carrying out their responsibilities under the Standards and Rules, the Committee, the Council, or the Managing Director requests information from a law school pursuant to Rule 6.7, the law school shall be given a date certain to provide the information.

Rule 7.8: Submission of Information
In any case in which the Committee, the Council, or the Managing Director requests information from a law school pursuant to Rule 7.8, the law school shall be given a date certain to provide the information.

Rule 8.9: Appointment of a Fact Finder
(a) One or more qualified persons may be appointed as fact finders for the specific purpose of gathering information to enable the Committee or the Council to determine a law school’s compliance with a Standard. A fact finder may be required at any time at the direction of the Council Committee, or Managing Director, and may be required under Rules 24.20(c) and 25.20(e) in connection with a law school’s application for acquiescence in a major change; under Rule 24.20(d) to assess compliance subsequent to the effective date of acquiescence in a major change; under Rule 25.34(b) in connection with a request for a variance; and under Rule 25.44(b) in connection with a complaint.

(b) The appointment of a fact finder shall include the following:

(1) A statement of the Standards, Rules, or other requirements to which the appointment relates;
(2) A statement of questions or issues for determination by the fact finder;
(3) A statement of relevant documents or information provided to the fact finder; and

(1) Resources available to the law school;
(2) Efforts and effectiveness in facilitating student career placement;
(3) Bar passage; and
(4) Student admissions including student credentials, size of enrollment, and academic attrition.

Rule 7.8: Submission of Information
In any case in which the Committee, the Council, or the Managing Director requests information from a law school pursuant to Rule 7.8, the law school shall be given a date certain to provide the information.

Rule 8.9: Appointment of a Fact Finder
(a) One or more qualified persons may be appointed as fact finders for the specific purpose of gathering information to enable the Committee or the Council to determine a law school’s compliance with a Standard. A fact finder may be required at any time at the direction of the Council Committee, or Managing Director, and may be required under Rules 24.20(c) and 25.20(e) in connection with a law school’s application for acquiescence in a major change; under Rule 24.20(d) to assess compliance subsequent to the effective date of acquiescence in a major change; under Rule 25.34(b) in connection with a request for a variance; and under Rule 25.44(b) in connection with a complaint.

(b) The appointment of a fact finder shall include the following:

(1) A statement of the Standards, Rules, or other requirements to which the appointment relates;
(2) A statement of questions or issues for determination by the fact finder;
(3) A statement of relevant documents or information provided to the fact finder; and
(d) The Managing Director shall review the report submitted by a fact finder and ensure that it complies with (c). The Managing Director shall then transmit the report to the dean in order to provide an opportunity for the law school to make factual corrections and comments. The law school shall be given at least 30 days to prepare its response to the report, unless the law school consents to a shorter time period. The 30 day period shall run from the date on which the Managing Director transmits the report to the law school.

Rule 9 10: Notice of Accreditation Decision by Other Agency
(a) An approved law school shall promptly inform the Managing Director of the following actions with respect to the law school:

(1) Pending or final action by State agency to suspend, revoke, withdraw, or terminate legal authority to provide post-secondary education;

(2) Decision by recognized agency to deny accreditation or pre-accreditation;

(3) Pending or final action by recognized agency to suspend, revoke, withdraw, or terminate accreditation or pre-accreditation; or

(4) Probation or equivalent status imposed by recognized agency.

(b) If the law school is part of a university, then the law school shall promptly inform the Managing Director of the above actions with respect to the university or any program offered by the university.

(c) A law school must complete and submit the Notice of State or Other Recognized Agency Action Form.

(d) The Council will not grant approval to a law school if the Council knows, or has reasonable cause to know, that the law school is subject to the actions in subsection (a), unless the Council can provide a thorough and reasonable explanation, consistent with the Standards, why the action of the other body does not preclude the Council’s grant of approval. Such explanation will be provided to the Secretary of the Department of Education.

(e) If the Council learns that an approved law school is the subject of an adverse action by another recognized accrediting agency or has been placed on probation or an equivalent status by another recognized agency, the Council will promptly review its approval of the law school to determine if it should also take adverse action or place the law school on probation.
The Council will, upon request, share with other appropriate recognized accrediting agencies and recognized State approval agencies information about the accreditation status of a law school and any adverse actions it has taken against a law school.

Rule 10.44: Failure to Provide Information or Cooperate with the Gathering of Information
(a) The Committee or Council may find that a law school has:

(1) Failed to provide information required to be provided under the Standards;
(2) Failed to comply with a request for information under these Rules of Procedure;
(3) Provided information to the Council Committee or the Managing Director’s Office that the Council Committee has reason to believe is false or misleading; or
(4) Failed to cooperate with a site evaluation, a fact finder, or other process for the gathering of information under the Standards or these Rules of Procedure.

(b) If the Committee or Council makes a finding under (a) above, then the Committee or Council may direct that representatives of the law school, including any person specifically designated by the Committee or Council, appear at a hearing to determine whether to impose sanctions and/or direct specific remedial action.

III. Action on Information

Rule 11.42: Proceedings to Determine Compliance with Standards in General
(a) In a proceeding to determine accreditation status or compliance with the Standards within the jurisdiction of the Council Committee under Rule 2.3, the Council Committee may:

(1) Conclude that the law school is in compliance with a Standard or all of the Standards;
(2) Request or gather further information that will enable the Council Committee to determine compliance with one or more Standards;
(3) Conclude that the Council Committee has reason to believe that a law school has not demonstrated compliance with the Standards;
(4) Conclude that the law school is not in compliance with a Standard; or
(5) Appoint a fact-finder. Direct the Managing Director to appoint a fact-finder.

(b) In the event the Council Committee requests or gathers further information or appoints a fact-finder in accordance with Rule 11.42(a) upon receipt of the law school’s response or any fact-finding report, the Council Committee must find the law school in compliance or not in compliance with the Standards for which information was requested or gathered, absent clearly articulated special circumstances. In the event of such special circumstances, the Council Committee may request or gather further information pursuant to Rule 11.42(a)(2), 11.42(a)(3), or 11.42(b) (b) (b) (b) (b)
Rule 12 13: Determinations of Compliance

(a) A determination that the law school is in compliance with all of the Standards means that the law school remains an approved law school.

(b) In finding a law school in compliance with a Standard, the Council Committee may couple the finding with a statement calling the law school’s attention to the requirements of that Standard when the Council Committee has reason to believe that the law school might, at some time before the next scheduled site evaluation, no longer be in compliance with the Standard in question.

(c) The approval status of a law school is not affected while an appeal from a decision, or recommendation of the Committee or Council is pending.

Rule 13 14: Actions on Determinations of Noncompliance with a Standard

(a) Following a determination by the Council Committee of non-compliance with a Standard in accord with Rule 11 12(a)(4), the Council Committee shall:

(1) Require the law school to bring itself into compliance and submit information by a specific date to demonstrate that it has come into compliance with the Standard; and

(2) Direct that representatives of the law school, including any person specifically designated by the Council Committee, appear at a hearing to determine whether to impose sanctions or direct specific remedial action in connection with the law school’s non-compliance with the Standard.

(b) The period of time by which a law school is required to demonstrate compliance with a Standard shall not exceed two years from the date of determination of noncompliance, except as provided for in subsection (c).

(c) Upon request of the law school and for good cause shown, the Committee Council may extend the date of compliance, or may recommend that the Council extend the date of compliance.

Rule 14 15: Reconsideration; Right to Appeal

(a) A law school does not have the right to request reconsideration of a decision or recommendation made by the Accreditation Committee or to request reconsideration of a decision made by the Council.

(b) A law school has a right to appeal a decision of the Accreditation Committee as provided for in Rule 23.

(c) Upon request of the law school and for good cause shown, the Committee Council may extend the date of compliance, or may recommend that the Council extend the date of compliance.

Rule 15 16: Sanctions for Noncompliance with a Standard

(a) Conduct for which sanctions may be imposed upon a law school includes, without limitation:
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(1) Substantial or persistent noncompliance with one or more of the Standards;

(2) Failure to present a reliable plan to bring the law school into compliance with the Standards;

(3) Failure to provide information or to cooperate in a site evaluation as required by the Standards;

(4) Making misrepresentations or engaging in misleading conduct in connection with consideration of the law school’s status by the Committee or the Council, or in public statements concerning the law school’s approval status;

(5) Initiating a major change or implementing a new program without having obtained the prior approval or acquiescence required by the Standards; or

(6) Provision of incomplete, inaccurate or misleading consumer information in violation of Standard 509.

(b) Sanctions may include any or all of the following:

(1) A monetary payment;

(2) A requirement that the law school refund all or part of tuition or fees paid by students;

(3) Public censure;

(4) Private censure;

(5) Publication or distribution of an apology or corrective statement by the law school;

(6) A prohibition against initiating new programs for a specific period;

(7) Probation for a specific period or until specific conditions are fulfilled; or

(8) Withdrawal of provisional or full approval.

(c) The Committee may itself impose any sanction under (b), except for sanctions under (7) or (8), which the Committee may recommend to the Council.

(d) Any sanction under (b) may be imposed, even if the law school has, at the time of the decision or recommendation, ceased the actions that are the basis for sanctions or otherwise brought itself into compliance with the Standards.

(e) The Council Committee shall consider aggravating and mitigating circumstances in determining the appropriate sanction, including the amount of a monetary payment.

(f) (1) Aggravating circumstances are considerations or factors that may justify an increase in the degree or severity of the sanction to be imposed and include, without limitation:
(i) prior history of violations;
(ii) degree of negligence, recklessness, or knowledge;
(iii) effort to conceal;
(iv) dishonest or selfish motive;
(v) a pattern of misconduct;
(vi) bad faith obstruction of an investigation or sanction proceeding by failing to comply with requests of the Managing Director’s Office, a Fact Finder, or rules of a sanction proceeding;
(vii) submission of false or misleading evidence, false or misleading statements, or other deceptive practices during the investigation process or sanction proceeding;
(viii) refusal to acknowledge wrongful nature of conduct;
(ix) injury to former, current, or prospective law students;
(x) apparent amount of monetary, strategic, or reputational gain;
(xi) failure to have sufficient systems in place to ensure compliance, including the law school dean’s lack of oversight;
(xii) institutional incentive structures that may contribute to noncompliance; and
(xiii) failure to enquire or investigate when circumstances warrant enquiry or investigation.

(2) Mitigating circumstances are any considerations or factors that may justify withholding or reducing a sanction and include, without limitation:

(i) absence of a prior history of violations;
(ii) degree of negligence, recklessness, or knowledge;
(iii) apparent lack of monetary, strategic, or reputational gain;
(iv) self-reporting of violation;
(v) timely good faith effort to rectify consequences of violation;
(vi) full and free disclosure to and cooperation with Managing Director’s Office, cooperation with fact finder, or cooperative attitude toward sanction proceedings; and
(vii) imposition of other sanctions.
Rule 16-17: Sanctions for Failure to Cure Noncompliance with a Standard

If, following a determination by the Council Committee that a law school is not in compliance with a Standard, the law school fails to bring itself into compliance within the time specified by the Council Committee, including any extension for good cause, or fails to complete remedial action directed under Rule 202(c) or fails to comply with sanctions imposed by the Committee or Council under Rule 15(b), the Council Committee shall impose or recommend that the Council impose further remedial action or sanctions as provided for in Rule 15 or the Council may extend the period for the law school to bring itself into compliance.

(3) The most recent site evaluation questionnaire;

Rule 17: Monitoring and Enforcing Compliance with Sanctions

(a) The Council Committee shall monitor the law school’s compliance with any requirements for remedial action, any sanctions, or any requirements of probation imposed under these Rules. If the Council Committee concludes that the law school is not complying with the sanctions that have been imposed, not making adequate progress toward bringing itself into compliance with the Standards, or not fulfilling the requirements of its probation, the Council Committee may impose or recommend that the Council impose additional sanctions referred to in Rule 15(b). The Committee may itself impose any sanction under 16(b), except for sanctions under (2) or (3).

(b) If a law school has been placed on probation, the law school shall demonstrate compliance with the Standards by the end of the period fixed for probation. If the law school fails to demonstrate compliance, then the Council Committee shall:

(1) Recommend that the Council withdraw approval; or

(2) Recommend that, for good cause shown, the Council extend the period for the law school to bring itself into compliance for good cause shown.

(c) If a law school has been placed on probation, and the law school demonstrates compliance with the Standards by the end of the period fixed for probation, then Council shall remove the probationary status from the law school.

V. Hearings and Meetings of the Accreditation Committee Council

Rule 18: Accreditation Committee Council Consideration

(a) The Accreditation Committee Council shall consider the status of a law school under Part III or an application from a law school under Part VI based on a record consisting of the following:

(1) Any fact finder’s report relating to the subject matter under consideration and any response from the law school;

(2) The most recent site evaluation report and any response from the law school;

(3) The most recent site evaluation questionnaire;
Rule 19.2b: Attendance at Council Accreditation Committee Meetings and Hearings
(a) A law school has a right to have representatives of the law school, including legal counsel, appear before the Council Committee at a hearing regarding (i) the law school’s application for provisional approval, (ii) the law school’s application for full approval, (iii) the law school’s application for acquiescence in a substantive major change under Rule 2429(a)(1) – 2429(a)(13), or at a hearing to determine whether to impose sanctions and/or direct specific remedial action on the part of the law school.

(b) The Managing Director in consultation with the Chair of the Council Committee may set reasonable limitations on the number of law school representatives that may appear and on the amount of time allotted for the appearance.

(c) Except as permitted in subsection (a), a law school does not have a right to appear at a meeting of the Council Accreditation Committee.

(d) The Managing Director or designee and any additional staff designated by the Managing Director shall be present at Council Accreditation Committee meetings and hearings. Legal Counsel for the Section may also be present at Council Accreditation Committee meetings and hearings.

Rule 20.24: Hearings before the Council Accreditation Committee
(a) In any hearing held in accordance with Rules 10.4(a) or 13.4(a)(2), the Managing Director shall give the law school at least 30 days’ notice of the Council Committee hearing. The notice shall specify the apparent non-compliance with the Standards or the apparent failure to provide information or to cooperate with the gathering of information and shall state the time and place of the hearing. For good cause shown, the Managing Director in consultation with the Chair may grant the law school additional time, not to exceed 30 days. Both the notice and the request for extension of time must be in writing.
(b) In any hearing before the Council Committee, the Managing Director shall provide the Council Committee with all appropriate questionnaires, reports, correspondence and any other information that the Managing Director and the Chair determine relevant to the hearing.

c) If the Committee Council determines following a hearing that a law school is not in compliance with a Standard then the Council Committee may:

(1) Impose sanctions, or recommend that the Council impose sanctions, on the law school; and/or

(2) Direct specific remedial action on the part of the law school.

d) Upon receipt of information demonstrating compliance with the Standard, the Council Committee may at any time find that the law school is in compliance and cancel the hearing.

e) Decisions of the Council shall be effective upon issuance.

VI. Hearings and Meetings of the Council

Rule 22: Council Consideration of Recommendation of Accreditation Committee

(a) A law school has a right to have representatives of the law school, including legal counsel, appear before the Council at a Council hearing following a Committee recommendation regarding (i) the law school’s application for provisional approval, (ii) the law school’s application for full approval, (iii) the law school’s application for acquiescence in a major change under Rule 29(a)(1), (iv) the law school’s application for provisional approval, (v) the law school’s application for acquiescence in a major change under Rule 29(a)(1), and (vi) the Committee’s recommendation to impose sanctions following a hearing held in accordance with Rules 11(b) or 14(a)(2).

(b) The Managing Director, in consultation with the Chair of the Council, may set reasonable limitations on the number of law school representatives that may appear at a meeting and on the amount of time allotted for the appearance.

(c) Except as permitted in subsection (a), a law school does not have a right to appear at a Council meeting, hearing or proceeding on any matter related to the accreditation of a law school.

(d) The Chair of the Council may invite the Chair of the Accreditation Committee to appear at the hearing if the Chair determines that such person could reasonably be expected to provide information helpful to the Committee. The Chair of the Accreditation Committee may not present new evidence unless the law school has the opportunity to respond to that new evidence.

(e) The Managing Director or designee and any additional staff designated by the Managing Director shall be present at Accreditation Committee meetings and hearings. Legal Counsel for the Section may also be present at Accreditation Committee meetings and hearings.

Rule 23: Council Consideration of Appeal from Accreditation Committee Decision

(a) A law school may appeal a decision of the Committee by filing with the Managing Director a written appeal within 30 days after the date of the letter reporting the Committee’s
Rule 24: Evidence and Record for Decision

(a) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the Council shall adopt the Committee’s findings of fact unless the Council determines that the findings are not supported by substantial evidence in the record.

(b) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the record on which the Council shall make its decision shall be the following:

(1) The record before the Committee on which the Committee based its decision or recommendation;

(2) The letter setting forth the Committee’s decision or recommendation;

(3) The written appeal by the law school, if applicable;

(4) Any written submission by the Committee in response to an appeal, if applicable;

(5) Any testimony of the law school in a hearing or an appearance before the Council.

(c) Except as specifically provided otherwise in these Rules, the law school shall not present any evidence to the Council that was not before the Committee at the time of the Committee’s decision or recommendation.

(d) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the Council will accept new evidence submitted by the law school only if the Executive Committee of the Council determines that:

(1) The evidence was not presented to the Committee;

(2) The evidence could not reasonably have been presented to the Committee;

(3) A reference back to the Committee to consider the evidence would, under the circumstances, present a serious hardship to the law school;

(4) The evidence was submitted at least 14 days in advance of the Council meeting and

(5) The evidence was appropriately verified at the time of submission.

Rule 25: Decisions by the Council

(a) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the Council shall consider the appeal promptly and, when feasible, at its next regularly scheduled meeting.

(b) A law school shall not have a right to appear before the Council in connection with the appeal.

(c) Except as specifically provided otherwise in these Rules, the law school shall not present any evidence to the Council that was not before the Committee at the time of the Committee’s decision or recommendation.

(d) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the Council will accept new evidence submitted by the law school only if the Executive Committee of the Council determines that:

(1) The evidence was not presented to the Committee;

(2) The evidence could not reasonably have been presented to the Committee;

(3) A reference back to the Committee to consider the evidence would, under the circumstances, present a serious hardship to the law school;

(4) The evidence was submitted at least 14 days in advance of the Council meeting and

(5) The evidence was appropriately verified at the time of submission.
decision, the Council shall give substantial deference to the conclusions, decisions, and recommendations of the Committee.

(b) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the Council may, as appropriate:

1. Affirm the Committee’s decision or recommendation;

2. Amend the Committee’s decision or recommendation, including imposing any sanction regardless of whether the Committee has imposed or recommended any sanction;

3. Reverse the Committee’s decision or recommendation;

4. Remand the matter to the Committee for further proceedings.

(a) If the Appeals Panel remands a decision of the Council for further consideration or action by the Council, the Council shall proceed in a manner consistent with the Appeals Panel’s decisions or instructions.

(b) In implementing the decision of the Appeals Panel, the Council may impose monitoring, reporting or other requirements on the law school consistent with the Appeals Panel decision and the Rules of Procedure.

VI. Applications

Rule 2227: Application for Provisional or Full Approval

(a) A law school seeking provisional or full approval shall file with the Managing Director a written notice of intent to seek approval.

(1) The notice shall be filed no later than March 15 in the academic year prior to the academic year in which the law school will apply for approval and shall indicate the law school’s preference for a fall or spring site evaluation visit.

(2) Upon receipt of written notice of a law school’s intent to seek provisional or full approval, the Managing Director shall arrange for a site evaluation as provided under Rule 4.

(3) A law school may not apply for provisional approval until it has completed the first full academic year of operating a full-time program of legal education.

(4) A provisionally approved law school may apply for full approval no earlier than two years after the date that provisional approval was granted.
(5) Upon notice to the Managing Director of its intent to seek provisional approval, a law school seeking provisional approval shall comply with Standard 102(f) regarding communication of its status.

(b) The application for provisional or full approval is due at least eight weeks prior to the scheduled site evaluation visit and must contain:

(1) A letter from the dean certifying that the law school has completed all of the requirements for seeking provisional or full approval or that the law school seeks a variance from specific requirements of the Standards and that the law school has obtained the concurrence of the president in the application;

(2) All completed forms and questionnaires, as adopted by the Council;

(3) In the case of a law school seeking provisional approval, a copy of a feasibility study that evaluates the nature of the educational program and goals of the law school, the profile of the students who are likely to apply, and the resources necessary to create and sustain the law school, including relation to the resources of a parent institution, if any;

(4) A copy of the self-study;

(5) Financial operating statements and balance sheets for the last three fiscal years, or such lesser time as the institution has been in existence. If the applicant is not a publicly owned institution, the statements and balance sheets must be certified;

(6) Appropriate documents detailing the law school and parent institution’s ownership interest in any land or physical facilities used by the law school;

(7) A request that the Managing Director schedule a site evaluation at the law school’s expense; and

(8) Payment to the Section of any required fee.

(c) A law school shall disclose whether an accrediting agency recognized by the United States Secretary of Education has denied an application for accreditation filed by the law school, revoked the accreditation of the law school, or placed the law school on probation. If the law school is part of a university, then the law school shall further disclose whether an accrediting agency recognized by the United States Secretary of Education has taken any of the actions enumerated above with respect to the university or any program offered by the university. As part of such disclosure, the law school shall provide the Managing Director with information concerning the basis for the action of the accrediting agency.
Rule 23: Reapplication for Provisional or Full Approval
(a) If the Council denies an application for provisional or full approval or withdraws provisional or full approval, or if a law school withdraws an application for provisional or full approval, a law school shall not reapply until it is able to certify that it has addressed the reasons for the denial, removal, or withdrawal, explain how it has done so, and is able to demonstrate that it is operating in compliance with the Standards.

(b) Any notice and reapplication must be filed within the schedule prescribed by Rule 22.

Rule 24: Application for Acquiescence in Major Substantive Change
(a) Major Substantive changes requiring application for acquiescence include:

(1) Acquiring another law school, program, or educational institution;

(2) Acquiring or merging with another university by the parent university where it appears that there may be substantial impact on the operation of the law school;

(3) Transferring all, or substantially all, of the program of legal education or assets of the approved law school to another law school or university;

(4) Merging or affiliating with one or more approved or unapproved law schools;

(5) Merging or affiliating with one or more universities;

(6) Materially modifying the law school’s legal status or institutional relationship with a parent institution;

(7) A change in control of the law school resulting from a change in ownership of the law school or a contractual arrangement;

(8) A change in the location of the law school that could result in substantial changes in the faculty, administration, student body, or management of the law school;

(9) Establishing a branch campus;

(10) Establishing a separate location other than a branch campus;

(11) A significant change in the mission or objectives of the law school;

(12) The addition of courses or programs that represent a significant departure from existing offerings or method of delivery since the latest site evaluation including instituting a new full-time or part-time division;

(13) The addition of a permanent location at which the law school is conducting a teach-out for students at another law school that has ceased operating before all students have completed their program of study;
(14) Contracting with an educational entity that is not certified to participate in Title IV, HEA programs, that would permit a student to earn 25 percent or more of the course credits required for graduation from the approved law school;

(15) Establishing a new or different program leading to a certificate or degree other than the J.D. degree;

(16) A change in program length measurement from clock hours to credit hours; and

(17) A substantial increase in the number of clock or credit hours required for graduation.

(b) An application for acquiescence in a major substantive change shall consist of the following:

(1) All completed forms and questionnaires, as adopted by the Council;

(2) A letter from the dean certifying that the law school has completed all of the requirements for requesting acquiescence in a major substantive change and that the law school has obtained the concurrence of the president in the application;

(3) A copy of the law school’s most recent self-study or an updated self-study if the most recent self-study is more than three years old where the application is for acquiescence in a major substantive change described in Rule 2429(a)(1) through 2429(a)(13);

(4) A description of the proposed change and a detailed analysis of the effect of the proposed change on the law school’s compliance with the Standards;

(5) Payment to the Section of the application fee.

(c) The Managing Director shall appoint a fact finder in connection with an application for acquiescence in a substantive major change, except that no fact finder is required if the Managing Director and the Chair of the Council Accreditation Committee determine that the application does not require additional information to assist Accreditation Committee and Council determination of the question of acquiescence.

(d) When the Council grants In recommending or granting acquiescence in a substantive major change under Rules 2429(a)(1) through 2429(a)(9), the Committee on Council Managing Director shall appoint a fact finder subsequent to the effective date of acquiescence as provided in Rule 25(e). The Committee on Council also may direct appointment of a fact finder subsequent to the effective date of acquiescence in a substantive major change under Rules 2429(a)(10) through 2429(a)(17) for purposes of determining whether the law school remains in compliance with the Standards. In recommending or granting When the Council grants acquiescence under Rule 2429(a)(10) in a separate location at which the law school offers more than 50% of the law school’s program of legal education, however, the Committee on Council Managing Director shall appoint a fact finder to conduct a visit within six months of the effective date of acquiescence or in the first academic term subsequent to acquiescence in which students are enrolled at the separate location.
In addition to satisfying the requirements of Rule 2429(b), an application for acquiescence shall contain information sufficient to allow the Accreditation Committee and Council to determine whether the major substantive change is so significant as to constitute the creation of a new or different law school. If the Accreditation Committee Council determines that the substantive major change constitutes the creation of a new or different law school, then it shall recommend to the Council that the school apply for provisional approval under the provisions of Standard 102 and Rule 25(a). Factors that shall be considered in making the determination of whether the major substantive change is so significant as to constitute the creation of a new or different law school include, without limitation:

(1) the financial resources available to the law school;
(2) a significant change, present or planned, in the governance of the law school;
(3) the overall composition of the faculty and staff at the law school;
(4) the educational program offered by the law school; and
(5) the location or physical facilities of the law school.

A law school's request for acquiescence in the proposed major substantive change in governance, control, assets, or finances of the law school, under Rule 2429(a)(1) through Rule 2429(a)(9) shall contain information sufficient to allow the Accreditation Committee and the Council to determine that:

(1) the financial resources available to the law school;
(2) a significant change, present or planned, in the governance of the law school;
(3) the overall composition of the faculty and staff at the law school;
(4) the educational program offered by the law school; and
(5) the location or physical facilities of the law school.

A law school's request for acquiescence in the proposed major substantive change in organizational structure shall be considered under the provisions of Rule 25(a), and will become effective upon the decision of the Council. The decision of the Council may not be retroactive.

Rule 25: Major Substantive Changes Requiring a Reliable Plan

(a) In addition to satisfying the requirements of Rule 2429(b), an application for acquiescence under Rule 2429(a)(1) through Rule 2429(a)(9) shall include a reliable plan.

(b) The reliable plan in connection with the establishment of a branch campus under Rule 2429(a)(9) shall contain information sufficient to allow the Accreditation Committee and the Council to determine that:

(1) the proposed branch campus has achieved substantial compliance with the Standards within three years of the effective date of acquiescence;
(2) the proposed branch campus will meet the requirements of Standard 106 applicable to separate locations and branch campuses.

(c) The reliable plan regarding a matter involving a substantial change in ownership, governance, control, assets, or finances of the law school, under Rule 2429(a)(7) shall contain information sufficient to allow the Accreditation Committee and the Council to determine whether the law school is reasonably likely to be in full compliance with

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each of the Standards as of the effective date of acquiescence.

(d) The reliable plan regarding a change in location of the law school that could result in substantial changes in the faculty, administration, student body, or management of the law school under Rule 2629(a)(8) shall contain information sufficient to allow the Accreditation Committee and the Council to determine whether the law school is reasonably likely to be in full compliance with each of the Standards within one year of the effective date of acquiescence.

(e) In a case where the Council has acquiesced in a major substantive change subject to (a), the Council Managing Director shall appoint a fact finder subsequent to the effective date of acquiescence, as provided in (f), (g), or (h). (f) In the case of the establishment of a branch campus under Rule 2629(a)(9), the fact finding visit required in accordance with (e) shall be conducted within six months of the effective date of acquiescence or in the first academic term subsequent to acquiescence in which students are enrolled at the branch campus to verify that the branch campus satisfies the requisites of (b)(2).

(g) In a case involving a substantial change in ownership, control, assets, or finances of the law school under Rule 2629(a)(1) through Rule 2629(a)(7), the fact finding visit required in accordance with (e) shall be conducted within six months of the effective date of acquiescence to verify that the law school is in compliance with the Standards.

(h) In a case involving a substantial change in location of the law school that could result in substantial changes in the faculty, administration, student body, or management of the law school under Rule 2629(a)(8), the fact finding visit required in accordance with (e) shall be conducted within one year of acquiescence to verify that the law school is in compliance with the Standards.

Rule 26.34: Reappraisal for Acquiescence in Major Substantive Change
(a) If the Committee or Council denies an application for acquiescence in a major substantive change, or if an application for acquiescence in a substantive major change is withdrawn by a law school, a law school shall not reapply until it is able to certify in its application that it has addressed the reasons for the denial or withdrawal, explains how it has done so, and is able to demonstrate that it is operating in compliance with the Standards.
(b) Any new application must be filed in accordance with Rule 24.28.

Rule 27.42: Application for Approval of Foreign Program
(a) A law school may apply for approval of programs in accordance with the procedures set forth in the following Criteria:

(1) Criteria for Foreign Summer and Intersession Programs offered by ABA-Approved Law Schools:

(2) Criteria for Approval of Semester and Year-Long Study Abroad Programs Established by ABA-Approved Law Schools; or

Rule 26.34: Reappraisal for Acquiescence in Major Substantive Change
(a) If the Committee or Council denies an application for acquiescence in a major substantive change, or if an application for acquiescence in a substantive major change is withdrawn by a law school, a law school shall not reapply until it is able to certify in its application that it has addressed the reasons for the denial or withdrawal, explains how it has done so, and is able to demonstrate that it is operating in compliance with the Standards.
(b) Any new application must be filed in accordance with Rule 24.28.

Rule 27.42: Application for Approval of Foreign Program
(a) A law school may apply for approval of programs in accordance with the procedures set forth in the following Criteria:

(1) Criteria for Foreign Summer and Intersession Programs offered by ABA-Approved Law Schools in a location outside the United States;

(2) Criteria for Approval of Semester and Year-Long Study Abroad Programs Established by ABA-Approved Law Schools; or
Rule 28 33: Application for Variance

(a) A law school applying for a variance has the burden of demonstrating that the variance should be granted. The application should include, at a minimum, the following:

(1) A precise description of the program changes or other actions for which the variance is sought, and identification of the Standard or Standards with which they are or may be inconsistent;

(2) An explanation of the bases and reasons that justify granting the variance; and

(3) Any additional information and factual material needed to sustain the law school’s burden of proof and support the granting of the application.

(b) The chair of the Accreditation Committee or the Managing Director may appoint one or more fact finders to elicit additional information and facts relevant and necessary to consideration of the application for a variance.

(c) The Managing Director, the Accreditation Committee or the Council may request written reports from a law school to which a variance has been granted in addition to the written reports required under the terms of the variance.

Rule 29 34: Teach-Out Plan

(a) If a provisional or fully approved law school decides to cease operations or close a branch campus, the law school shall promptly make a public announcement of the decision and shall notify the Managing Director, the appropriate state licensing authority, and the United States Department of Education of the decision.

(b) A provisional or fully approved law school must submit a teach-out plan for approval upon occurrence of any of the following events:

(1) The law school notifies the Managing Director’s Office that it intends to cease operations or close a branch campus;

(2) The Accreditation Committee recommends, or the Council acts to withdraw, terminate, or suspend, the accreditation of the law school;

(3) The United States Secretary of Education notifies the Managing Director’s Office that the Secretary has initiated an emergency action against an institution, in accordance with section 487(c)(1)(G) of the HEA, or an action to limit, suspend, or terminate an institution participating in any title IV, HEA program, in accordance with section 487(c)(1)(F) of the HEA, and that a teach-out plan is required;

(4) A state licensing or authorizing agency notifies the Managing Director’s Office that an institution’s license or legal authorization to provide an educational program has been or will be terminated, or suspended, the accreditation of the law school;
The law school shall submit the teach-out plan for the law school or branch being closed as required by paragraph (b) to the Managing Director’s Office within the time specified by the Managing Director. The Managing Director’s Office, in consultation with the Chair of the Council Accreditation Committee, may require a law school to enter into a teach-out agreement as part of its teach-out plan.

(d) A law school must submit the “Teach-Out Plan Approval Form,” as adopted by the Council, and address each item in the form.

(e) If a law school voluntarily enters into a teach-out agreement or if the Managing Director requires a law school to submit a teach-out agreement as part of a teach-out plan, the law school must submit the “Teach-Out Agreement Approval Form,” as adopted by the Council, and address each criterion in the form.

(f) The Accreditation Committee Council will promptly review a plan either approve or deny the teach-out plan submitted in accordance with (b) and (c), and shall recommend approval or denial of the plan by the Council.

(1) Approval of the teach-out plan may be conditioned on specified changes to the plan.

(2) If the teach-out plan is denied, the law school must revise the plan to meet the deficiencies identified and resubmit the plan no later than 30 days after receiving notice of the decision.

(g) Upon approval of a teach-out plan of a law school or branch that is also accredited by another recognized accrediting agency, the Managing Director’s Office shall notify that accrediting agency within 30 days of its approval.

(h) Upon approval of a teach-out plan, the Managing Director shall within 30 days notify all recognized agencies that accredit other programs offered by the institution of which the law school is a part.

(i) In the event a law school closes without an approved teach-out plan or agreement, the Managing Director’s office will work with the United States Department of Education and the appropriate State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.

VII. VIII. Appeals Panel Procedure

Rule 30.45: Appeals Panel

(a) The Appeals Panel shall consist of at least five persons appointed by the Chair of the Council. Members shall serve a one-year term beginning at the end of the Annual Meeting of the Section and continuing to the end of the next Annual Meeting of the Section or until replaced. Appeals Panel members and alternates are eligible to serve consecutive terms or non-consecutive terms.

(b) The Appeals Panel members and alternates are eligible to serve consecutive terms or non-consecutive terms.

(c) The law school shall submit the “Teach-Out Plan Approval Form,” as adopted by the Council, and address each item in the form.

(d) The Appeals Panel members and alternates are eligible to serve consecutive terms or non-consecutive terms.

(e) If a law school voluntarily enters into a teach-out agreement or if the Managing Director requires a law school to submit a teach-out agreement as part of a teach-out plan, the law school must submit the “Teach-Out Agreement Approval Form,” as adopted by the Council, and address each criterion in the form.

(f) The Accreditation Committee Council will promptly review a plan either approve or deny the teach-out plan submitted in accordance with (b) and (c), and shall recommend approval or denial of the plan by the Council.

(1) Approval of the teach-out plan may be conditioned on specified changes to the plan.

(2) If the teach-out plan is denied, the law school must revise the plan to meet the deficiencies identified and resubmit the plan no later than 30 days after receiving notice of the decision.

(g) Upon approval of a teach-out plan of a law school or branch that is also accredited by another recognized accrediting agency, the Managing Director’s Office shall notify that accrediting agency within 30 days of its approval.

(h) Upon approval of a teach-out plan, the Managing Director shall within 30 days notify all recognized agencies that accredit other programs offered by the institution of which the law school is a part.

(i) In the event a law school closes without an approved teach-out plan or agreement, the Managing Director’s office will work with the United States Department of Education and the appropriate State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.
(b) Every member of the Appeals Panel shall be:

(1) A former member of the Council or Accreditation Committee; or

(2) An experienced site evaluator.

(c) Members of the Appeals Panel shall be:

(1) Experienced in and knowledgeable about the Standards, Interpretations and Rules of Procedure;

(2) Trained in the Standards, Interpretations and Rules of Procedure at a retreat or workshop or by other appropriate methods within the 3 years prior to appointment; and

(3) Subject to the Section’s Conflicts of Interest Policy, as provided in IOP 19.

(d) The Appeals Panel shall include at least one of each of the following:

(1) an academic:

(2) an administrator:

(3) a legal educator;

(4) a practitioner or member of the judiciary; and

(5) a representative of the public.

(e) No more than fifty percent of the members may be persons whose primary professional employment is as a law school dean, faculty or staff member. Public members shall have qualifications and representation consistent with the regulations of the United States Department of Education applicable to the accreditation of professional schools.

Rule 31.36: Form and Content of Appeals to the Appeals Panel

(a) A law school may appeal decisions of the Council specified in Rule 3.4 by filing a written appeal with the Managing Director within 30 days after of the date of the letter to the law school reporting the decision of the Council.

(b) The written appeal shall include:

(1) a statement of the grounds upon which the appeal is based; and

(2) documentation in support of the grounds upon which the appeal is based.

(c) The written appeal shall include:

(1) a statement of the grounds upon which the appeal is based; and

(2) documentation in support of the grounds upon which the appeal is based.
The grounds for an appeal are limited to the following:

(1) That the decision of the Council was arbitrary and capricious; or

(2) That the Council failed to follow the applicable Rules of Procedure, and the procedural error which failure was substantial and prejudicial, adversely affecting the decision of the Council. prejudiced its decision.

(2) That the Council failed to follow the applicable Rules of Procedure, and the procedural error which failure was substantial and prejudicial, adversely affecting the decision of the Council. prejudiced its decision.

(1) The decision of the Council was arbitrary and capricious; or

(2) That the Council failed to follow the applicable Rules of Procedure, and the procedural error which failure was substantial and prejudicial, adversely affecting the decision of the Council. prejudiced its decision.

(2) That the Council failed to follow the applicable Rules of Procedure, and the procedural error which failure was substantial and prejudicial, adversely affecting the decision of the Council. prejudiced its decision.

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(1) That the decision of the Council was arbitrary and capricious; or

(2) That the Council failed to follow the applicable Rules of Procedure, and the procedural error which failure was substantial and prejudicial, adversely affecting the decision of the Council. prejudiced its decision.

(2) That the Council failed to follow the applicable Rules of Procedure, and the procedural error which failure was substantial and prejudicial, adversely affecting the decision of the Council. prejudiced its decision.

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(1) That the decision of the Council was arbitrary and capricious; or

(2) That the Council failed to follow the applicable Rules of Procedure, and the procedural error which failure was substantial and prejudicial, adversely affecting the decision of the Council. prejudiced its decision.

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(2) That the Council failed to follow the applicable Rules of Procedure, and the procedural error which failure was substantial and prejudicial, adversely affecting the decision of the Council. prejudiced its decision.

The written appeal and supporting documentation may not contain or refer to any evidence that was not in the record before the Council.

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Rule 37: Membership of the Appeals Panel for the Proceeding

(a) Within 30 days of receipt of a written appeal within the scope of authority of the Appeals Panel, the Managing Director shall appoint three members of the Appeals Panel to hear the particular matter and make the decision. The appointed members shall be known as the Proceeding Panel. The Managing Director shall designate one member of the Proceeding Panel as chair.

(b) For law schools for which the Council is the institutional accreditor, the Managing Director shall appoint an academic, an administrator, and a representative of the public to serve on the Proceeding Panel. For law schools for which the Council is the programmatic accreditor, the Managing Director shall appoint a legal educator, a practitioner or member of the judiciary, and a representative of the public to serve on the Proceeding Panel.

(c) In the event a number of the Appeals Panel cannot be appointed to participate in a decision on appeal so as to ensure that the Proceeding Panel meets the requirements of 35 and 37, the Managing Director shall appoint to the Proceeding Panel another person who meets those requirements.

Rule 38: Scheduling of Hearings

(a) The Managing Director shall refer the appeal to the Appeals Panel within 30 days of receipt of a written appeal within the scope of authority of the Appeals Panel. The Managing Director shall refer the appeal to the Proceeding Panel. In referring the appeal, the Managing Director shall provide the Proceeding Appeals Panel with copies of:

(1) The written appeal;

(2) The decision of the Council; and

(3) The record before the Council, including any transcript of hearing.

(b) The Managing Director, in consultation with the Chair of the Proceeding Appeals Panel, shall set the date, time, and place of the hearing.

(1) The hearing shall be scheduled within forty-five days of the Managing Director.

Rule 38: Scheduling of Hearings

(a) The Managing Director shall refer the appeal to the Appeals Panel within 30 days of receipt of a written appeal within the scope of authority of the Appeals Panel. The Managing Director shall refer the appeal to the Proceeding Panel. In referring the appeal, the Managing Director shall provide the Proceeding Appeals Panel with copies of:

(1) The written appeal;

(2) The decision of the Council; and

(3) The record before the Council, including any transcript of hearing.

(b) The Managing Director, in consultation with the Chair of the Proceeding Appeals Panel, shall set the date, time, and place of the hearing.

(1) The hearing shall be scheduled within forty-five days of the Managing Director.
Director's referral of the appeal to the Proceeding Appeals Panel.

(2) The Managing Director shall inform the law school of the date, time, and place of the hearing at least 30 days in advance of the hearing, unless the law school agrees to the hearing on less than 30 days' notice.

Rule 33.25: Burdens and Evidence in Proceedings

(a) The law school appealing to the Appeals Panel has the burden of demonstrating that the Council's decision was arbitrary and capricious, and not supported by the evidence on record, or inconsistent with the Rules of Procedure and that inconsistency prejudiced its decision. or that the Council failed to follow the applicable Rules of Procedure, which failure was substantial and prejudicial, adversely affecting the decision of the Council.

(b) The appeal shall be decided based exclusively on the record before the Committee and the Council, the transcript of the hearing before the Council, and the decision letter of letters of those bodies and any documents cited in those decision letters and transcripts of hearings before the Committee and the Council. Except as provided in Rule 41(e), no new evidence shall not be considered by the Proceeding Appeals Panel.

Rule 34.46: Procedure in Hearings before the Proceeding Appeals Panel

(a) The hearing will be a closed proceeding and not open to the public.

(b) The law school shall have a right to have representatives, including legal counsel, appear at the hearing.

(c) The Council shall be represented at the hearing through the Chair, other members of the Council as the Chair of the Council deems appropriate, and legal representation for the Council.

(d) The Managing Director or designee shall be present at the hearing. The Managing Director may designate additional staff to be present at the hearing.

(e) The hearing shall be transcribed by a court reporter and a transcript of the hearing shall be provided to the Proceeding Appeals Panel, the Council, and the law school.

Rule 35.44: Action by Decision of the Proceeding Appeals Panel

(a) Within 30 days of the hearing, the Proceeding Appeals Panel shall provide the Council and the law school with a written statement of the Proceeding Panel's decision and the basis for that decision. Issue a written decision no later than 30 days following the hearing. The decision shall state specifically the grounds upon which it is based.

(b) The Proceeding Appeals Panel, following a hearing, has the authority to:
(1) Affirm the decision of the Council;
(2) Reverse the decision of the Council and enter a new decision;
(3) Amend the decision of the Council; or
(4) Remand the decision of the Council for further consideration.

(c) The decision of the Proceeding Appeals Panel shall be effective upon issuance. If the Proceeding Appeals Panel remands a decision for further consideration or action by the Council, the Proceeding Appeals Panel shall identify specific issues that the Council must address.

(d) Decisions by the Proceeding Appeals Panel under (b)(1), (2) and (3) are final and not appealable.

(c) When the only remaining deficiency cited by the Council in support of an adverse decision is a law school's failure to meet the Standards dealing with financial resources for a law school, the law school may request a review of new financial information that was not part of the record before the Council at the time of the adverse decision if all of the following conditions are met:

(1) A written request for review is filed with the Office of the Managing Director within 30 days after the date of the letter reporting the adverse decision of the Council to the law school;
(2) The financial information was unavailable to the law school until after the adverse decision subject to the appeal was made; and
(3) The financial information is significant and bears materially on the financial deficiencies that were the basis of the adverse decision by the Council.

(f) The request to review new financial information will be considered by the Council at its next meeting occurring at least 30 days after receipt of the request.

(a) The United States Department of Education procedures and rules for the recognition of accrediting agencies require a recognized accrediting agency to have a process for the reporting of complaints against accredited institutions that might be out of compliance with the agency's accreditation standards. This is the process for the Council with regard to law schools having J.D. programs approved by the Council.

(b) The request to review new financial information only once and a decision made by the Council with respect to that review does not provide a basis for appeal.

(c) A law school may request review of new financial information only once and a decision made by the Council with respect to that review does not provide a basis for appeal.

Rule 36.42: Complaints in General
(a) The United States Department of Education procedures and rules for the recognition of accrediting agencies require a recognized accrediting agency to have a process for the reporting of complaints against accredited institutions that might be out of compliance with the agency's accreditation standards. This is the process for the Council with regard to law schools having J.D. programs approved by the Council.
(b) The process for Complaints under these Rules aims is designed to bring to the attention of the Council, the Committee, and the Managing Director facts and allegations that may indicate that an approved law school is operating its program of legal education out of compliance with the Standards.

(c) This process is not available to serve as a mediating or dispute-resolving process for persons with complaints about the policies or actions of an approved law school. Neither the Council, the Committee, nor the Managing Director will intervene with an approved law school on behalf of an individual with a complaint against or concern about action taken by a law school that adversely affects that individual. The outcome of this process will not be the ordering of any The Council will, as a part of this process, provide no individual relief for any person, nor will it order any specific action by a law school with respect to any individual. The outcome of this process will not be the school on behalf of an individual with a complaint against or concern about action taken by an approved law school that adversely affects that individual. The outcome of this process will not be the ordering of any The Council will, as a part of this process, provide no individual relief for any person, nor will it order any specific action by a law school with respect to any individual.

(d) If a law school that is the subject of a complaint is due to receive a regularly scheduled sabbatical site evaluation within a reasonable amount of time after the complaint is received, usually within one year, the complaint may be handled as part of the sabbatical site evaluation. Rule 37.43: Submission of Complaints

(a) Any person may file with the Managing Director a written complaint alleging non-compliance with the Standards.

(1) Except in extraordinary circumstances, the complaint must be filed within one calendar year of the facts on which the allegation is based. Pursuit of other remedies does not toll this one calendar year limit.

(2) Complaints must be in writing using the form “Complaint Against an ABA Approved Law School” and must be signed. The form shall be available online and from the Office of the Managing Director.

(3) Anonymous complaints will not be considered.

(4) A complaint that has been resolved will not be subject to further review or reconsideration unless subsequent complaints about the law school raise new issues or suggest a pattern of significant noncompliance with the Standards not evident from the consideration of the previously resolved complaint.

(b) The Complaint must provide the following information:

(1) A clear and concise description of the nature of the complaint and any evidence upon which the allegation is based, with relevant supporting documentation. The description and supporting evidence should include relevant facts that support the allegation that the law school is out of compliance with the Standards referenced in the complaint.

(2) The Standards and Interpretations alleged to have been violated and the time frame in which the lack of compliance is alleged to have occurred.
(3) A description of the steps taken to exhaust the law school’s grievance process and the actions taken by the law school in response to the complaint as a result of prescribed procedures. (4) Disclosure of any other channels the complainant is pursuing, including legal action. (5) A description of the steps taken to exhaust the law school’s grievance process and the actions taken by the law school in response to the complaint as a result of prescribed procedures. (4) Disclosure of any other channels the complainant is pursuing, including legal action. 

Rule 38 44: Disposition of Complaints

(a) The Managing Director, upon receiving a complaint submitted in accordance with Rule 43 and not dismissed, shall proceed as follows:

(1) The Managing Director shall acknowledge receipt of the complaint within 14 days of its receipt.

(2) The Managing Director shall determine whether the complaint alleges facts that raise issues relating to an approved law school’s compliance with the Standards. This determination shall be made within six weeks of receiving the complaint. If the Managing Director concludes that the complaint does not raise issues relating to an approved law school’s compliance with the Standards, the matter will be closed.

(3) If the Managing Director determines that the complaint may raise issues relating to an approved law school’s compliance with the Standards, the Managing Director will send the complaint to the law school and request a response within 30 days. The Managing Director may extend the period for response if, in the judgment of the Managing Director, there is good cause for such an extension.

(4) The Managing Director will review any response to a complaint within 45 days of receipt. If the response establishes that the law school is not out of compliance with respect to the matters raised in the complaint, the Managing Director will close the matter.

(b) If the law school’s response to a complaint does not establish that it is in compliance with the Standards on the matters raised by the complaint, the Managing Director, in consultation with the Chair of the Council Committee, may appoint a fact finder to investigate the issues raised by the complaint and the law school’s response.

(c) If the law school’s response to a complaint does not establish that it is in compliance with the Standards on the matters raised by the complaint, then the Managing Director shall refer the complaint, along with the law school’s response, the fact-finder’s report, if any, and any other relevant information, to the Committee Council for further action in accordance with these Rules.
Rule 39 45: Notice of Disposition of Complaint
The Managing Director will promptly notify the person submitting a complaint of the final disposition of the complaint. The notification shall not include a copy of the law school’s response, if any, and shall not include a copy of any written decision of the Council Committee.

Rule 40 46: Appeal of Managing Director’s Disposition of Complaint
There is no appeal to any body of a conclusion by the Managing Director that a complaint does not raise issues under the Standards.

Rule 41 47: Review of Complaint Process
To ensure the proper administration of this complaint process, the Committee Council shall periodically review the written complaints received in the Managing Director’s Office and their disposition.

Rule 42 48: Records of Complaints
The Managing Director’s Office shall keep a record of the complaints under Part VIII of these Rules for a period of ten years.

IX. Transparency and Confidentiality

Rule 43 49: Confidentiality of Accreditation Matters
Except as otherwise provided in these Rules, all matters relating to the accreditation of a law school, including any proceedings, hearings or meetings of the Committee Council, shall be confidential.

Rule 44 50: Communication of Decisions and Recommendations
When a law school is the subject of a decision or recommendation in accordance with these Rules, the Managing Director shall promptly inform the dean and the president of the decision or recommendation, in writing.

Rule 45 51: Communication and Distribution of Site Evaluation Reports
(a) Except as provided in Part IX of these Rules, site evaluation and fact finding reports shall be confidential.
(b) The law school may release an entire site evaluation report or fact finding report or portions of a report.

(1) If the law school makes public the site evaluation report or any portion of it, the law school must notify the Managing Director at or before the time of the disclosure. In the event the law school discloses only a portion of the site evaluation report, the Managing Director, in consultation with the Chair of the Council, may subsequently disclose any other portions of the site evaluation report or the entire report.

(2) Discussion of the contents of a site evaluation report with, or release of the report to, the faculty, the university administration, or the governing board of the university or law school, does not constitute release of the report to the public within the meaning of this Rule.
(c) If the dean determines that a site evaluation report for the dean's law school contains criticism of the professional performance, competence, or behavior of a member of the law school's faculty or professional staff:

(1) The dean shall make available to the person affected the relevant portions of the report and shall send the Managing Director a copy of those relevant portions and any accompanying memorandum or letter to the affected person.

(2) The affected person shall have the right to file with the Managing Director a document responding to the criticism contained in the site evaluation report.

(3) Any such response to the criticism shall become part of the law school's official file.

Rule 47 53: Applications, Decisions and Recommendations Made Public

(a) When a law school has applied for provisional or full approval, acquiescence in a major change, or a variance, the Council shall provide public notice:

(1) That the law school has submitted an application; and

(2) Of the procedural steps for consideration of the application.

(b) After a law school has been notified of the Council's decision or recommendation, the Managing Director may state publicly the conclusions of the Council's decision or recommendation, the Managing Director may state publicly the conclusions of the Council's decision or recommendation.
Council and its decision or recommendation, with an explanation of the procedural steps in further consideration of the matter, concerning:

1. The law school’s application for provisional or full approval;
2. The law school’s application for acquiescence in a major substantive change;
3. The law school’s application for a variance;
4. The imposition of sanctions or specific remedial action on the law school;
5. The placing of the law school on probation; or
6. The withdrawal of the law school’s approval;

c) After a law school has been notified of the Council’s decision, the Managing Director shall provide public notification of the Council’s conclusions and decision (except as to a sanction that is explicitly not public), with an explanation of any procedural steps for further consideration of the matter, concerning:

1. The law school’s application for provisional or full approval;
2. The law school’s application for acquiescence in a major substantive change;
3. The law school’s application for a variance;
4. The imposition of sanctions or specific remedial action on the law school;
5. The placing of the law school on probation; or
6. The withdrawal of the law school’s approval;

d) After a matter concerning a law school has been acted upon decided by an Appeals Panel, the Council or the Managing Director shall provide public notification of the conclusions and decision of the Appeals Panel.

Rule 48.54: Statistical Reports

(a) School specific information and statistical reports derived from data contained in all questionnaires are for the use of the Council, the Committee, the Managing Director, and deans of ABA-approved law schools, and are not for public release.

(b) Information contained in statistical reports prepared from data contained in annual questionnaires is for exclusive and official use by those persons authorized by the Council to receive such statistical reports, except as public disclosure of information about specific law schools is authorized under Standard 509 or has been made public by the law school.
(c) The Managing Director may release general data from the statistical reports and questionnaires that are not school-specific.

Rule 49 55: Publication of List of Approved Law Schools
The Council shall publish annually a complete list of all approved law schools. The list shall be published in one or more venues designated by the Council pursuant to Standard 509.

X. XI. Amendment of Standards, Interpretations and Rules

Rule 50 56: Council Authority
The Council has authority to adopt, revise, amend or repeal the Standards, Rules, and Interpretations.

Rule 5157: Concurrence by the ABA House of Delegates
(a) A decision by the Council to adopt, revise, amend or repeal the Standards, Interpretations or Rules does not become effective until it has been concurred in by the ABA House of Delegates in accordance with House Rule 45.9. After the meeting of the Council at which it decides to adopt, revise, amend or repeal the Standards, Interpretations or Rules, the Chairperson of the Council shall furnish a written statement of the Council action to the House.

(b) Once the action of the Council is placed on the calendar of a meeting of the House, the House shall at that meeting either agree with the Council’s decision or refer the decision back to the Council for further consideration. If the House refers a decision back to the Council, the House shall provide the Council with a statement setting forth the reasons for its referral.

(c) A decision by the Council to adopt, revise, amend or repeal the Standards, Interpretations or Rules is subject to a maximum of two referrals back to the Council by the House. If the House refers a Council decision back to the Council twice, then the decision of the Council following the second referral will be final and will not be subject to further review by the House.

(c) The Managing Director may release general data from the statistical reports and questionnaires that are not school-specific.

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(c) A decision by the Council to adopt, revise, amend or repeal the Standards, Interpretations or Rules is subject to a maximum of two referrals back to the Council by the House. If the House refers a Council decision back to the Council twice, then the decision of the Council following the second referral will be final and will not be subject to further review by the House.
The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence, the attached changes to the ABA Standards and Rules of Procedure for Approval of Law Schools.¹

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the Council of the Section of Legal Education and Admissions to the Bar files a resolution to the House seeking concurrence of the House in any actions of the Council to adopt, revise, or repeal the ABA Standards and Rules of Procedures for Approval of Law Schools. The House may either concur with the Council’s decision or refer the decision back to the Council for further consideration. A decision by the Council is subject to a maximum of two referrals back to the Council by the House. The decision of the Council following the second referral shall be final.

The restructuring of the Council’s work on the ABA law school accreditation process, which requires these Standards and Rules changes, will move all of the work of the accreditation process (adopting standards and enforcing them against law schools) to the Council level, eliminating two committees (Accreditation Committee and the Standards Review Committee). These changes, which are the most fundamental changes in the process in at least several decades, cannot be implemented in the middle of a year. The Council believes that these changes will shorten the decision-making timeline, eliminate redundancies, avoid the necessity for staff increases, reduce expenses, and, overall, improve the effectiveness and efficiency of the process.

The amendments were approved by the Council for Notice and Comment during its meeting held on November 3-4, 2017. A public hearing was held on April 12, 2018. The Council received no written comments on the proposed changes and no one testified at the public hearing on the proposed changes. The Council approved the amendments at its meeting on May 11, 2018. This restructuring also involves changes to the Section’s Bylaws, which are being presented to the Board of Governors for approval and will be the subject of a vote at the Section’s business meeting on August 4, 2018 during the ABA Annual Meeting.

The Council has two responsibilities: (a) approve/accredit first-professional degree in law programs in the United States; and (b) offer and operate programs and services to benefit members of the ABA Section of Legal Education and Admissions to the Bar and legal education and bar admissions more broadly. No changes are proposed in the way the Council carries out its work on non-accreditation matters.

Though the ultimate responsibility for accreditation has always been vested in the Council, the Council for many years has relied on two committees (Accreditation and Standards Review) to assist in this work.

The Accreditation Committee (AC) has been delegated a substantial portion of work done to assure that law schools operate in compliance with the Standards [see current Rule of Procedure 3]. The Council believes that eliminating the AC and doing this work at the Council level has advantages

that will improve the efficiency and effectiveness of the accreditation process. For example, the Council will be able to act on major changes proposed by law schools in one step, rather than two (an AC recommendation and then Council review of that recommendation), shortening the response time on proposals that, in many cases, are more time-sensitive than the current process can accommodate. The restructuring will also allow the Council to move more expeditiously in enforcing the Standards when there are concerns that schools are not abiding by them. Moreover, the Council will have a deeper and clearer sense of how the Standards that it adopts are working at the school level if it is involved in the regular comprehensive review of schools and the interim monitoring process, which the AC now handles. Finally, the restructuring will eliminate the need for, and expense of, four-five AC meetings each year.

The Council also has ultimate responsibility for the Standards and Rules of Procedure. In this work, the Council has been aided by the work of the Standards Review Committee (SRC). The Council believes that doing all of this work on the Standards and Rules at the Council level will improve the effectiveness and efficiency of the accreditation process in a variety of ways, including the timeline for getting work done, and elimination of many redundancies that happen in the drafting and review of the drafting of Standards.

The concept has been introduced and discussed with law schools, primarily with the law school deans, on several occasions. The proposed, rather formalistic, changes to the Standards and Rules of Procedure were put out for comment. The call for comment stated that comment was invited not so much on the language changes that the restructuring requires, but rather on the concept of the changes.

No negative comments were submitted in the notice and comment process. The Council believes that the law schools support this restructuring.

Respectfully submitted,

Maureen A. O’Rourke
Dean, Boston University School of Law
Chair, Council of the Section of Legal Education and Admissions to the Bar
August 2018
1. **Summary of Resolution(s).**

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2018 to the Rules of the ABA Standards and Rules of Procedure for Approval of Law Schools.

2. **Approval by Submitting Entity.**

Yes. The amendments were approved by the Council for Notice and Comment during its meeting held on November 3-4, 2017. A public hearing was held on April 12, 2018. The Council approved the amendments at its meeting on May 10-11, 2018.

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 amendments modify the existing ABA Standards and Rules of Procedure for Approval of Law Schools.

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 Council will notify ABA-approved law schools and other interested entities of the approved changes to the ABA Standards and Rules of Procedure for Approval of Law Schools.
Schools. Deans of ABA-approved law schools have been made aware of this change over the course of the last six months. The Council and the Managing Director’s Office will determine strategy going forward at its August 2018 meeting, including a preview of August and September meetings, and a discussion of the new governance structure and work of the Council.

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

None.

9. Disclosure of Interest. (If applicable)

Not applicable.

10. Referrals.

The amendments were posted on the Section’s website and circulated for Notice and Comment to the following interested persons and entities:

- ABA Standing and Special Committees, Task Forces, and Commission Chairs;
- ABA Section Directors and Delegates;
- Conference of Chief Justices;
- National Conference of Bar Presidents;
- National Association of Bar Executives;
- Law Student Division;
- SBA Presidents;
- National Conference of Bar Examiners;
- University Presidents;
- Deans and Associate Deans; and

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

Barry A. Currier, Managing Director
American Bar Association
Section of Legal Education and Admissions to the Bar
321 N. Clark St.
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Ph: (312) 988-6744 / Cell: (310) 400-2702
Email: barry.currier@americanbar.org
12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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Associate Dean and Professor  
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Minneapolis, MN 55455  
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Email: howla001@umn.edu

The Honorable Solomon Oliver, Jr.  
Chief Judge  
U.S. District Court for the Northern District of Ohio  
Carl B. Stokes United States Courthouse  
801 West Superior Avenue  
Cleveland, OH 44113  
Ph: (216) 357-7171 / Cell: (216) 973-6496  
Email: solomon_oliver@ohnd.uscourts.gov
EXECUTIVE SUMMARY

1. Summary of the Resolution

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2018 to the Rules of the ABA Standards and Rules of Procedure for Approval of Law Schools.

2. Summary of the Issue that the Resolution Addresses

The revision seeks to accomplish the task of restructuring the work of the ABA accreditation process by eliminating the Council’s Accreditation and Standards Review Committees, and having all of the work be done at the Council level.

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

The proposals amend the 2017-2018 ABA Standards and Rules of Procedure for Approval of Law Schools.

4. Summary of Minority Views

None of which the Council is aware. No comments were received and no one testified at the hearing held on April 12, 2018.

EXECUTIVE SUMMARY

1. Summary of the Resolution

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2018 to the Rules of the ABA Standards and Rules of Procedure for Approval of Law Schools.

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The proposals amend the 2017-2018 ABA Standards and Rules of Procedure for Approval of Law Schools.

4. Summary of Minority Views

None of which the Council is aware. No comments were received and no one testified at the hearing held on April 12, 2018.
RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in adopting the amendments dated August 2018 to the Standards of the ABA Standards and Rules of Procedure for Approval of Law Schools, to restructure the work of the ABA accreditation process by eliminating the Council’s Accreditation and Standards Review Committees, and having all work completed by the Council.
Definitions

As used in the Standards, Interpretations, and Rules of Procedure:

(1) “Accreditation Committee” or “Committee” means the Accreditation Committee of the Section.

(2) “Approved law school” means a fully approved law school that the Council or Accreditation Committee has determined meets the requirements of Standard 103 or a provisionally approved law school that the Council or the Accreditation Committee has determined meets the requirements of Standard 102.

(3) “Association” means the American Bar Association.

(4) “Branch campus” means a type of separate location at which a student may earn more than two-thirds of the credit hours that the law school requires for the award of a J.D.

(5) “Council” means the Council of the Section.

(6) “Dean” means the chief administrative officer of a law school and includes an acting or interim dean.

(7) “Full-time faculty member” means an individual whose primary professional employment is with the law school, who is designated by the law school as a full-time faculty member, who devotes substantially all working time during the academic year to responsibilities described in Standard 404(a), and whose outside professional activities, other than those described in Standard 404(a), if any, do not unduly interfere with his or her responsibilities as a full-time faculty member.

(8) “Governing board” means a board of trustees, board of regents, or comparable body that has ultimate policy making authority for a law school or the university of which the law school is a part.


(10) “Interpretations” mean the Interpretations of the Standards for Approval of Law Schools.

(11) “J.D. degree” means the professional degree in law granted upon completion of a program of legal education that is governed by the Standards.
"Managing Director" means the Managing Director of the Section of Legal Education and Admissions to the Bar of the American Bar Association.

"President" means the chief executive officer of a university or, if the university has more than one administratively independent unit, of the independent unit. If a law school is not part of a university, “president” refers to the chief executive officer of any entity that owns the law school, if there is such a person, or else the Chair of the Board of Directors of the law school.

"Probation" is a public status indicating that a law school is not being operated in compliance with the Standards and is at risk of having its approval withdrawn.

"Rules" mean the Rules of Procedure for Approval of Law Schools.

"Section" means the Section of Legal Education and Admissions to the Bar of the American Bar Association.

"Separate location" means a physical location within the United States: (1) at which the law school offers J.D. degree courses, (2) where a student may earn more than sixteen credit hours of the school’s program of legal education, and (3) that is not in reasonable proximity to the law school’s main location.

"Standards" mean the Standards for Approval of Law Schools.

"University" means a post-secondary educational institution, whether referred to as a university, college, or by any other name, that confers a baccalaureate degree (and may grant other degrees).

Standard 104. PROVISION OF INFORMATION BY LAW SCHOOLS TO ACCREDITATION COMMITTEE AND THE COUNCIL

A law school shall furnish a completed annual questionnaire, self-study, site evaluation questionnaire, and such other information as the Accreditation Committee or Council may require. This information must be complete, accurate, and not misleading, and must be submitted in the form, manner, and time frame specified by the Council.

Standard 107. VARIANCES

(a) A law school proposing to make any change that is or may be inconsistent with one or more of the Standards may apply to the Council for a variance only on one of the following bases:

(1) A law school may apply for a variance in response to extraordinary circumstances in which compliance with the relevant Standard or Standards would create or constitute extreme hardship for the law school and/or its students. In such cases, the
law school must demonstrate that: i) the proposed variance is consistent with the general purposes and objectives of the overall Standards, and ii) the anticipated benefits of granting the variance outweigh any anticipated harms to the law school’s program or its students.

The variance, if granted, will be for a term certain and limited to the expected duration of the extraordinary circumstances on the basis of which it was granted. It may be extended once for a further term certain, but only if the extraordinary circumstances persist and are beyond the control of the law school.

The decision granting a variance on this basis may require the law school to report to the Managing Director, the Accreditation Committee, or the Council regularly as specified in the decision.

(2) In all variance applications that do not fall within subsection (a)(1), the law school must demonstrate that: i) the proposed variance is consistent with the general purposes and objectives of the overall Standards, ii) the proposed changes or actions that are the basis for the requested variance are experimental or innovative and have the potential to improve or advance the state of legal education, and iii) the anticipated benefits of granting the variance outweigh any anticipated harms to the law school’s program or its students.

The variance, if granted, shall be for a term certain and can be extended once, with the extension being for either a further term certain or indefinite, but subject to revocation on the basis of either a change in the showing made by the law school when the variance was granted or a change in circumstances.

The decision granting a variance on this basis may require the law school to report to the Managing Director, the Accreditation Committee, or the Council regularly as specified in the decision.

(b) If the changes that are the subject of the application for a variance constitute or come to constitute a major change in programs or structure under Standard 105 or 106, then the law school shall seek acquiescence by the Council in order to initiate or continue the changes.

(c) A variance, when granted, is school specific and shall be based on and limited to the facts and circumstances that existed at the law school at the time it applied for the variance.
The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence, the attached changes to the ABA Standards and Rules of Procedure for Approval of Law Schools1.

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the Council of the Section of Legal Education and Admissions to the Bar files a resolution to the House seeking concurrence of the House in any actions of the Council to adopt, revise, or repeal the ABA Standards and Rules of Procedures for Approval of Law Schools. The House may either concur with the Council’s decision or refer the decision back to the Council for further consideration. A decision by the Council is subject to a maximum of two referrals back to the Council by the House. The decision of the Council following the second referral shall be final.

The restructuring of the Council’s work on the ABA law school accreditation process, which requires these Standards and Rules changes, will move all of the work of the accreditation process (adopting standards and enforcing them against law schools) to the Council level, eliminating two committees (Accreditation Committee and the Standards Review Committee) These changes, which are the most fundamental changes in the process in at least several decades, cannot be implemented in the middle of a year. The Council believes that these changes will shorten the decision-making timeline, eliminate redundancies, avoid the necessity for staff increases, reduce expenses, and, overall, improve the effectiveness and efficiency of the process.

The amendments were approved by the Council for Notice and Comment during its meeting held on November 3-4, 2017. A public hearing was held on April 12, 2018. The Council received no written comments on the proposed changes and no one testified at the public hearing on the proposed changes. The Council approved the amendments at its meeting on May 11, 2018. This restructuring also involves changes to the Section’s Bylaws, which are being presented to the Board of Governors for approval and will be the subject of a vote at the Section’s business meeting on August 4, 2018 during the ABA Annual Meeting.

The Council has two responsibilities: (a) approve/accredit first-professional degree in law programs in the United States; and (b) offer and operate programs and services to benefit members of the ABA Section of Legal Education and Admissions to the Bar, and legal education and bar admissions more broadly. No changes are proposed in the way the Council carries out its work on non-accreditation matters.

Though the ultimate responsibility for accreditation has always been vested in the Council, the Council for many years has relied on two committees (Accreditation and Standards Review) to assist in this work.

The Accreditation Committee (AC) has been delegated a substantial portion of work done to assure that law schools operate in compliance with the Standards [see current Rule of Procedure 3]. The Council believes that eliminating the AC and doing this work at the Council level has advantages 2.


that will improve the efficiency and effectiveness of the accreditation process. For example, the Council will be able to act on major changes proposed by law schools in one step, rather than two (an AC recommendation and then Council review of that recommendation), shortening the response time on proposals that, in many cases, are more time-sensitive than the current process can accommodate. The restructuring will also allow the Council to move more expeditiously in enforcing the Standards when there are concerns that schools are not abiding by them. Moreover, the Council will have a deeper and clearer sense of how the Standards that it adopts are working at the school level if it is involved in the regular comprehensive review of schools and the interim monitoring process, which the AC now handles. Finally, the restructuring will eliminate the need for, and expense of, four-five AC meetings each year.

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No negative comments were submitted in the notice and comment process. The Council believes that the law schools support this restructuring.

Respectfully submitted,

Maureen A. O’Rourke
Dean, Boston University School of Law
Chair, Council of the Section of Legal Education and Admissions to the Bar
August 2018
1. **Summary of Resolution(s).**

   Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2018 to the Standards of the ABA Standards and Rules of Procedure for Approval of Law Schools.

2. **Approval by Submitting Entity.**

   Yes. The amendments were approved by the Council for Notice and Comment during its meeting held on November 3-4, 2017. A public hearing was held on April 12, 2018. The Council approved the amendments at its meeting on May 10-11, 2018.

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 amendments modify the existing ABA Standards and Rules of Procedure for Approval of Law Schools.

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 Council will notify ABA-approved law schools and other interested entities of the approved changes to the ABA Standards and Rules of Procedure for Approval of Law Schools.
Schools. Deans of ABA-approved law schools have been made aware of this change over the course of the last six months. The Council and the Managing Director’s Office will determine strategy going forward at its August 2018 meeting, including a preview of August and September meetings, and a discussion of the new governance structure and work of the Council.

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

9. Disclosure of Interest. (If applicable)
   Not applicable.

10. Referrals.
   The amendments were posted on the Section’s website and circulated for Notice and Comment to the following interested persons and entities:
   - ABA Standing and Special Committees, Task Forces, and Commission Chairs;
   - ABA Section Directors and Delegates;
   - Conference of Chief Justices;
   - National Conference of Bar Presidents;
   - National Association of Bar Executives;
   - Law Student Division;
   - SBA Presidents;
   - National Conference of Bar Examiners;
   - University Presidents;
   - Deans and Associate Deans; and

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)
   Barry A. Currier, Managing Director
   American Bar Association
   Section of Legal Education and Admissions to the Bar
   321 N. Clark St.
   Chicago, IL 60654-7598
   Ph: (312) 988-6744 / Cell: (310) 400-2702
   Email: barry.currier@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.)

Joan S. Howland  
Associate Dean and Professor  
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229 19th Avenue South  
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Email: howla001@umn.edu

The Honorable Solomon Oliver, Jr.  
Chief Judge  
U.S. District Court for the Northern District of Ohio  
Carl B. Stokes United States Courthouse  
801 West Superior Avenue  
Cleveland, OH 44113  
Ph: (216) 357-7171 / Cell: (216) 973-6496  
Email: solomon_oliver@ohnd.uscourts.gov
EXECUTIVE SUMMARY

1. Summary of the Resolution

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2018 to the Standards of the ABA Standards and Rules of Procedure for Approval of Law Schools.

2. Summary of the Issue that the Resolution Addresses

The revision seeks to accomplish the task of restructuring the work of the ABA accreditation process by eliminating the Council’s Accreditation and Standards Review Committees, and having all of the work be done at the Council level.

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

The proposals amend the 2017-2018 ABA Standards and Rules of Procedure for Approval of Law Schools.

4. Summary of Minority Views

None of which the Council is aware. No comments were received and no one testified at the hearing held on April 12, 2018.
RESOLVED, That the American Bar Association House of Delegates concurs in the action of
the Council of the Section of Legal Education and Admissions to the Bar in adopting the
amendments dated August 2018 to Rules 3, 5, 10, 14, 22, 23, 24, 25, 34, 52, and 53 of the ABA
Standards and Rules of Procedure for Approval of Law Schools:

1. Rule 3, Accreditation Committee Responsibility and Authority (authority to approve
teach-outs);
2. Rule 5, Site Evaluations (authority to postpone site evaluations);
3. Standard 10, Notice of Accreditation Decision by Other Agency (removal of non-existent
form);
4. Rule 14, Actions on Determinations of Noncompliance with a Standard (addition of
specific remedial action);
5. Rule 22, Council Consideration of Recommendation of Accreditation Committee (right
to appearance of representatives);
6. Rule 23, Council Consideration of Appeal from Accreditation Committee Decision
(appeals period shortened);
7. Rule 24, Evidence and Record for Decision (30-days to submit new evidence);
8. Rule 25, Decisions by the Council (decision final upon issuance);
9. Rule 34, Teach-Out Plan (approval by Council);
10. Rule 52, Disclosure of Decision Letter (removes duplication); and
requirements)
Rule 3: Accreditation Committee Responsibility and Authority

(a) The responsibility and authority of the Accreditation Committee is delegated to it by the Council.

(b) The Committee has jurisdiction to make recommendations to the Council concerning:

(1) an application for provisional or full approval;
(2) withdrawal of provisional or full approval;
(3) an application for acquiescence in a major change under Rules 29(a)(1) through 29(a)(13); and
(4) an application for a variance.

(c) The Committee has jurisdiction to make decisions concerning all matters other than those specified in Rule 3(a), including:

(1) determining compliance with the Standards of any provisionally or fully approved law school in connection with a site evaluation, a complaint, a response to a request for information, a fact-finding report, interim monitoring of accreditation status, or any other circumstances as provided in these Rules;
(2) granting or denying an application for approval of a foreign programs, and the continuance of a foreign program as set forth in the Criteria for Foreign Summer and Intersession Programs Offered by ABA-Approved Law Schools in a Location Outside the United States; the Criteria for Approval of Foreign Semester and Year-Long Programs; and the Criteria for Accepting Credit for Student Study at a Foreign Institution; and
(3) granting or denying an application for acquiescence in a major change under Rule 29(a)(14) through 29(a)(17).

(d) The Committee has jurisdiction to impose sanctions and/or direct specific remedial action, or to recommend to the Council that it impose sanctions and/or direct specific remedial action, in accordance with Rules 16 to 18.

(e) The Committee has the authority to create subcommittees and task forces as it deems necessary or advisable.
Rule 5: Site Evaluations

(a) A site evaluation of a law school or of a program is a comprehensive examination of the law school or program conducted by one or more persons qualified to conduct site evaluations who:

(1) Review documents relating to the law school or program;

(2) Perform an on-site evaluation of the law school or program; and

(3) Prepare a factual report to be used by the Committee for purposes of making decisions or recommendations relating to accreditation status of the law school or program.

(b) Site evaluations of law schools shall be conducted according to the following schedule:

(1) A site evaluation of a fully approved law school shall be conducted in the third year following the granting of full approval and every seventh year thereafter.

(2) A site evaluation of a provisionally approved law school shall be conducted in accordance with subsection (g) below.

(3) A site evaluation shall be conducted upon application by a law school for provisional approval.

(c) The Council or Committee may order additional site evaluations of a law school when special circumstances warrant.

(d) In extraordinary circumstances, a site evaluation of a law school may be postponed upon the request of the law school. In such cases, the postponement shall be at the discretion of the Managing Director in consultation with the chair of the Committee and shall not exceed one year.

(e) When a site evaluation of a law school is required under the Standards or these Rules, the Managing Director shall make the following arrangements:

(1) Schedule the site evaluation during the regular academic year, at a time when classes in the program of legal education are being conducted.

(2) Appoint a qualified site evaluation team of sufficient size to accomplish the purposes of the site evaluation, and appoint a chair of the site evaluation team;

(3) Provide the site evaluation team all relevant documents relating to Accreditation Committee and Council action regarding the law school;
(4) Provide the site evaluation team with any third-party comments received by the Managing Director’s Office regarding the law school’s compliance with the Standards;

(5) Provide the site evaluation team all complaints received under Rule 43 and not dismissed by the Managing Director or the Accreditation Committee; and

(6) Provide the site evaluation team with any necessary or appropriate directions or instructions.

(f) In connection with a site evaluation of a law school, the Managing Director shall direct the law school to provide the following documents to the site evaluation team before the site evaluation:

(1) All completed forms and questionnaires, as adopted by the Council; and

(2) In the case of a law school applying for provisional or full approval, the completed application for provisional or full approval.

(g) Site evaluations for provisionally approved law schools shall be conducted as follows:

(1) In years two and four, and upon application for full approval, the law school shall be inspected in accordance with the rules for site evaluation of fully approved law schools.

(2) The Accreditation Committee has the discretion to order a site evaluation in any other year. The Accreditation Committee may direct that the additional site evaluation be limited in scope.

(h) Following a site evaluation, the site evaluation team shall prepare a written report on facts and observations that will enable the Committee to determine compliance with the Standards or other issues relating to the accreditation status of the law school. A site evaluation report shall not contain conclusions regarding compliance with Standards or make recommendations for action by the Committee or the Council.

(i) The Managing Director shall review the report submitted by a site evaluation team and ensure that it complies with (h). The Managing Director shall then transmit the report to the president and the dean in order to provide an opportunity to make factual corrections and comments. The law school shall be given at least 30 days to prepare its response to the report, unless the law school consents to a shorter time period. The 30 day period shall run from the date on which the Managing Director transmits the report to the law school.

(j) Following receipt of the law school’s response to the site evaluation report, the Managing Director shall forward a copy of the report with the law school’s response to members of the Accreditation Committee and the site evaluation team.

(k) Site evaluations regarding foreign programs shall be conducted as provided under the:
Criteria for Foreign Summer and Intersession Programs Offered by ABA-Approved Law Schools in a Location Outside the United States;

(2) Criteria for Approval of Semester and Year-Long Study Abroad Programs Established by ABA-Approved Law Schools.

Rule 10: Notice of Accreditation Decision by Other Agency

(a) An approved law school shall promptly inform the Managing Director of the following actions with respect to the law school:

(1) Pending or final action by State agency to suspend, revoke, withdraw, or terminate legal authority to provide post-secondary education;

(2) Decision by recognized agency to deny accreditation or pre-accreditation;

(3) Pending or final action by recognized agency to suspend, revoke, withdraw, or terminate accreditation or pre-accreditation;

(4) Probation or equivalent status imposed by recognized agency.

(b) If the law school is part of a university, then the law school shall promptly inform the Managing Director of the above actions with respect to the university or any program offered by the university.

(c)(d) A law school must complete and submit the Notice of State or Other Recognized Accrediting Agency Action Form.

(e)(f) The Council will, upon request, share with other appropriate recognized accrediting agencies and recognized State approval agencies information about the accreditation status of a law school and any adverse actions it has taken against a law school.

(4) Probation or equivalent status imposed by recognized agency.

(2) Decision by recognized agency to deny accreditation or pre-accreditation;

(3) Pending or final action by recognized agency to suspend, revoke, withdraw, or terminate accreditation or pre-accreditation;

(4) Probation or equivalent status imposed by recognized agency.

(b) If the law school is part of a university, then the law school shall promptly inform the Managing Director of the above actions with respect to the university or any program offered by the university.

(c)(d) A law school must complete and submit the Notice of State or Other Recognized Accrediting Agency Action Form.

(e)(f) The Council will, upon request, share with other appropriate recognized accrediting agencies and recognized State approval agencies information about the accreditation status of a law school and any adverse actions it has taken against a law school.
Rule 14: Actions on Determinations of Noncompliance with a Standard

(a) Following a determination by the Committee of non-compliance with a Standard in accord with Rule 12(a)(4), the Committee shall:

(1) Require the law school to bring itself into compliance and submit information by a specific date to demonstrate that it has come into compliance with the Standard;

(2) Direct that representatives of the law school, including any person specifically designated by the Committee, appear at a hearing to determine whether to impose sanctions or direct specific remedial action in connection with the law school’s non-compliance with the Standard.

(b) The Managing Director shall be present at Accreditation Committee meetings and hearings. Legal Counsel for the Managing Director shall be present at Accreditation Committee meetings and hearings.

(c) Upon request of the law school and for good cause shown, the Committee may extend the date of compliance or may recommend that the Council extend the date of compliance.

Rule 22: Council Consideration of Recommendation of Accreditation Committee

(a) A law school has a right to have representatives of the law school, including legal counsel, appear before the Council at a Council hearing following a Committee recommendation regarding (i) the law school’s application for provisional approval, (ii) the law school’s application for full approval, (iii) the law school’s application for accreditation in a major change under Rule 29(a)(1) – 29(a)(13), and (iv) the Committee’s recommendation to impose sanctions following a hearing held in accordance with Rules 11(b) or 14(a)(2), and (c) the Committee’s recommendation of specific remedial action.

(b) The Managing Director in consultation with the Chair of the Council may set reasonable limitations on the number of law school representatives that may appear at a meeting and on the amount of time allotted for the appearance.

(c) Except as permitted in subsection (a), a law school does not have a right to appear at a Council meeting, hearing or proceeding on any matter related to the accreditation of a law school.

(d) The Chair of the Council may invite the Chair of the Accreditation Committee to appear at the hearing, if the Chair determines that such person could reasonably be expected to provide information helpful to the Committee. The Chair of the Accreditation Committee may not present new evidence unless the law school has the opportunity to respond to that new evidence.

(e) The Managing Director or designee and any additional staff designated by the Managing Director shall be present at Accreditation Committee meetings and hearings. Legal Counsel for
Rule 23: Council Consideration of Appeal from Accreditation Committee Decision

(a) A law school may appeal a decision of the Committee by filing with the Managing Director a written appeal within 15-30 days after the date of the letter reporting the Committee’s decision.

(b) The Council shall consider the appeal promptly and, when feasible, at its next regularly scheduled meeting.

(c) A law school shall not have a right to appear before the Council in connection with the appeal.

Rule 24: Evidence and Record for Decision

(a) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the Council shall adopt the Committee’s findings of fact unless the Council determines that the findings are not supported by substantial evidence in the record.

(b) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the record on which the Council shall make its decision shall be the following:
   (1) The record before the Committee on which the Committee based its decision or recommendation;
   (2) The letter setting forth the Committee’s decision or recommendation;
   (3) The written appeal by the law school, if applicable;
   (4) Any written submission by the Committee in response to an appeal, if applicable;
   (5) Any testimony of the law school in a hearing or an appearance before the Council.

(c) Except as specifically provided otherwise in these Rules, the law school shall not present any evidence to the Council that was not before the Committee at the time of the Committee’s decision or recommendation.

(d) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the Council will accept new evidence submitted by the law school only if the Executive Committee of the Council determines that:
   (1) The evidence was not presented to the Committee;
   (2) The evidence could not reasonably have been presented to the Committee;
(3) A reference back to the Committee to consider the evidence would, under the circumstances, present a serious hardship to the law school;

(4) The evidence was submitted at least 3014 days in advance of the Council meeting; and

(5) The evidence was appropriately verified at the time of submission.

Rule 25: Decisions by the Council

(a) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the Council shall give substantial deference to the conclusions, decisions, and recommendations of the Committee.

(b) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the Council may, as appropriate:

(1) Affirm the Committee’s decision or recommendation;

(2) Amend the Committee’s decision or recommendation, including imposing any sanction regardless of whether the Committee has imposed or recommended any sanction;

(3) Reverse the Committee’s decision or recommendation; or

(4) Remand the matter to the Committee for further proceedings.

(c) If the Council remands a decision for further consideration or action by the Committee, the Council shall identify specific issues that the Committee must address.

(d) The decision of the Council shall be effective upon issuance.

Rule 34: Teach-Out Plan

(a) If a provisional or fully approved law school decides to cease operations or close a branch campus, the law school shall promptly make a public announcement of the decision and shall notify the Managing Director, the appropriate state licensing authority, and the United States Department of Education of the decision.

(b) A provisional or fully approved law school must submit a teach-out plan for approval upon occurrence of any of the following events:

(1) The law school notifies the Managing Director’s Office that it intends to cease operations or close a branch campus;

(2) The Accreditation Committee recommends, or the Council acts to withdraw,
The law school shall submit the teach-out plan for the law school or branch being closed as required by paragraph (b) to the Managing Director’s Office within the time specified by the Managing Director. The Managing Director’s Office, in consultation with the Chair of the Accreditation Committee Council, may require a law school to enter into a teach-out agreement as part of its teach-out plan.

(c) A law school must submit the “Teach-Out Plan Approval Form,” as adopted by the Council, and address each item in the form.

(d) If a law school voluntarily enters into a teach-out agreement or if the Managing Director requires a law school to submit a teach-out agreement as part of a teach-out plan, the law school must submit the “Teach-Out Agreement Approval Form,” as adopted by the Council, and address each criterion in the form.

(e) The Accreditation Committee Council will promptly review a teach-out plan submitted in accordance with (b) and (c) and shall recommend approval or denial of the plan by the Council.

(f) Approval of the teach-out plan may be conditioned on specified changes to the plan.

(1) If the teach-out plan is denied, the law school must revise the plan to meet the deficiencies identified and resubmit the plan no later than 30 days after receiving notice of the decision.

(g) Upon approval of a teach-out plan of a law school or branch that is also accredited by another recognized accrediting agency, the Managing Director’s Office shall notify that accrediting agency within 30 days of its approval.

(h) Upon approval of a teach-out plan, the Managing Director shall within 30 days notify all recognized agencies that accredit other programs offered by the institution of which the law school is a part.

(i) In the event a law school closes without an approved teach-out plan or agreement, the Managing Director’s office will work with the United States Department of Education and the appropriate
State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.

**Rule 52: Disclosure of Decision Letters**

(a) Except as provided in Rule 53, decisions and recommendations of the Committee and Council shall be confidential.

(b)(i) If the law school makes public a decision or recommendation of the Committee or Council, the law school must make public the entire decision or recommendation.

(1) If the law school makes public a decision or recommendation of the Committee or Council, the law school must notify the Managing Director at or before the time of the disclosure.

(ii) The Managing Director, in consultation with the Chair of the Council, may subsequently correct any inaccurate or misleading information released or published by the law school in connection with the disclosure or the decision or recommendation.

(ii) A corrective communication by the Managing Director may include the disclosure of portions of the site evaluation report or the entire site evaluation report.

(2) Discussion of the contents of a decision or recommendation with, or release of the report to, the faculty, the university, or the governing board of the university or law school, does not constitute release of the decision or recommendation to the public within the meaning of this Rule.

**Rule 53: Applications, Plans, Decisions and Recommendations Made Public**

(a) When a law school has applied for provisional or full approval, acquiescence in a major change, or a variance, or has submitted a teach-out plan for approval, the Council or the Managing Director shall provide public notice:

(1) That the law school has submitted an application or plan; and

(2) Of the procedural steps for consideration of the application or plan.

(b) After a law school has been notified of the Committee’s decision or recommendation, the Managing Director may state publicly the conclusions of the Committee and its decision or recommendation, with an explanation of the procedural steps in further consideration of the matter, concerning:

(1) The law school’s application for provisional or full approval;
(2) The law school’s application for acquiescence in a major change;

(3) The law school’s application for a variance;

(4) The imposition of sanctions or specific remedial action on the law school;

(5) The placing of the law school on probation; or

(6) The withdrawal of the law school’s approval.

After a law school has been notified of the Committee’s decision concerning the law school’s significant noncompliance with one or more Standards under Rule 12(a)(4), the Managing Director shall provide public notification of the Committee’s conclusions and decision, with an explanation of any procedural steps for further consideration of the matter.

After a law school has been notified of the Council’s decision, the Managing Director shall provide public notification of the Council’s conclusions and decision (except as to a sanction that is explicitly not public), with an explanation of any procedural steps for further consideration of the matter, concerning:

(1) The law school’s application for provisional or full approval;

(2) The law school’s application for acquiescence in a major change;

(3) The law school’s application for a variance;

(4) The imposition of sanctions or specific remedial action on the law school;

(5) The placing of the law school on probation; or

(6) The withdrawal of the law school’s approval;

(7) The law school’s significant non-compliance with one or more Standards under Rule 12(a)(4); or

(8) The law school’s submission of a teach-out plan.

After a matter concerning a law school has been acted upon by an Appeals Panel, the Council or the Managing Director shall provide public notification of the conclusions and decision of the Appeals Panel.

After a law school has received a decision from the Committee or Council, the Managing Director, with the concurrence of the Council Chair, may issue a public statement in writing or orally to address other matters related to the accreditation of the school, to confirm or deny
Proposal 2

Rule 53: Applications, Plans, Decisions and Recommendations Made Public

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- (a) That the law school has submitted an application or plan; and
- (b) Of the procedural steps for consideration of the application or plan.

(b) After a law school has been notified of the Committee’s decision or recommendation, the Managing Director may state publicly the conclusions of the Committee and its decision or recommendation, with an explanation of the procedural steps in further consideration of the matter, concerning:

1. The law school’s application for provisional or full approval;
2. The law school’s application for acquiescence in a major change;
3. The law school’s application for a variance;
4. The imposition of sanctions or specific remedial action on the law school;
5. The placing of the law school on probation; or
6. The withdrawal of the law school’s approval.

(c) After a law school has been notified of the Council’s decision, the Managing Director shall provide public notification of the Council’s conclusions and decision (except as to a sanction that is explicitly not public), with an explanation of any procedural steps for further consideration of the matter, concerning:

1. The law school’s application for provisional or full approval;
2. The law school’s application for acquiescence in a major change;
3. The law school’s application for a variance;
4. The imposition of sanctions or specific remedial action on the law school;
5. The placing of the law school on probation; or
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(d) After a matter concerning a law school has been acted upon by an Appeals Panel, the Council or the Managing Director shall provide public notification of the conclusions and decision of the Appeals Panel.

(e) After a law school has been notified of a Council’s decision, the Managing Director, with the concurrence of the Council Chair, may issue a public statement in writing or orally to address other matters related to the accreditation of the school, to confirm or deny media reports on the law school’s accreditation or matters related to that accreditation, or to respond to an inquiry from the public.
The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence, the attached changes to the ABA Standards and Rules of Procedure for Approval of Law Schools1.

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the Council of the Section of Legal Education and Admissions to the Bar files a resolution to the House seeking concurrence of the House in any actions of the Council to adopt, revise, or repeal the ABA Standards and Rules of Procedures for Approval of Law Schools. The House may either concur with the Council’s decision or refer the decision back to the Council for further consideration. A decision by the Council is subject to a maximum of two referrals back to the Council by the House. The decision of the Council following the second referral shall be final.

The amendments were approved by the Council for Notice and Comment during its meeting held on November 3-4, 2017, and February 9-10, 2018. A public hearing was held on April 12, 2018. The Council received no written comments on the proposed changes and no one testified at the public hearing on the proposed changes. The Council approved the amendments at its meeting on May 11, 2018.

Rule 3(a)(5) currently provides that the Accreditation Committee (“AC”) has jurisdiction to make recommendations about teach-out plans. The proposed amendment deletes AC and replaces it with the Council so that the authority to approve a teach-out remains solely with the Council and approval is not delayed by requiring review and a recommendation by the AC.

Rule 5(d) currently provides that in extraordinary circumstances, a site evaluation of a law school may be postponed upon the request of the law school. The proposed amendment removes “upon the request of the law school,” so that the Managing Director has authority to postpone a visit.

Rule 10(c) currently provides that a law school must complete and submit the Notice of State or Other Recognized Agency Action Form. This form does not exist so the proposed amendment deletes this provision.

Rule 14(a)(2) currently provides that the Committee can direct a law school representative to appear at a hearing to determine whether to impose sanctions. However, Rule 21 provides that at the hearing, the Committee may impose sanctions or direct specific remedial action. The proposed amendment adds “specific remedial action to Rule 14(a)(2) to be consistent with Rule 21.

Rule 22 currently provides that a law school has a right to have representatives, including legal counsel, appear before the Council following a Committee recommendation to impose sanctions. The proposed amendment adds “specific remedial action” so that a law school has a right to have representatives appear on a Committee recommendation to direct specific remedial action since such action is proposed to be added to Rule to Rule 14(a)(2).

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Rule 23 currently provides that a law school may appeal a decision of the Accreditation Committee by filing a written appeal within 30 days after the date of the letter reporting the decision. The proposed amendment would shorten the appeal period to 15 days which the Council deems a sufficient length of time.

The proposed amendment to Rule 24 requires a law school to submit new evidence at least 30 days before the Council meeting, giving the Executive Committee sufficient time to review the evidence and make a determination whether the evidence will be accepted.

Rule 25 does not specify when the decision of the Council will be effective. The proposed amendment adds a section that provides the decision of the Council will be effective upon issuance.

The proposed amendment to Rule 34 requires review of a teach-out plan by the Council instead of the AC and Council. This will allow for a quicker review of the plan given the time sensitive nature of the process.

The proposed amendment deletes Rule 52(a) because it is already addressed in Rule 49.

One proposed amendment to Rule 53 adds the submission of a teach-out plan (see Rule 34) to Rule 53 in two places. First, it includes the submission of a teach-out plan in the list of requests or submissions that shall be made public when filed by a law school in Rule 53(a). Second, it adds the Council’s conclusion and decision on a teach-out plan to the list of conclusions and decisions that must be made public following Council action and notification to the law school of that action in Rule 53(c).

The second proposed amendment clarifies and makes specific the requirements of Rule 53 that the Managing Director make public, after notice of the decision to a school, an Accreditation Committee or Council decision of significant non-compliance with a Standard under Rule 12(a)(4). This aligns the Rule with the requirements of the United States Department of Education, to which the Council is subject, and the provisions of Council Internal Operating Practice 4.

Finally, for accreditation matters that have been made public regarding the status of a law school, the amendment to Rule 53 clarifies the Managing Director’s ability to comment on these matters.

Respectfully submitted,

Maureen A. O’Rourke
Dean, Boston University School of Law
Chair, Council of the Section of Legal Education and Admissions to the Bar
August 2018
General Information Form

Submitting Entity: American Bar Association
Section of Legal Education and Admissions to the Bar

Submitted By: Dean Maureen A. O’Rourke, Chair

1. Summary of Resolution(s).
Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2018 to Rules 3, 5, 10, 14, 22, 23, 24, 25, 34, 52, and 53 of the ABA Standards and Rules of Procedure for Approval of Law Schools.

2. Approval by Submitting Entity
Yes. The amendments were approved by the Council for Notice and Comment during its meeting held on November 3-4, 2017 and February 9-10, 2018. A public hearing was held on April 12, 2018. The Council approved the amendments at its meeting on May 10-11, 2018.

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 amendments modify the following existing ABA Standards and Rules of Procedure for Approval of Law Schools.

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 Council will notify ABA-approved law schools and other interested entities of the approved changes to the ABA Standards and Rules of Procedure for Approval of Law Schools.
8. Cost to the Association. (Both direct and indirect costs)
None.

9. Disclosure of Interest. (If applicable)
Not applicable.

10. Referrals.
The amendments were posted on the Section’s website and circulated for Notice and Comment to the following interested persons and entities:

• ABA Standing and Special Committees, Task Forces, and Commission Chairs;
• ABA Section Directors and Delegates;
• Conference of Chief Justices;
• National Conference of Bar Presidents;
• National Association of Bar Executives;
• Law Student Division;
• SBA Presidents;
• National Conference of Bar Examiners;
• University Presidents;
• Deans and Associate Deans; and
• Section Affiliated Organizations, including AccessLex Institute, American Association of Law Libraries, Association of American Law Schools, Association of Legal Writing Directors, Clinical Legal Education Association, Law School Admission Council, National Association for Law Placement, and Society of American Law Teachers.

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

Barry A. Currier, Managing Director
American Bar Association
Section of Legal Education and Admissions to the Bar
321 N. Clark St.
Chicago, IL 60654-7598
Ph: (312) 988-6744 / Cell: (310) 400-2702
Email: barry.currier@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.)

Joan S. Howland
Associate Dean and Professor
University of Minnesota Law School
Walter F. Mondale Hall
Room 120
229 19th Avenue South
Minneapolis, MN 55455
Ph: (612) 625-9036
Email: howла001@umn.edu

The Honorable Solomon Oliver, Jr.
Chief Judge
U.S. District Court for the Northern District of Ohio
Carl B. Stokes United States Courthouse
801 West Superior Avenue
Cleveland, OH 44113
Ph: (216) 357-7171 / Cell: (216) 973-6496
Email: solomon_oliver@ohnd.uscourts.gov
EXECUTIVE SUMMARY

1. Summary of the Resolution

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2018 to Rules 3, 5, 10, 14, 22, 23, 24, 25, 34, 52, and 53 of the ABA Standards and Rules of Procedure for Approval of Law Schools.

2. Summary of the Issue that the Resolution Addresses

Rule 3(a)(5) currently provides that the Accreditation Committee (“AC”) has jurisdiction to make recommendations about teach-out plans. The proposed amendment deletes AC and replaces it with the Council so that the authority to approve a teach-out remains solely with the Council and approval is not delayed by requiring review and a recommendation by the AC.

Rule 5(d) currently provides that in extraordinary circumstances, a site evaluation of a law school may be postponed upon the request of the law school. The proposed amendment removes “upon the request of the law school,” so that the Managing Director has authority to postpone a visit.

Rule 10(c) currently provides that a law school must complete and submit the Notice of State or Other Recognized Agency Action Form. This form does not exist so the proposed amendment deletes this provision.

Rule 14(a)(2) currently provides that the Committee can direct a law school representative to appear at a hearing to determine whether to impose sanctions. However, Rule 21 provides that at the hearing, the Committee may impose sanctions or direct specific remedial action. The proposed amendment adds “specific remedial action to Rule 14(a)(2) to be consistent with Rule 21.

Rule 22 currently provides that a law school has a right to have representatives, including legal counsel, appear before the Council following a Committee recommendation to impose sanctions. The proposed amendment adds “specific remedial action” so that a law school has a right to have representatives appear on a Committee recommendation to direct specific remedial action since such action is proposed to be added to Rule to Rule 14(a)(2).

Rule 23 currently provides that a law school may appeal a decision of the Accreditation Committee by filing a written appeal within 30 days after the date of the letter reporting the decision. The proposed amendment would shorten the appeal period to 15 days which the Council deems a sufficient length of time.

The proposed amendment to Rule 24 requires a law school to submit new evidence at least 30 days before the Council meeting, giving the Executive Committee sufficient time to review the evidence and make a determination whether the evidence will be accepted.

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The proposed amendment to Rule 24 requires a law school to submit new evidence at least 30 days before the Council meeting, giving the Executive Committee sufficient time to review the evidence and make a determination whether the evidence will be accepted.
Rule 25 does not specify when the decision of the Council will be effective. The proposed amendment adds a section that provides the decision of the Council will be effective upon issuance.

The proposed amendment to Rule 34 requires review of a teach-out plan by the Council instead of the AC and Council. This will allow for a quicker review of the plan given the time sensitive nature of the process.

The proposed amendment deletes Rule 52(a) because it is already addressed in Rule 49.

One proposed amendment to Rule 53 adds the submission of a teach-out plan (see Rule 34) to Rule 53 in two places. First, it includes the submission of a teach-out plan in the list of requests or submissions that shall be made public when filed by a law school in Rule 53(a). Second, it adds the Council’s conclusion and decision on a teach-out plan to the list of conclusions and decisions that must be made public following Council action and notification to the law school of that action in Rule 53(c).

The second proposed amendment clarifies and makes specific the requirements of Rule 53 that the Managing Director make public, after notice of the decision to a school, an Accreditation Committee or Council decision of significant non-compliance with a Standard under Rule 12(a)(4). This aligns the Rule with the requirements of the United States Department of Education, to which the Council is subject, and the provisions of Council Internal Operating Practice 4.

Finally, for accreditation matters that have been made public regarding the status of a law school, the amendment to Rule 53 clarifies the Managing Director’s ability to comment on these matters.

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

The proposals amend the 2017-2018 ABA Standards and Rules of Procedure for Approval of Law Schools.

4. Summary of Minority Views

None of which the Council is aware. No comments were received and no one testified at the hearing held on April 12, 2018.
RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in adopting the amendments dated August 2018 to Standard 501 (Admission) and Standard 503 (Admission Test) of the ABA Standards and Rules of Procedure for Approval of Law Schools.
Standard 501. ADMISSIONS

(a) A law school shall adopt, publish, and adhere to sound admission policies and practices consistent with the Standards, in the law school’s mission, and the objectives of its program of legal education.

(b) A law school shall only admit only applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar.

(c) Among the factors to consider in assessing compliance with this Standard are the academic and admission credentials of the law school’s entering students, the academic attrition rate of the law school’s students, the bar passage rate of its graduates, and the effectiveness of the law school’s academic support program. Compliance with Standard 316 is not alone sufficient to comply with the Standard.

(d) A law school shall not admit or readmit a student who has been disqualified previously for academic reasons without an affirmative showing that the prior disqualification does not indicate a lack of capacity to complete its program of legal education and be admitted to the bar. For every admission or readmission of a previously disqualified individual, a statement of the considerations that led to the decision shall be placed in the admittee’s file.

Interpretation 501-1

Among the factors to consider in assessing compliance with this Standard are the academic and admission credentials of the law school’s entering students, the academic attrition rate of the law school’s students, the bar passage rate of its graduates, and the effectiveness of the law school’s academic support program. Compliance with Standard 316 is not alone sufficient to comply with the Standard.

Interpretation 501-2

Sound admissions policies and practices may include consideration of admission test scores, undergraduate course of study and grade point average, extracurricular activities, work experience, performance in other graduate or professional programs, relevant demonstrated skills, and obstacles overcome. If a law school requires an admission test, it shall publish information regarding which tests are accepted.

Interpretation 501-2

A law school having a cumulative non-transfer attrition rate above 20 percent for a class creates a rebuttable presumption that the law school is not in compliance with the Standard.

Interpretation 501-3
Failure to include a valid and reliable admission test as part of the admissions process creates a rebuttable presumption that a law school is not in compliance with Standard 501.

Standard 503. ADMISSION TEST

A law school shall require each applicant for admission as a first-year J.D. degree student to take a valid and reliable admission test to assist the school and the applicant in assessing the applicant's capability of satisfactorily completing the school’s program of legal education. In making admissions decisions, a law school shall use the test results in a manner that is consistent with the current guidelines regarding proper use of the test results provided by the agency that developed the test.

Interpretation 503-1
A law school that uses an admission test other than the Law School Admission Test sponsored by the Law School Admission Council shall demonstrate that such other test is a valid and reliable test to assist the school in assessing an applicant’s capability to satisfactorily complete the school’s program of legal education.

Interpretation 503-2
This Standard does not prescribe the particular weight that a law school should give to an applicant’s admission test score in deciding whether to admit or deny admission to the applicant.

Interpretation 503-3
(a) It is not a violation of this Standard for a law school to admit no more than 10% of an entering class without requiring the LSAT from:
(1) Students in an undergraduate program of the same institution as the J.D. program; and/or
(2) Students seeking the J.D. degree in combination with a degree in a different discipline.
(b) Applicants admitted under subsection (a) must meet the following conditions:
(1) Scored at or above the 85th percentile on the ACT or SAT for purposes of subsection (a)(1) or for purposes of subsection (a)(2), scored at or above the 85th percentile on the GRE or GMAT; and
(2) Ranked in the top 10% of their undergraduate class through six semesters of academic work or achieved a cumulative GPA of 3.5 or above through six semesters of academic work.
The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (House) for its concurrence, the amendments to Standards 501 (Admission) and 503 (Admission Test) of the ABA Standards and Rules of Procedure for Approval of Law Schools.1

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the Council of the Section of Legal Education and Admissions to the Bar files a resolution to the House seeking concurrence of the House in any actions of the Council to adopt, revise, or repeal the ABA Standards and Rules of Procedures for Approval of Law Schools. The House may either concur with the Council’s decision or refer the decision back to the Council for further consideration. A decision by the Council is subject to a maximum of two referrals back to the Council by the House. The decision of the Council following the second referral shall be final.

The amendments were approved by the Council for Notice and Comment during its meeting held on November 3-4, 2017. A public hearing was held on April 12, 2018. The Council approved the amendments at its meeting on May 11, 2018.

In March 2017, the Council circulated for Notice and Comment a proposal that would result in the following changes to the Standard 503: [1] establish a process by which law school admission tests other than the Law School Admission Test (LSAT) offered by the Law School Admissions Council (LSAC) can be certified as valid and reliable law school admission tests that all law schools can use to meet the requirements of Standard 503; [2] eliminate Interpretation 503-1, which currently allows a law school to demonstrate that a test other than the LSAT (or presumably any other test that would be certified by the Council under the proposed new approach) is a valid and reliable law school admission test for that school; [3] reconfirm the Council’s prior action to eliminate the “safe harbor” provision of current Interpretation 503-3; and [4] make clear that every law school will have to require at least the LSAT or another certified test as part of its admissions process and that no variances will be granted to this requirement.

After discussion and reviewing the comments received, the Standards Review Committee recommended that the Council reject the proposal that had been circulated and offered three options to the Council. In its recommendation to the Council, the Committee stated that it believes that Standard 501 sets out sufficiently strong statements that a law school must adopt, publish, and adhere to sound admission policies, and that a law school shall admit only applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar, so that the requirement of an admission test is not needed. The factors to be considered in assessing compliance with the Standard have been moved from an Interpretation into the body of Standard 501. The factor of “academic and admission test credentials” has been changed to “academic and admission credentials.” The Committee felt that the many factors listed in Standard 501 should be sufficient for the Accreditation Committee and the Council to determine whether a law school is in compliance. It also felt that in order to demonstrate whether only capable individuals are being

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admitted to a law school, more focus should be placed on outcomes, assessed through bar passage and attrition rates.

The Council circulated for Notice and Comment the option that would (a) eliminate the requirement in Standard 503 of a valid and reliable admissions test and (b) revise Standard 501 by moving Interpretation 501-1 (factors to consider in assessing compliance with Standard 501) into the black letter of the Standard. An admissions test would be one of the factors relevant to determining whether a law school complies with Standard 501. The proposal also included a new sentence in Interpretation 501-1 requiring law school to publish information informing potential students which tests are accepted.

Comments Received: A total of 16 comments were received by the end of the Notice and Comment period, some with multiple signatories. The comments were varied. In summary, those in favor of the proposed changes stated that “test optional” admissions would promote diversity, would provide law schools with greater flexibility, and would allow law schools to innovate in looking to other indicia of predictors of success. Some also stated that they believed sufficient safeguards were in place under proposed changes to Standard 501 to unambiguously place the burden on law schools to admit capable students. Those opposed to the changes, especially to eliminate Standard 503, stated that the removal of a standardized test would harm diversity, open the door to bias, risk undermining public confidence in the legal profession, and complicate collecting data for consumer protection information. Moreover, there were concerns that there are insufficient outputs in place to move to a fully test-optional accreditation standard.

Hearing Testimony: The following entities and individuals testified, stating positions consistent with their submitted comments: Society of American Law Teachers (Professor Matthew Charity); Clinical Legal Education (Professor Joy Radice); Educational Testing Services (Dr. Joanna Gorin, Dr. David Klieger, and Christine Betaneli); Law School Admissions Council (Professor Larry Dessem, Professor Christina Whittman, Camille deJorna, Dean Kellye Testy, and Dean Susan Krinsky); Minority Network (Dean Jay Austin); and Dean Gisele Joachim on behalf of admissions professionals from 22 ABA-approved law schools.

The Standards Review Committee considered the comments and testimony and recommended that the Council should adopt the changes the Council approved for Notice and Comment and, additionally, adopt the following Interpretation to proposed Standard 501:

Interpretation 501-3
Failure to include a valid and reliable admission test as part of the admissions process creates a rebuttable presumption that a law school is not in compliance with Standard 501.

The Council agreed with the recommendation and has included this Interpretation in the resolution. The Council believes that adding this Interpretation will address concerns about unregulated innovation in admissions, while still providing the benefits outlined in the Explanation that accompanied the proposed changes that were posted for Notice and Comment. The Council did not agree that there were insufficient outputs or mechanisms to address when a law school appears to be admitting students in violation of Standard 501. Specifically, interim monitoring successfully determined whether a law school complies with Standard 501. The proposal also included a new sentence in Interpretation 501-1 requiring law school to publish information informing potential students which tests are accepted.

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triggers early identification of potential non-compliance with admissions criteria. The Council also did not agree that the gathering of consumer protection information would be sacrificed in the absence of requiring a specific test. The collection of data in the Annual Questionnaire can be modified to ensure consumer protection information remains robust.

Sincerely,

Maureen A. O’Rourke
Dean, Boston University School of Law
Chair, Council of the Section of Legal Education and Admissions to the Bar
August 2018
1. Summary of Resolution(s).

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2018 to Standards 501 (Admission) and 503 (Admission Test) of the ABA Standards and Rules of Procedure for Approval of Law Schools.

2. Approval by Submitting Entity.

The amendments were approved by the Council for Notice and Comment during its meeting held on November 3-4, 2017. A public hearing was held on April 12, 2018. The Council approved the amendments at its meeting on May 11, 2018.

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 amendments modify the existing ABA Standards and Rules of Procedure for Approval of Law Schools.

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 Council will notify ABA-approved law schools and other interested entities of the approved changes to the ABA Standards and Rules of Procedure for Approval of Law Schools.
8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

Not applicable.

10. Referrals.

The amendments were posted on the Section’s website and circulated for Notice and Comment to the following interested persons and entities:

- ABA Standing and Special Committees, Task Forces, and Commission Chairs;
- ABA Section Directors and Delegates;
- Conference of Chief Justices;
- National Conference of Bar Presidents;
- National Association of Bar Executives;
- Law Student Division;
- SBA Presidents;
- National Conference of Bar Examiners;
- University Presidents;
- Deans and Associate Deans; and

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

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

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The Honorable Solomon Oliver, Jr.  
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801 West Superior Avenue  
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1. **Summary of the Resolution**

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

The proposal eliminates the requirement in Standard 503 of a valid and reliable admissions test and revises Standard 501 by moving Interpretation 501-1 (factors to consider in assessing compliance with Standard 501) into the black letter of the Standard. An admissions test would be one of the factors relevant to determining whether a law school complies with Standard 501. A new sentence in Interpretation 501-1 requires law schools to publish information informing potential students which tests are accepted. New Interpretation 501-3 addresses concerns about unregulated innovation in admissions by stating that failure to include a valid and reliable admission test as part of the admissions process creates a rebuttable presumption that a law school is not in compliance with Standard 501.

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

The proposals amend the 2017-2018 ABA Standards and Rules of Procedure for Approval of Law Schools.

4. **Summary of Minority Views**

Of the comments received, those opposed to the changes, especially to eliminate Standard 503, stated that the removal of a standardized test would harm diversity, open the door to bias, risk undermining public confidence in the legal profession, and complicate collecting data for consumer protection information. Moreover, there were concerns that there are insufficient outputs in place to move to a fully test-optional accreditation standard.
RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2018 to the following ABA Standards and Rules of Procedure for Approval of Law Schools:

1. Standard 303: Curriculum
2. Standard 304: Simulation Courses, Clinics, and Field Placements
3. Standard 305: Other Academic Study
4. Standard 306: Distance Education
5. Standard 307: Studies, Activities, and Field Placements Outside the United States
1. Standard 303: Curriculum

Standard 303. CURRICULUM

(a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:

(1) one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members; and

(2) one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised; and

(3) one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement, as defined in Standard 304. To satisfy this requirement, a course must be primarily experiential in nature and must:

(i) integrate doctrine, theory, skills, and legal ethics, and engage students in the performance of one or more of the professional skills identified in Standard 302;

(ii) develop the concepts underlying the professional skills being taught;

(iii) provide multiple opportunities for performance; and

(iv) provide opportunities for self-evaluation.

(b) A law school shall provide substantial opportunities to students for:

(1) law clinics or field placement(s); and

(2) student participation in pro bono legal services, including law-related public service activities.

Interpretation 303-1

A law school may not permit a student to use a course to satisfy more than one requirement under this Standard. For example, a course that includes a writing experience used to satisfy the upper-class writing requirement [see 303(a)(2)] cannot be counted as one of the experiential courses required in Standard 303(a)(3). This does not preclude a law school from offering a course that may count either as an upper-class writing requirement [see 303(a)(2)] or as a simulation course [see 304(a) and 304(b)] provided the course meets all of the requirements of both
types of courses and the law school permits a student to use the course to satisfy only one requirement under this Standard.

Interpretation 303-2

Factors to be considered in evaluating the rigor of a writing experience include the number and nature of writing projects assigned to students, the form and extent of individualized assessment of a student’s written products, and the number of drafts that a student must produce for any writing experience.

Interpretation 303-3

Rule 6.1 of the ABA Model Rules of Professional Conduct encourages lawyers to provide pro bono legal services primarily to persons of limited means or to organizations that serve such persons. In addition, lawyers are encouraged to provide pro bono law-related public service. In meeting the requirement of Standard 303(b)(2), law schools are encouraged to promote opportunities for law student pro bono service that incorporate the priorities established in Model Rule 6.1. In addition, law schools are encouraged to promote opportunities for law students to provide over their law school career at least 50 hours of pro bono service that complies with Standard 303(b)(2).

Pro bono and public service opportunities need not be structured to accomplish any of the outcomes required by Standard 302. Standard 303(b)(2) does not preclude the inclusion of credit-granting activities within a law school’s overall program of law-related pro bono opportunities so long as law-related non-credit bearing initiatives are also part of that program.

Interpretation 303-4

Law-related public service activities include (i) helping groups or organizations seeking to secure or protect civil rights, civil liberties, or public rights; (ii) helping charitable, religious, civic, community, governmental, and educational organizations not able to afford legal representation; (iii) participating in activities providing information about justice, the law or the legal system to those who might not otherwise have such information; and (iv) engaging in activities to enhance the capacity of the law and legal institutions to do justice.

2. Standard 304: Simulation Courses, Clinics, and Field Placements

Standard 304. EXPERIENTIAL COURSES, SIMULATION COURSES, LAW CLINICS, AND FIELD PLACEMENTS

(a) Experiential courses satisfying Standard 303(a) are simulation courses, law clinics, and field placements that must be primarily experiential in nature and must:

(1) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302;

(2) develop the concepts underlying the professional skills being taught;

(3) provide multiple opportunities for performance;
(4) provide opportunities for student performance, self-evaluation, and feedback from a faculty member, or, for a field placement, a site supervisor; 

(5) a classroom instructional component; or, for a field placement, a classroom instructional component, regularly scheduled tutorials, or other means of ongoing, contemporaneous, faculty-guided reflection; and

(6) provide direct supervision of the student’s performance by the faculty member; or, for a field placement, provide direct supervision of the student’s performance by a faculty member or a site supervisor.

(b) (c) A simulation course provides substantial experience not involving an actual client, that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member, and (2) includes the following:

(i) direct supervision of the student’s performance by the faculty member;

(ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and

(iii) a classroom instructional component.

(c) (b) A law clinic provides substantial lawyering experience that (1) involves advising or representing one or more actual clients or serving as a third-party neutral, and (2) includes the following:

(i) direct supervision of the student’s performance by a faculty member;

(ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and

(iii) a classroom instructional component.

(d) (c) A field placement course provides substantial lawyering experience that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a setting outside a law clinic under the supervision of a licensed attorney or an individual otherwise qualified to supervise, and (2) includes the following:

(i) direct supervision of the student’s performance by a faculty member or site supervisor;

(ii) opportunities for performance, feedback from either a faculty member or a site supervisor, and self-evaluation; and

(iii) a written understanding among the student, faculty member, and a person in authority at the field placement that describes both (A) the substantial lawyering experience and opportunities for performance, feedback and self-evaluation; and (B) the respective roles of faculty and any site supervisor in supervising the student and in assuring the educational quality of the experience for the student, including a clearly articulated method of evaluating the student’s academic performance;
(iii) (vi) a method for selecting, training, evaluating and communicating with site supervisors, including regular contact between the faculty and site supervisors through in-person visits or other methods of communication that will assure the quality of the student educational experience. When appropriate, a school may use faculty members from other law schools to supervise or assist in the supervision or review of a field placement program;

(ii) (iv) a classroom instructional component, regularly scheduled tutorials, or other means of ongoing, contemporaneous, faculty-guided reflection; and

(iii) (vii) sufficient control of the student experience to ensure that the requirements of the Standard are met. The law school must maintain records to document the steps taken to ensure compliance with the Standard, which shall include, but is not necessarily limited to, the written understandings described in Standard 304(c)(iii)(d)(i).

(c) (d) Credit granted for such a simulation, law clinic, or field placement course shall be commensurate with the time and effort required and the anticipated quality of the educational experience of the student.

(f) (e) Each student in such a simulation, law clinic, or field placement course shall have successfully completed sufficient prerequisites or shall receive sufficient contemporaneous training to assure the quality of the student educational experience.

Interpretation 304-1

To qualify as an experiential course under Standard 303, a simulation, law clinic, or field placement must also comply with the requirements set out in Standard 303(c)(ii). When appropriate, a school may use faculty members from other law schools to supervise or assist in the supervision or review of a field placement program.

3. Standard 305: Other Academic Study

Standard 305. OTHER ACADEMIC STUDY

(a) A law school may grant credit toward the J.D. degree for courses that involve student participation in studies or activities in a format that does not involve attendance at regularly scheduled class sessions, including, but not limited to, moot court, law review, and directed research.

(b) Credit granted for such a course shall be commensurate with the time and effort required and the anticipated quality of the educational experience of the student.

(c) Each student’s educational achievement in such a course shall be evaluated by a faculty member.

Interpretation 305-1
To qualify as a writing experience under Standard 303, other academic study must also comply with the requirement set out in Standard 303(a)(2). To qualify as an experiential course under Standard 303, other academic study must also comply with the requirements set out in Standard 303(a)(3).

4. Standard 306: Distance Education

Standard 306. DISTANCE EDUCATION

(a) A distance education course is one in which students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously.

(b) Credit for a distance education course shall be awarded only if the academic content, the method of course delivery, and the method of evaluating student performance are approved as part of the school’s regular curriculum approval process.

(c) A law school shall have the technological capacity, staff, information resources, and facilities necessary to assure the educational quality of distance education.

(d) A law school may award credit for distance education and may count that credit toward the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction required by Standard 311(b) if:

1. there is opportunity for regular and substantive interaction between faculty member and student and among students;
2. there is regular monitoring of student effort by the faculty member and opportunity for communication about that effort; and
3. the learning outcomes for the course are consistent with Standard 302.

(e) A law school shall not grant a student more than a total of 15 credit hours toward the J.D. degree for courses qualifying under this Standard. A law school may grant a student up to one-third of the credit hours required for the J.D. degree for distance education courses qualifying under this Standard. A law school may grant up to 10 of those credits during the first one-third of a student’s program of legal education.

(f) A law school shall not enroll a student in courses qualifying for credit under this Standard until that student has completed instruction equivalent to 28 credit hours toward the J.D. degree.

(g) A law school shall establish an effective process for verifying the identity of students taking distance education courses and that also protects student privacy. If any additional student...
charges are associated with verification of student identity, students must be notified at the time of registration or enrollment.

Interpretation 306-1
Technology used to support a distance education course may include, for example:

(a) The Internet;
(b) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;
(c) Audio and video conferencing;
(d) Video cassettes, DVDs, and CD-ROMs, if the cassettes, DVDs, or CD-ROMs are used in a course in conjunction with any of the technologies listed in paragraphs (a) through (c).

Methods to verify student identity as required in Standard 306(a) include, but are not limited to:
(i) a secure login and pass code, (ii) proctored examinations, and (iii) other technologies and practices that are effective in verifying student identity. As part of the verification process, a law school shall verify that the student who registers for a class is the same student that participates and takes any examinations for the class.

5. Standard 307: Studies, Activities, and Field Placements Outside the United States

(a) A law school may grant credit for study outside the United States that meets the requirements of the Criteria adopted by the Council;
(b) A law school may grant credit for field placements outside the United States that meet the requirements of Standard 304;
(c) A law school may grant up to two-thirds of the credits required for the J.D. degree for study outside the United States provided the credits are obtained in a program sponsored by an ABA-approved law school. Programs sponsored by an ABA-approved law school include programs held in accordance with the Criteria for Approval of Foreign Summer and Intersession Programs Established by ABA-Approved Law Schools; and field placements outside the United States;
(d) A law school may grant up to a maximum of one-third of the credits required for the J.D. degree for any combination of 1) student participation in study outside the United States under the Criteria for Acceptance Credit for Student Study at a Foreign Institution and 2) credit for courses completed at a law school outside the United States in accordance with Standard 505(c);
(e) Credit hours granted pursuant to subsections (b), (c) and (d) shall not in combination exceed two-thirds of the total credits required for the J.D. degree.
A student participating in study outside the United States must have successfully completed sufficient prerequisites or must contemporaneously receive sufficient training to assure the quality of the student educational experience.

Standard 307. STUDIES, ACTIVITIES, AND FIELD PLACEMENTS OUTSIDE THE UNITED STATES

(a) A law school may grant credit for (1) studies or activities outside the United States that are approved in accordance with the Rules of Procedure and Criteria as adopted by the Council and (2) field placements outside the United States that meet the requirements of Standard 304 and are not held in conjunction with studies or activities that are approved in accordance with the Rules of Procedure and Criteria as adopted by the Council.

(b) The total credits for student participation in such studies or activities may not exceed one-third of the credits required for the J.D. degree.

Interpretation 307-1

The three Criteria adopted by the Council are the Criteria for Approval of Foreign Summer and Intersession Programs Established by ABA-Approved Law Schools, the Criteria for Approval of Foreign Semester and Year-Long Study Abroad Programs Established by ABA-Approved Law Schools, and the Criteria for Accepting Credit for Student Study at a Foreign Institution.

Interpretation 307-2

For purposes of Standard 307, a brief visit to a country outside the United States that is part of a course offered and based primarily at the law school and approved through the school’s regular curriculum approval process is not considered to be studies outside the United States.


(a) A law school shall maintain a law library that:

(1) provides support through expertise, resources, and services adequate to enable the law school to carry out its program of legal education, accomplish its mission, and support scholarship and research;

(2) develops and maintains a direct, informed, and responsive relationship with the faculty, students, and administration of the law school;

(3) working with the dean and faculty, engages in a regular planning and assessment process, including assessment of the effectiveness of the library in achieving its mission and realizing its established goals; and

(4) remains informed on and implements, as appropriate, technological and other developments affecting the library’s support for the law school’s program of legal education.

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(3) working with the dean and faculty, engages in a regular planning and assessment process, including assessment of the effectiveness of the library in achieving its mission and realizing its established goals; and

(4) remains informed on and implements, as appropriate, technological and other developments affecting the library’s support for the law school’s program of legal education.
(b) A law school shall provide on a consistent basis sufficient financial resources to the law library to enable it to fulfill its responsibilities of support to the law school and realize its established goals.
The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (House) for its concurrence, the changes to the following ABA Standards and Rules of Procedure for Approval of Law Schools:

1. Standard 303: Curriculum
2. Standard 304: Simulation Courses, Clinics, and Field Placements
3. Standard 305: Other Academic Study
4. Standard 306: Distance Education
5. Standard 307: Studies, Activities, and Field Placements Outside the United States

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the Council of the Section of Legal Education and Admissions to the Bar files a resolution to the House seeking concurrence of the House in any actions of the Council to adopt, revise, or repeal the ABA Standards and Rules of Procedures for Approval of Law Schools. The House may either concur with the Council’s decision or refer the decision back to the Council for further consideration. A decision by the Council is subject to a maximum of two referrals back to the Council by the House. The decision of the Council following the second referral shall be final.

The amendments to Standards 303, 304, and 305 were approved by the Council for Notice and Comment during its meeting held on November 3-4, 2017. A public hearing was held on April 12, 2018. The amendments to Standards 306 and 307 were approved by the Council for Notice and Comment during its meeting held on February 22, 2018. A public hearing was held on April 12, 2018. The Council approved the amendments at its meeting on May 11, 2018.

1. Standard 303: Curriculum
2. Standard 304: Simulation Courses, Clinics, and Field Placements
3. Standard 305: Other Academic Study

The revisions adopted by the Council move the general definition of what an experiential course must contain from Standard 303(a)(3) to Standard 304(a). Duplicative language defining simulation, clinic, and field placement in Standard 304 was deleted. Finally, the cross references in Standards 303, 304, and 305 were changed to reflect the recommended changes.

During the comment period and at the public hearing, the Clinical Legal Education Association questioned the removal of key language in proposed Standard 304 when the intent of the Committee was not to make any substantive changes but, rather, to remove redundancies and streamline Standards 303 and 304. The Standards Review Committee agreed and recommended that the Council reinsert language requiring that experiential courses must be “primarily experiential in nature,” and language clarifying the phrase “direct supervision of the student’s performance by the faculty member.”


The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (House) for its concurrence, the changes to the following ABA Standards and Rules of Procedure for Approval of Law Schools:

1. Standard 303: Curriculum
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The revisions adopted by the Council move the general definition of what an experiential course must contain from Standard 303(a)(3) to Standard 304(a). Duplicative language defining simulation, clinic, and field placement in Standard 304 was deleted. Finally, the cross references in Standards 303, 304, and 305 were changed to reflect the recommended changes.

During the comment period and at the public hearing, the Clinical Legal Education Association questioned the removal of key language in proposed Standard 304 when the intent of the Committee was not to make any substantive changes but, rather, to remove redundancies and streamline Standards 303 and 304. The Standards Review Committee agreed and recommended that the Council reinsert language requiring that experiential courses must be “primarily experiential in nature,” and language clarifying the phrase “direct supervision of the student’s performance by the faculty member.”

The additional language was approved by the Council and is reflected in the text of the proposed revisions in this resolution.

4. Standard 306: Distance Education

The proposal raises the number of distance education credit hours permitted from 15 credits to up to one-third of the credits required for the J.D. degree. Under this proposed revision, law schools would be permitted to grant 10 of those distance education credit hours in the first year. The current structure of the Standard is familiar and avoids any confusion that might be caused by a different approach. The current definition of a distance education course is also retained: A distance education course is one in which students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously.

Interpretation 306-1 has been deleted because the description of the types of technology that can be used to support distance education is outdated and unnecessary.

One comment was received in support of the proposal and no testimony was presented on this topic at the public hearing.

5. Standard 307: Studies, Activities, and Field Placements Outside the United States

The overarching goal of the proposed changes to Standard 307 was to address two matters: (a) how the Standards and Criteria deal with field placements that are located outside the United States; and (b) the total amount of credits that may be earned toward the J.D. for studies outside the United States.

First, the current Standard states that studies must be “approved in accordance with the Rules and the Criteria.” The Criteria for Foreign Summer and Intersession Programs Offered by ABA-Approved Law Schools in a Location Outside the United States; the Criteria for Approval of Foreign Semester and Year-Long Study Abroad Programs Established by ABA-Approved Law Schools, and the Criteria for Accepting Credit for Student Study at a Foreign Institution (collectively, the “Criteria”) no longer require approval of all programs; thus, the word “approval” is no longer appropriate. Further, there is no need to mention the Rules of Procedure in Standard 307. As revised, the proposed draft of Standard 307(a) would be amended to read: “A law school may grant credit for study outside the United States that meets the requirements of the Criteria adopted by the Council.”

Further, there is a need to clarify the rules on foreign field placements. Standard 304 with respect to field placements makes no distinction between domestic and foreign field placements. Proposed subsection (b) clarifies that foreign field placements must meet the requirements of Standard 304. The proposed draft includes a reference to field placements in subsection (c) to clarify that foreign field placements count toward the maximum of credits allowed for study outside the United States. The two-third credit limitation would thus also include field placement credits obtained outside of the United States.
There is also confusion about the limits the Standards impose on the number of credits allowed toward the J.D. degree for studies outside the United States. The proposed changes to the Standards clarify the matter. The proposal distinguishes between studies outside the United States that are operated and sponsored by an ABA-approved law school and studies at a foreign institution. The draft proposes that law schools be permitted to grant up to two-thirds of the credits required for the J.D. degree in study outside the United States, but that only one-third of those credits may be from study at a foreign institution. See subsection (c) of the proposed amendments. Studies that are sponsored by an ABA-approved law school include programs held in accordance with the Criteria for Approval of Foreign Summer and Intersession Programs Established by ABA-Approved Law Schools; programs held in accordance with the Criteria for Approval of Foreign Semester and Year-Long Study Abroad Programs Established by ABA-Approved Law Schools; and field placements outside the United States. Study at a foreign institution includes any credit given under Standard 505 for prior law study at a foreign institution, as well as any credit given under the Criteria for Accepting Credit for Student Study at a Foreign Institution.

Finally, there is a need to clarify how the limit on study outside the United States in Standard 307 interacts with the limit on credit for prior law study outside the United States provided in Standard 505. The draft proposes in subsection (d) that law schools be permitted to grant up to one-third of the credits required for the J.D. degree for study at a foreign institution, including both credit for prior law study under Standard 505 and credit for student study at a foreign institution.

The Criteria for Approval of Foreign Summer and Intersession Programs Established by ABA-Approved Law Schools were amended recently and no longer include a provision prohibiting foreign study before a student has completed one year of full- or part-time study because the Council concluded that such a provision should be in the Standards, if anywhere. The draft proposes that subsection (f) of Standard 307 be amended to permit foreign study so long as a student has successfully completed sufficient prerequisites or contemporaneously receives sufficient training to assure the quality of the student educational experience undertaken outside the United States.

No written comments were received regarding the proposal and no testimony was presented on this topic at the public hearing.


The current version of Standard 601(a)(3) was developed during the Comprehensive Review as a method of involving a law library in the process of strategic planning required of a law school. It was envisioned that the planning and assessment taking place for a law school (under what was then Standard 203 Strategic Planning and Assessment) would incorporate the work done by the library under this new Standard. To ensure that incorporation, it was decided that a written assessment should be completed by the library.

However, when then Standard 203 was replaced during a later phase of the Comprehensive Review with the requirement of a law school self-study and self-assessment, no change was made to the new Standard 601. As a result, the library community has been left confused as to what is required to comply with 601(a)(3). For example: Does a written assessment require an annual report? Must
a survey of user satisfaction be conducted to develop an assessment? How often must the written report be prepared?

It is appropriate for a law library to engage in the process of planning and assessment. This process helps the staff to achieve the goals set out in the rest of Standard 601. However, the requirement that the assessment be written is excessive, not required of any other unit of the law school, and has led to confusion for both library directors and the Accreditation Committee. This can be resolved simply by removing the requirement that the assessment be “written.” By making this change, a law library and a law school can determine how best to develop a method of assessment that meets the needs of the institution.

The Society of American Law Library Directors and the American Association of Law Libraries sent written comments and urged that the Standard not be changed and that a “written” assessment be retained as a requirement. No testimony was presented on this topic at the public hearing.

The Standards Review Committee and the Council considered the comments but makes no changes to the proposal as written. The requirement of a written assessment plan for the library continues to cause difficulty for the Accreditation Committee and confusion for site teams and law schools having site visits.

Law schools are still required to prepare periodic self-studies and self-assessments under Standard 204 and are required to conduct an ongoing evaluation as required under Standard 315 Evaluation of the Program of Legal Education, Learning Outcomes, and Assessment Methods.

Sincerely,

Maureen A. O’Rourke
Dean, Boston University School of Law
Chair, Council of the Section of Legal Education and Admissions to the Bar

August 2018
1. **Summary of Resolution(s).**

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2018 to the following ABA Standards and Rules of Procedure for Approval of Law Schools:

1. Standard 303: Curriculum
2. Standard 304: Simulation Courses, Clinics, and Field Placements
3. Standard 305: Other Academic Study
4. Standard 306: Distance Education
5. Standard 307: Studies, Activities, and Field Placements Outside the United States

2. **Approval by Submitting Entity.**

The amendments to Standards 303, 304, and 305 were approved by the Council for Notice and Comment during its meeting held on November 3-4, 2017. A public hearing was held on April 12, 2018. The amendments to Standards 306 and 307 were approved by the Council for Notice and Comment during its meeting held on February 22, 2018. A public hearing was held on April 12, 2018. The Council approved the amendments at its meeting on May 11, 2018.

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 amendments modify the existing ABA Standards and Rules of Procedure for Approval of Law Schools.

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 Council will notify ABA-approved law schools and other interested entities of the approved changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*. The Council and the Managing Director’s Office will prepare guidance memoranda and training materials regarding the revised Standards, as necessary.

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

None.

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

Not applicable.

10. **Referrals.**

The amendments were posted on the Section’s website and circulated for Notice and Comment to the following interested persons and entities:

- ABA Standing and Special Committees, Task Forces, and Commission Chairs;
- ABA Section Directors and Delegates;
- Conference of Chief Justices;
- National Conference of Bar Presidents;
- National Association of Bar Executives;
- Law Student Division;
- SBA Presidents;
- National Conference of Bar Examiners;
- University Presidents;
- Deans and Associate Deans; and

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 Council will notify ABA-approved law schools and other interested entities of the approved changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*. The Council and the Managing Director’s Office will prepare guidance memoranda and training materials regarding the revised Standards, as necessary.

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

None.

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

Not applicable.

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- Law Student Division;
- SBA Presidents;
- National Conference of Bar Examiners;
- University Presidents;
- Deans and Associate Deans; and
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Barry A. Currier, Managing Director
American Bar Association
Section of Legal Education and Admissions to the Bar
321 N. Clark St.
Chicago, IL 60654-7598
Ph: (312) 988-6744 / Cell: (310) 400-2702
Email: barry.currier@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.)

Joan S. Howland
Associate Dean and Professor
University of Minnesota Law School
Walter F. Mondale Hall
Room 120
229 19th Avenue South
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Email: howla001@umn.edu

The Honorable Solomon Oliver, Jr.
Chief Judge
U.S. District Court for the Northern District of Ohio
Carl B. Stokes United States Courthouse
801 West Superior Avenue
Cleveland, OH 44113
Ph: (216) 357-7171 / Cell: (216) 973-6496
Email: solomon.oliveri@ohnd.uscourts.gov
EXECUTIVE SUMMARY

1. Summary of the Resolution

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2018 to the following ABA Standards and Rules of Procedure for Approval of Law Schools:

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3. Standard 305: Other Academic Study
4. Standard 306: Distance Education
5. Standard 307: Studies, Activities, and Field Placements Outside the United States

2. Summary of the Issue that the Resolution Addresses

1. Standard 303: Curriculum
2. Standard 304: Simulation Courses, Clinics, and Field Placements
3. Standard 305: Other Academic Study

The proposal moves the general definition of what an experiential course must contain from Standard 303(a)(3) to Standard 304(a). Duplicative language defining simulation, clinic, and field placement in Standard 304 was deleted. Finally, the cross references to the Standards in the Interpretations were changed to reflect the recommended changes.

4. Standard 306: Distance Education

The proposal raises the number of distance education credit hours permitted from 15 credits to up to one-third of the credits required for the J.D. degree. Under this proposed revision, law schools would be permitted to grant 10 of those distance education credit hours in the first year. The current structure of the Standard is familiar and avoids any confusion that might be caused by a different approach. The current definition of a distance education course is also retained.

5. Standard 307: Studies, Activities, and Field Placements Outside the United States

The overarching goal of the proposed changes to Standard 307 is to address two matters: (a) how the Standards and Criteria deal with field placements that are located outside the United States; and (b) the total amount of credits that may be earned toward the J.D. for studies outside the United States.


The proposal eliminates the requirement that the assessment of the effectiveness of the library in achieving its mission and realizing its established goals must be in writing.
3. Please Explain How the Proposed Policy Position will address the issue

The proposals amend the 2017-2018 ABA Standards and Rules of Procedure for Approval of Law Schools.

4. Summary of Minority Views

None.
RESOLVED, That the American Bar Association supports in principle the Inter-American
Convention on Protecting the Human Rights of Older Persons and encourages the United
Nations, operating through its Open-Ended Working Group on Ageing or similar process, to
draft a convention on the rights of older persons, considering the Organization of American
States Convention as an instructive precedent.
On June 15, 2015, the General Assembly of the Organization of American States (OAS) approved the Inter-American Convention on Protecting the Human Rights of Older Persons during its General Assembly. It is the first international human rights convention focused on the rights of older persons. The purpose of the Convention is stated in Article 1: “to promote, protect and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons, in order to contribute to their full inclusion, integration, and participation in society.” As of March 2018, the convention has been signed and ratified by the governments of Argentina, Bolivia, Chile, Costa Rica and Uruguay. Brazil has signed the convention but not yet ratified it.


This resolution recognizes the historic nature of the convention, supports its purpose in principle, and calls on the United Nations to use it as a springboard to the creation of a U.N. Convention on the Rights of Older Persons, an option that has been under consideration by the U.N. Open-ended Working Group on Ageing since 2010. The ABA has participated in the meetings of the Working Group through an appointed liaison since the House of Delegates adopted the following resolution in August 2011:

That the American Bar Association urges the United States Department of State and the United Nations and its member states to support the ongoing processes at the United Nations and the Organization of American States to strengthen protection of the rights of older persons, including the efforts and consultations towards an international and regional human rights instrument on the rights of older persons.

The debate in the U.N. Working Group among member states has been characterized by stark differences in views over the need for a convention, although the participating non-governmental organizations have been uniformly in support of a convention. This resolution goes one step further than the 2011 resolution above by expressly calling on the U.N. to begin the process of drafting a convention on the rights of older persons, considering the OAS convention as a useful precedent on which to build and revise as needed.

We know from experience that a rights treaty is not a magic bullet, but it will serve as a very important tool to bring about a better future for older people. The rationale for the convention rests on a recognition that, while all existing conventions addressing human rights and fundamental freedoms apply to older persons, they lack specificity and coherence in addressing the special circumstances of older persons as a group; and in their enforcement, they have consistently been inadequate in protecting the human rights deficiencies experienced by older persons.

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A U.S. State Department official expressed the United States' position on the OAS convention, or on any other convention on the rights of older persons, in the following response to a query on August 11, 2016:

[The U.S. has consistently opposed the negotiation of new legally binding instruments on the rights of older persons. The U.S. recognizes the importance of using the OAS and the UN to address the challenges older persons face in this hemisphere and throughout the world, including the enjoyment of their human rights. However, the U.S. does not believe that a regional convention is necessary to ensure that the human rights of older persons are protected. Rather than promoting a new instrument, the U.S. believes resources of the OAS and its member states should be used to identify practical steps that governments in the Americas might adopt to combat discrimination against older persons, including best practices in the form of national legislation and enhanced implementation of existing international human rights treaties. In doing so, such efforts should be aimed at addressing immediately and in practical ways the challenges faced by older persons.]

While the U.S. has not been a supporter of a convention up to this point, international thinking and activities concerning the aging of the planet’s population suggest considerable momentum toward a need to recognize the special circumstances of older persons in a rights-based instrument.

Current Landscape of Human Rights and Aging

The demographics are daunting. Worldwide, persons age 60 years and older numbered 607 million in the year 2000, or 9 percent of the world population. By 2015 the number rose to 901 million, or over 12% of the population. By 2050, the global population of older persons is projected to reach nearly 2.1 billion, or 21.5% of the global population. Moreover, the number of people aged 80 years or over, the “oldest-old” persons, is growing even faster. In 2000, there were 71 million people aged 80 or over worldwide. By 2050, that number is projected to increase to 434 million, a more than six-fold increase in its size in 2000. The growth rate is not uniform everywhere. Two thirds of the world’s older persons live in the developing regions and their numbers are growing faster there than in the developed regions. Gender differences are also important. In 2015, women accounted for 54 percent of the global population aged 60 years or over and 61 percent of those aged 80 years or over in 2015. Older women are especially vulnerable to multiple discrimination, based on age, gender, race, and other characteristics.

Older persons in large and growing numbers suffer unique human rights shortcomings around the world. They too often struggle on the margins of society because of discriminatory views on aging. We may not see this as frequently in the United States, but we do see it. Conditions vary widely worldwide and abuses are too common. Older men and women are often denied access

1 Email communication from Judith Heumann, Special Advisor for International Disability Rights. U.S. Department of State, August 11, 2016, to Charles Subatino, ABA Commission on Law and Aging.

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to services, jobs, pensions and other financial supports, and adequate health and long-term care, including person-centered end-of-life care. Older individuals are unduly vulnerable to abuse, neglect, and poverty. While there are a good number of existing human rights instruments and mechanisms that, in theory, offer potential to protect the rights of older persons, this potential is seriously diluted by the lack of specificity, depth, comprehensiveness, and consistency.

The above is not meant to suggest that international law completely ignores rights protection for older persons. The UN’s first rights document after WWII, the non-binding Universal Declaration of Human Rights, contains this in Article 25, paragraph 1:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.3 (Emphasis added)

Only three of nine legally binding UN rights instruments make even brief reference to the circumstances of older people: the Migrant Workers Convention; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and the Convention on the Rights of Persons with Disabilities (CRPD). However, only the Migrant Workers Convention prohibits discrimination on the basis of age, a provision which obviously excludes those who are not migrant workers.4 CEDAW provides for the equal right of women to social security in old age, and it offers some protection against sexist inheritance practices.5 The CRPD requires states to provide services to prevent and minimize further disabilities among older people and to provide “age appropriate” or “age sensitive” measures for persons with disabilities.6

Nevertheless, human rights law is largely silent on important topics such as:

- Rights within community-based and long-term care settings, both for the caregiver and for the person receiving care.
- Legal planning mechanisms for older age.
- The abolition of mandatory retirement ages.
- Legal capacity and equality before the law for older women and men under guardianship or diagnosed with dementia.
- The right to access to health care, which in existing human rights instruments, fails to address nursing homes and other institutional isolation and rights to home and community-based care.
- End-of-life rights, including access to palliative care.
- Elder abuse and exploitation in its many forms across cultures, including violence as a result of witchcraft accusations in some cultures.

4 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 7; CRPD Article 25 (b) Article 28 (2) (b) Article 13, Article 16.
5 CEDAW, Article 11.1 (e).
6 CRPD Article 25 (b) Article 28 (2) (b) Article 13, Article 16.

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- Elder abuse and exploitation in its many forms across cultures, including violence as a result of witchcraft accusations in some cultures.
International human rights standards for identified vulnerable populations (women, children, refugees, persons with disabilities) have gained increasing recognition in contemporary society. However, older persons as a group have not been a high priority beneficiary of this attention. In response to this perceived shortcoming, a growing advocacy effort among both non-governmental and governmental organizations has sought to bring about a convention drafting and approval process directly addressing the human rights of older persons. This effort produced the first regional international convention on human rights and aging, approved by the Organization of American States.

Other related efforts demonstrate a growing worldwide awareness of a need to hone in on the human rights of older persons. The United Nations Open-Ended Working Group on Ageing has met at least annually since 2010 and continues its deliberations. See http://social.un.org/ageing-working-group.

In addition, the U.N. Human Rights Council announced, in May, 2014, the appointment of an Independent Expert “on the full enjoyment of the human rights of all older persons.” During her initial 3-year term, the Independent Expert was specifically tasked with assessing how existing international human rights instruments have been implemented in relation to older people’s rights, identifying both good practices and implementation gaps. Along with other specified duties, the Independent Expert produced a comprehensive report on her findings and recommendations in July of 2016.

The African Union has been active, since 2009, considering a draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa. The draft Protocol received the full support of the African Commission on Human and Peoples’ Rights and was adopted during the 26th African Union Summit which took place in January 2016. It is open to ratification by Member States of the African Union. See www.achpr.org/mechanisms/older-disabled.

The European states have also begun to focus on the human rights of older persons in recent years. In February 2014, the Council of Europe adopted the first European instrument dealing specifically with the full spectrum of human rights of older persons, – Recommendation CM/Rec(2014)2 of the Committee of Ministers recommends a range of measures to be taken by Member States in order to combat discrimination based on old age and covers the major rights challenges facing older persons: non-discrimination; autonomy and participation; protection from violence and abuse; social protection and employment; care; and administration of justice. See https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000010607e646f.

The European Union has no special instrument addressing older persons, although the EU Charter of Fundamental Rights does contain one sentence on the rights of the elderly: “The

Rights to economic security in the face of worldwide population aging.

Existing human rights law only offers limited protection against the negative impact of the actions of the private sector and individuals within families.

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Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.⁷

The United Nations and its instrumentalities have issued some 17 documents on aging since 1948, including declarations, principles, resolutions, plans of action, and proclamations. However, none of these rises to the level of a binding treaty. Most provisions affecting older persons that are recognized in treaties and other instruments protect economic, social and cultural rights. These types of treaties identify standards for progressive implementation. Such categorization tends to imply that these rights are programmatic aspirations - in contrast with civil and political rights, which are of immediate application. In other words, they are "soft law" - they lack sanctions for non-compliance or infringements. Though it applies only to the Americas, the Inter-American Convention on Protecting the Human Rights of Older Persons is the first international convention providing mandatory rights recognition and protection for older persons.

It is noteworthy that the comprehensive report of the U.N. Independent Expert to the Human Rights Council, favorably highlights the OAS convention as a model practice, stating:

The Convention is an example of good practice that could inspire other regions, as it allows States to strengthen cohesion and normative action and to clarify States' obligations with regard to the rights of older persons.⁸

The need for an international convention on the rights of older persons has been recognized for some time. In a 2003 analysis, Professors Diego Rodriguez-Pinzon and Claudia Martin of the Academy on Human Rights and Humanitarian Law at the American University provided a detailed overview of the different types of international human rights and the various international regional systems of protection that relate to varying extents to older persons.⁹ These authors concluded that older persons are the only group in need of the special protection (unlike women, children, persons with disabilities, etc.) that do not have an international instrument to protect their rights; the current international instruments are not providing adequate answer to their needs. Thus, they recommended that any future action or plan for the elderly should consider creation of a legal instrument and supervising body for the rights of older persons. The Inter-American Convention fulfills that recommendation.

The Inter-American Convention

The Inter-American Convention on Protecting the Human Rights of Older Persons provides a comprehensive statement of broadly defined human rights as specifically applied to older persons, especially in connection with respect to circumstances unique to or disproportionately affecting older persons. For example, the convention defines key terms not addressed in other

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⁷ EU Charter of Fundamental Rights, Article 25.
treaties, such as age discrimination in old age, multiple discrimination, palliative care, active and healthy aging, and long-term care services. Starting with a set of general principles, the convention then sets forth 27 specific protected rights. Quite different views have been expressed within the ABA about the appropriateness or breadth of certain rights and their practical implications, as well as certain of the enforcement provisions, but there is unanimity in support for the explicit recognition of the rights of older persons in a binding international instrument. Moreover, the ABA did not play any role in influencing the OAS drafting process. In the United Nations process, the input of the ABA and other non-governmental organizations has been welcomed.

The driving principal of the Inter-American Convention is embraced by this resolution. That principle calls for a fundamental change in the social paradigm of aging. Older persons must be seen as legitimate, productive, and important rights holders in an aging world, rather than perceived as merely a vulnerable and no-longer-productive group that makes unwarranted claims on public resources. The Preamble of the Inter-American Convention espouses:

the need to address matters of old age and ageing from a human-rights perspective that recognizes the valuable current and potential contributions of older persons to the common good, to cultural identity, to the diversity of their communities, to human, social, and economic development, and to the eradication of poverty.

A rights-based perspective is the missing element in several decades of U.N. activities on aging. In 1982, the First World Assembly on Ageing adopted the International Plan of Action on Ageing. The “Vienna Plan” was the first international instrument on aging that aimed to provide a roadmap to strengthen the capacities of governments and civil society to deal effectively with the aging of populations. Building on gaps in that plan, the General Assembly adopted the U.N. Principles on Older Persons in 1991. These principles specifically promoted the rights of older persons but without any authority to enforce them. In 2002, the Second World Conference on Ageing in Madrid adopted the “Madrid International Plan of Action on Aging” or MIPAA to strengthen efforts toward goals not met by the prior two instruments. MIPAA called for the promotion and protection of all human rights and fundamental freedoms, including the right to development, the need to include aging in global agendas, and the need to combat discrimination based on age.

The U.N. Commission for Social Development evaluated MIPAA after ten years and then 20 years. Its 20-year review found that the goals of the Plan overall have not been met. Among the Commission’s findings:

- Implementation continued to be weak. Gaps between policy and practice and the mobilization and/or building of sufficient human and financial capacities remained a major constraint. Ten years after its adoption, the Madrid Plan of Action had made only limited headway in national development plans. The mainstreaming of aging issues saw little progress by any yardstick….

- Recommendations for action proposed in the strategic implementation framework through 2012 had only limited impact on the situation of older persons. Awareness of the
The flaw in relying only on aspirational road maps and identifying best practices is that they have no teeth. They lack a rights-based mandate and enforceability mechanism.

This conclusion is reinforced by the findings of the U.N. High Commissioner for Human Rights whose office did an analysis of the normative standards in international human rights laws in 2012 and concluded:

The analysis supports the view that there is a demonstrable inadequacy of protection arising from normative gaps, as well as fragmentation and a lack of coherence and specificity of standards as they relate to the experience of older persons. 11

Rationale for ABA Action and Existing ABA Policy

The ABA has the ability and the stature to play a key role in shaping U.S. policy with respect to human rights and international conventions. The ABA brings to the table the legal expertise and a long history of human rights values that adds recognized credibility in helping to shape positions taken by the Administration. The ABA can serve in a leadership role to advocate for the first ever binding treaty that articulates with specificity human rights principles as they apply to the aging members of our aging society.

The ABA has supported other conventions in recent years such as the Convention on the Rights of Persons with Disabilities (2010), the Convention on the Rights of the Child (1991), and the Convention on the Elimination of All forms of Discrimination against Women (1996), all of which have been signed but not ratified by the United States. On the subject of international aging, the ABA adopted the 2011 resolution quoted at the beginning of this report.

ABA policy has consistently been supportive of the creation of a regional and international human rights instrument on aging. The ABA has also acted on that goal by appointing a liaison to the U.N. Open-Ended Working Group on Aging in 2012. 12 The present resolution builds upon the momentum created by the OAS convention and can be used by the ABA as a springboard and precedent to energize efforts to move the United Nations toward the goal of drafting a U.N. convention on the rights of older persons.

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Conclusion

The proposed policy acknowledges the human rights milestone represented by the OAS convention and enables the ABA to speak out clearly in support of the rights of older persons and to encourage the U.N. to move forward toward the drafting of U.N. convention, recognizing the OAS convention as a useful precedent. As a prominent advocate for international human rights and the rule of law, the ABA shoulders an especially important leadership role to advocate for and guide the drafting of a binding treaty that articulates with specificity human rights principles as they apply to the aging members of our aging society.

Respectfully submitted,

Hon. Patricia Banks, Chair
Commission on Law and Aging
August 2018

Steven M. Richman, Chair
Section of International Law
August 2018

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This resolution supports in principle the Inter-American Convention on Protecting the Human Rights of Older Persons adopted by the Organization of American States on June 15, 2105, and encourages the United Nations to move forward toward drafting a United Nations convention on the rights of older persons, using the convention as an instructive precedent.

The purpose of the Convention is to promote, protect, and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons in the Americas in order to contribute to their full inclusion, integration and participation in society. The United Nations has no specialized convention on the rights of older persons, but it does have an Open-Ended Working Group on Ageing that, among other things, is considering the need for such a convention.

2. Approval by Submitting Entity.

Approved by Commission on Law and Aging on April 20, 2018; and by the Section of International Law in April 25, 2018.

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

Yes, a somewhat related resolution sponsored by the Commission on Law and Aging that expressly called on the US to sign and ratify the OAS Convention was before the House of Delegates in August, 2017; but the resolution was voluntarily withdrawn to permit further dialogue on the contents of the resolution with the Section of International Law.

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

On the subject of international rights of older persons, the ABA adopted a resolution in August, 2011, to support emergent efforts to strengthen the protection of the rights of older persons, including consideration of an international convention. The resolution stated:

That the American Bar Association urges the United States Department of State and the United Nations and its member states to support the ongoing processes at the United Nations and the Organization of American States to strengthen protection of the rights of older persons, including the efforts and consultations towards an international and regional human rights instrument on the rights of older persons.
Thus, ABA policy clearly points toward the creation of a regional and/or international human rights instrument on aging. The ABA has also supported other specialized conventions in recent years, such as the Convention on the Rights of Persons with Disability (2010), the Convention on the Rights of the Child (1991), and the Convention on the Elimination of All forms of Discrimination against Women (1996), all of which have been signed but not ratified by the United States.

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


As of March 2018, the OAS Convention had been signed and ratified by the governments of Argentina, Bolivia, Chile, Costa Rica and Uruguay. Brazil has signed the convention but not yet ratified it.

The U.N. Open-Ended Working Group on Ageing is scheduled to convene its 9th meeting in July, 2018, during which the drafting of a similar U.N. convention will continue to be urged by several States and most non-governmental organizations participating. However, the Working Group has made no formal decision or recommendation on the drafting of such a convention.

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

The policy will allow further consultations with the State Department to urge its consideration of the convention and will enable collaboration with other non-governmental organizations in advocacy for the convention, as well as in the drafting of a convention if and when the U.N. decides to proceed with that course.

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

None

9. Disclosure of Interest. (If applicable)

None

10. Referrals.

- Center for Human Rights
- Civil Rights and Social Justice
- Commission on Disability Rights
- Commission on Domestic and Sexual Violence
- Commission on Hispanic Legal Rights and Responsibilities
- Commission on Homelessness and Poverty
- Government and Public Sector Lawyers Division
- National Legal Aid & Defender Association
- Rule of Law Initiative
- Section of Administrative Law and Regulatory Practice

None

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- Rule of Law Initiative
- Section of Administrative Law and Regulatory Practice
Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

ABA Commission on Law and Aging
1050 Connecticut Ave., NW, Ste. 400
Washington, DC 20036
202-662-8686 (office)
charles.sabatino@americanbar.org

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.)

Commission on Law and Aging
312-968-0016
p0017b@sbcglobal.net
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution, submitted jointly by the Commission on Law and Aging and the Section on International Law, supports in principle the Inter-American Convention on Protecting the Human Rights of Older Persons adopted by the Organization of American States on June 15, 2105, and encourages the United Nations to move forward toward drafting a United Nations convention on the rights of older persons, using the convention as an instructive precedent.

2. Summary of the Issue that the Resolution Addresses

Older persons in large and growing numbers suffer unique human rights shortcomings around the world. They too often struggle on the margins of society because of discriminatory views on aging. We may not see this as frequently in the United States, but we do see it. Conditions vary widely worldwide and abuses are too common. Older men and women are often denied access to services, jobs, pensions and other financial supports, and adequate health and long-term care, including person-centered end-of-life care. Older individuals are unduly vulnerable to abuse, neglect, and poverty. While there are a good number of more general human rights instruments and mechanisms that, in theory, offer potential to protect the rights of older persons, this potential is seriously diluted by the lack of specificity, depth, comprehensiveness, and consistency.

The purpose of the OAS Convention is to promote, protect, and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons in the Americas in order to contribute to their full inclusion, integration and participation in society. The United Nations has no specialized convention on the rights of older persons, but it does have an Open-Ended Working Group on Ageing that, among other things, is considering the need for such a convention.

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

The resolution recognizes the historic nature of the Inter-American Convention on Protecting the Human Rights of Older Persons as an important precedent. It supports the convention in principle and not in all its specifics, because there are a variety of views within the ABA about the appropriateness or breadth of certain rights in the convention and their practical implications, as well as certain of the enforcement provisions. But, there is unanimity in support for the explicit recognition of the rights of older persons in a binding international instrument. The resolution can be used by the ABA as a springboard and precedent to energize efforts to move the United Nations toward the goal of drafting a U.N. convention on the rights of older persons. A U.N. convention, if undertaken, can provide a comprehensive statement on how existing broadly defined human rights specifically apply to older persons, especially in connection with respect to fundamental freedoms of older persons in the Americas in order to contribute to their full inclusion, integration and participation in society. The United Nations has no specialized convention on the rights of older persons, but it does have an Open-Ended Working Group on Ageing that, among other things, is considering the need for such a convention.

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circumstances unique to or disproportionately affecting older persons, such as discrimination based on age; multiple discrimination; palliative care; long-term care services and supports; a right to life and dignity in old age; a right to independence and autonomy; a right to participation and community integration; and a right to safety and a life free of violence of any kind.

4. Summary of Minority Views

None as of this writing.
RESOLVED, That the American Bar Association adopts the American Bar Association Model Code of Judicial Conduct for State Administrative Law Judges dated August 2018, as applied to members of the administrative judiciary. For purposes of this resolution, the administrative judiciary includes all individuals whose exclusive role in the administrative process is to preside and make decisions in judicial or quasi-judicial capacity in evidentiary proceedings, but does not include agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of an agency head; and

FURTHER RESOLVED, That the American Bar Association urges state, local, and territorial governments to enact and adopt ethical principles applicable to the administrative judiciary, as defined herein, in accordance with the Model Code.
Most of the text herein is based on the 2007 American Bar Association Model Code of Judicial Conduct which was approved by the House of Delegates of the American Bar Association and represents the policy of the American Bar Association. Please bear in mind that modifications to address the functions of administrative law judges have not been approved by the House and, thus, are not yet the policy of the American Bar Association.

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In 1989, following 12 years of effort, the Conference endorsed a Model Code for Federal Administrative Law Judges which was published by the ABA and has been circulated. Because of the widely differing systems of administrative adjudications at the state level, it was recognized that a separate Model Code for State Administrative Law Judges should be developed. The 1995 Model Code of Judicial Conduct for State Administrative Law Judges reflected the culmination of the efforts of the National Conference of the Administrative Law Judiciary (NCALJ), State Practices Committee (attached) chaired by Judge Edwin L. Felter, Jr., then Chief Administrative Law Judge of the Central Panel of the State of Colorado, and the NCALJ Committee on Ethics and Responsibility, chaired by Judge Ronnie Yoder (Federal), Judge Felter, Vice-Chair (State).

The 1995 Model Code was endorsed by the Executive Committee of the National Conference of Administrative Law Judges at the 1995 annual meeting in Chicago, Illinois. The conference approved the distribution of the code to state administrative law judges as a reference for them in considering their own conduct and for others in considering the Code of Judicial Conduct appropriately applicable to state administrative law judges. The Code was based upon the 1990 Model Code of Judicial Conduct of the American Bar Association (ABA) and the 1989 Model Code for Federal Administrative Law Judges, with modifications considered appropriate in adapting the Code for state administrative law judges. The 1995 Code assumed decisional independence by the covered administrative law judges and served as an aspirational code for hearing officers who are not guaranteed such decisional independence.

As noted in the Preface of the Model Code for federal administrative law judges.

"The Code has not been adapted to apply to state administrative law judges and hearing officers, because of the wide variations in the nature of those positions. See ABA Informal Opinion 86-1522 dated December 24, 1986, holding that, if the applicability of the ABA Model Code to federal administrative law judges is assumed, then they are 'judges' within the meaning of the Code and that applicability of the Code to state administrative law judges 'depends upon the facts of the particular case.'"
Most states have adopted some version of the State Model Administrative Procedure Act, but administrative adjudications are conducted within agencies by a wide variety of hearing officers, including attorneys and non-attorneys, with a variety of titles and various degrees of decisional independence. In addition, twenty-five states, three cities and one county have central panel systems where ALJs in central panels hold hearings for a variety of agencies.

In 2007, the ABA, after years of efforts, adopted a new Model Code of Judicial Conduct, which represented a significant change from the 1990 Code. The most important paradigm shift in the 2007 Code was that the Canons enunciated general principles, and each Canon is broken down into enforceable rules. The ABA House of Delegates resoundingly approved the 2007 Code, which has now been adopted (almost “lock, stock and barrel”) by more than a majority of states. The Application Section of the 2007 Model Code [I (A)] states that the code applies to all full-time judges. Section I (B) of the Application Section defines “judge” as including “member (s) of the administrative law judiciary.” Thirty-Three states have approved a revised Judicial Code for the judicial branch, based on the 2007 ABA Model Code and forty-seven states have initiated or completed review of their judicial codes in light of the 2007 ABA Model Code (Appendix A).

The Ad Hoc Committee consists of:
- Lorraine Lee, Chief Administrative Law Judge, Washington State Office of Administrative Hearings (Member, NCALJ Executive Committee);
- John Allen, former Chief Administrative Law Judge, Cook County, Illinois (Member, NCALJ Executive Committee);
- Edwin L. Felter, Jr., Senior Administrative Law Judge, Colorado Office of Administrative Courts;
- Julian Mann III, Chief Administrative Law Judge, North Carolina / Chair of NCALJ (2015/2016), Ex-Office;
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- Amanda Banninga, Staff Director, NCALJ.

AD HOC COMMITTEE TO REVISE AND UPDATE 1995 MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES

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New York City; Washington, D.C.; Chicago; and, Cook County, Illinois

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The Model Code of Judicial Conduct for State Administrative Law Judges (hereinafter “Model Code”) is intended to establish basic ethical standards for administrative law judges or any other hearing officials, whatever their title, in any state. The Code is intended to govern the conduct of these administrative law judges (hereinafter “ALJs”) and to provide guidance to assist administrative law judges in establishing and maintaining high standards of judicial and personal conduct. This Code is based upon the Model Code of Judicial Conduct as adopted by the ABA in 2007.

The text of the rules under the canons is intended to be authoritative and enforceable. The commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the rules. The commentary is not intended as a statement of additional rules. When the text uses shall or shall not, it is intended to impose binding obligations, the violation of which can result in disciplinary action. When should or should not is used, the text is a statement of what is or is not appropriate conduct, but not as a binding rule under which a judge may be disciplined. When “may” is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The terms administrative law judge or judge are intended to include all hearing officers, referees, trial examiners or any other person holding office to whom the authority to conduct an administrative adjudication has been delegated by the agency or by the governmental entity, or by statute and who exercises independent and impartial judgment in conducting hearings and in issuing initial or final decisions containing findings of fact and conclusions of law in accordance with the applicable statutes or agency rules and without ex parte communication or instruction as proscribed in Canon 2.9. Such decisions should be binding on all parties to the action, including the agency, unless modified— or reversed by the agency as authorized by law. An administrative law judge should be removable for good cause.

The canons and rules thereunder are rules of reason. They should be applied consistently with constitutional requirements, statutes, administrative rules, and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The code is designed to provide guidance to an ALJ and to provide a structure for regulating conduct. However, it is not intended, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned
application of the text and should depend on such factors as the seriousness of the
transgression, whether there is a pattern of improper activity, and the effect of the
improper activity on others or on the administrative law system. The Code is not
designed or intended as a basis for civil liability or criminal prosecution. Furthermore,
the purpose of the code would be subverted if the Code were invoked by lawyers for
mere tactical advantage in a proceeding.

CANON I

AN ADMINISTRATIVE LAW JUDGE SHALL UPHOLD AND PROMOTE THE
INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE ADMINISTRATIVE LAW
JUDICIARY AND AVOID THE APPEARANCE OF IMPROPRIETY.

Rule 1.1: Compliance with the Law

An ALJ shall comply with the law, including the Code of Conduct for Administrative Law
Judges.

Comment

None.

Rule 1.2: Promoting Confidence in the Administrative Law Judiciary

An ALJ shall act at all times in a manner that promotes public confidence in the
independence, integrity, and impartiality of the administrative law judiciary, and shall
avoid impropriety and the appearance of impropriety.

Comment

[1] An independent and honorable administrative law judiciary is indispensable to justice
in our society. An ALJ should participate in establishing, maintaining, and enforcing high
standards of conduct and shall personally observe those standards so that the integrity
and independence of the administrative law judiciary is preserved. The provisions of this
code shall be construed and applied to further that objective.

[2] Deference to the judgments and rulings in administrative proceedings depends upon
public confidence in the integrity and independence of ALJs. The integrity and
independence of ALJs depends in turn upon their acting without fear or favor. Although
ALJs should be independent, they must comply with the law, including the provisions of
this Code. Public confidence in the impartiality of the administrative law judiciary is
maintained by the adherence of each ALJ to this responsibility. Conversely, violation of
this code diminishes public confidence in the administrative law judiciary and thereby
does injury to our system of government.
Rule 1.3: Avoiding Abuse of Prestige of Judicial Office

An administrative law judge shall not abuse the prestige of office to advance the personal or economic interests of the judge or others, or allow others to do so.

Comment

[1] It is improper for an ALJ to use or attempt to use their position to gain personal advantage or deferential treatment of any kind. For example, an ALJ must not use judicial letterhead to gain an advantage in conducting their personal business.

[2] A judge may provide a reference or recommendation for an individual based upon the ALJ's personal knowledge, using official letterhead if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.

[3] Special considerations arise when ALJs write or contribute to publications of for-profit entities, whether related or unrelated to the law. An ALJ should not permit anyone associated with the publication of such materials to exploit the ALJ's office in a manner that violates this Rule or other applicable law. The ALJ should retain sufficient control over the advertising to avoid such exploitation.

CANON 2

AN ADMINISTRATIVE LAW JUDGE SHALL PERFORM THE DUTIES OF OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

Rule 2.1: Giving Precedence to the Duties of Office

The duties of office, as prescribed by law, shall take precedence over all of an ALJ's personal and extrajudicial activities.

Comment

[1] To ensure that ALJ's are available to fulfill their judicial duties, ALJ's must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.

[2] Although it is not a duty of office unless prescribed by law, ALJs are encouraged to participate in activities that promote public understanding of and confidence in the administrative justice system.
Rule 2.2: Impartiality and Fairness

An ALJ shall uphold and apply the law and shall perform all duties of office fairly and impartially.

Comment

[1] To ensure impartiality and fairness to all parties, an ALJ must be objective and open-minded.

[2] Although each ALJ comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the ALJ approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] It is not a violation of this Rule for an ALJ to make reasonable accommodations to ensure self-represented litigants are afforded the opportunity to have their matters fairly heard.

Rule 2.3: Bias, Prejudice and Harassment

(A) An ALJ shall perform the duties of office, including administrative duties, without bias or prejudice.

(B) An ALJ shall not, in the performance of official duties, by words or conduct manifest bias or prejudice, or engage in harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit support staff, or others subject to the ALJ's direction and control to do so.

(C) An ALJ shall require lawyers in proceedings before the ALJ to refrain from manifesting bias or prejudice, or engaging in harassment, based on attributes or factors enumerated in (B) above, against parties, witnesses, lawyers, or others.

Comment

[1] An ALJ who manifests bias or prejudice impairs the fairness of proceedings and brings the administrative judiciary into disrepute.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based on stereotypes; threatening; intimidating; or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal philosophy, a judge must interpret and apply the law without regard to whether the ALJ approves or disapproves of the law in question.
characteristics. Even facial expressions and body language can convey to parties and lawyers, the media, and others an appearance of bias or prejudice. An ALJ must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment, as referred to in paragraphs (B) and (C) is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as the factors enumerated in (2) above.

[4] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

Rule 2.4: External Influences on Judicial Conduct

(A) An ALJ shall not be swayed by public clamor or fear of criticism.

(B) An ALJ shall not permit family, social, political, financial, or other interests or relationships to influence the ALJ’s judicial conduct or judgment.

(C) An ALJ shall not convey or permit others to convey the impression that any person or organization is in a position to influence the ALJ.

Comment

An independent administrative law judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular. Confidence in the administrative law judiciary is eroded if decision making is perceived to be subject to inappropriate outside influences.

Rule 2.5 Competence, Diligence, and Cooperation

(A) An ALJ shall perform judicial and administrative duties competently and diligently.

(B) An ALJ shall cooperate with other ALJs, legal professionals and other officials in the administration of official business.

Comment

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform judicial responsibilities.

[2] An ALJ should seek the necessary docket time and resources to discharge all adjudicative and administrative responsibilities.
Prompt disposition of the ALJ's business requires the ALJ to devote adequate time to judicial duties, to be punctual in attending hearings and expeditious in determining matters, and to take reasonable measures to ensure that staff, litigants, and their lawyers or lay representatives cooperate with the ALJ to that end.

[4] In disposing of matters promptly, an ALJ must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. An ALJ should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. Attention to prompt resolution of the ALJ's docket, and issuing decisions without undue delay, is critical to the effectiveness and efficiency of administrative justice organizations. To quote William Penn, "To delay Justice is Injustice."

Rule 2.6: Ensuring the Right to Be Heard

(A) An ALJ shall accord to every person who has a legal interest in a proceeding, or that person's lawyer or lay representative, the right to be heard according to law.

(B) An ALJ may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

Comment

None.

Rule 2.7 Responsibility to Decide

An ALJ shall hear and decide matters assigned to the ALJ, except where disqualification is required by Rule 2.11 or other law.

Comment

None.

Rule 2.8: Decorum and Demeanor

(A) An ALJ shall require order and decorum in proceedings before the ALJ.

(B) An ALJ shall be patient, dignified, and courteous to litigants, witnesses, lawyers, staff and others with whom the ALJ deals in an official capacity, and shall require similar conduct of lawyers, staff, officials, and others subject to the ALJ's direction and control.

Comment

None.
Rule 2.9: Ex Parte Communications

(A) An ALJ shall not initiate, permit, or consider ex parte communications, or consider other communications made to the ALJ outside the presence of the parties or their lawyers, concerning a pending or impending matter, including communications from an agency/litigant, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the ALJ reasonably believes that no party will gain a procedural, substantive or tactical advantage as a result of the ex parte communication; and,

(b) the ALJ makes provision to promptly notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) An ALJ may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the ALJ, if the ALJ gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) An ALJ may consult with staff and officials whose functions are to aid the ALJ in carrying out the ALJ's adjudicative responsibilities (this excludes agency personnel with regard to a pending or impending matter before the ALJ), or with other ALJs or Law Clerks under the direction and control of the ALJ, provided the ALJ makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility to personally decide the matter.

(4) An ALJ may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle some issues pending before the ALJ.

(5) An ALJ may initiate, permit, or consider any ex parte communications when expressly authorized by law to do so.

(B) If an ALJ inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the ALJ shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.
Rule 2.10: Statements on Pending and Impending Cases

(A) An ALJ shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any tribunal, or make any non-public statement that might substantially interfere with a fair hearing.

(B) An ALJ shall not, in connection with cases, controversies, or issues that are likely to come before the ALJ, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of office.

(C) An ALJ shall require staff and others subject to the ALJ’s direction and control to refrain from making statements that the ALJ would be prohibited from making by paragraph (A) and (B).

(D) Notwithstanding the restrictions in paragraph (A), an ALJ may make public statements in the course of performing their official duties, may explain tribunal procedures, and may comment on any proceeding in which the ALJ is a litigant in a personal capacity.

(E) Subject to the requirements of paragraph (A), an ALJ may respond directly or through a third party to allegations in the media or elsewhere concerning the ALJ’s conduct in a matter.

Rule 2.11: Disqualification

(A) An ALJ shall disqualify himself or herself in any proceeding in which the ALJ’s impartiality might reasonably be questioned, including but not limited to the following circumstances:
(1) The ALJ has a personal bias or prejudice concerning a party or party’s
lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The ALJ knows that the ALJ, the ALJ’s spouse or domestic partner, or a
person within the third degree of relationship to either of them, or the spouse
or domestic partner of such person is:

(a) a party to the proceeding, or an officer, director, general partner, major
shareholder, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis interest that could be
substantially affected by the proceeding, or;

(d) likely to be a material witness in the proceeding.

(3) The ALJ knows that they, individually or as a fiduciary, or the ALJ’s spouse,
domestic partner, parent or child, or any other member of the ALJ’s family
residing in the ALJ’s household, has an economic interest in the subject matter in
controversy or in a party to the proceeding.

(4) The ALJ has made a public statement, other than in a tribunal proceeding,
adjudicative decision, or adjudicative opinion, that commits or appears to commit
the ALJ to reach a particular result or rule in a particular way in the proceeding or
controversy.

(5) The ALJ:

(a) served as a lawyer in the matter in controversy, or was associated with
a lawyer who participated substantially as a lawyer in the matter during
such association;

(b) served in government employment, and in such capacity participated
personally and substantially as a lawyer or public official concerning the
proceeding, or has publicly expressed an opinion concerning the merits of
the particular matter in controversy;

(c) was a material witness concerning the matter, or

(d) previously presided as an ALJ or judge over the matter in another
tribunal or court.

(B) An ALJ shall keep informed about the ALJ’s personal and fiduciary economic
interests, and make reasonable effort to keep informed about the personal economic
interests, and make reasonable effort to keep informed about the personal economic
Rule 2.12: Supervisory Duties

(A) An ALJ shall require staff and others subject to the ALJ’s direction and control to act in a manner consistent with the ALJ’s obligations under this Code.

(B) An ALJ with supervisory authority for the performance of other ALJs shall take reasonable measures to ensure that those ALJs properly discharge their adjudicative responsibilities, including the prompt disposition of matters before them.

Comment

[1] A judge is responsible for their own conduct and for the conduct of others, such as staff, when those persons are acting at the judge’s direction or control. A judge may not direct court personnel to engage in conduct on the judge’s behalf or as the judge’s representative when such conduct would violate the Code if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under their supervision administer their workloads promptly.

[3] A supervisory ALJ should not interfere with the decisional independence of other ALJs. Reasonable docket control, case assignments, logistical matters and other administrative concerns are appropriate; provided, that these are done in an impartial manner and in no way operate to favor any particular outcome in any case.

Rule 2.13: Disability and Impairment

An ALJ having a reasonable belief that the performance of a lawyer or another ALJ is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take reasonable measures to ensure that judges under their supervision administer their workloads promptly.

None.

Comment

[1] A judge is responsible for their own conduct and for the conduct of others, such as staff, when those persons are acting at the judge’s direction or control. A judge may not direct court personnel to engage in conduct on the judge’s behalf or as the judge’s representative when such conduct would violate the Code if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under their supervision administer their workloads promptly.

[3] A supervisory ALJ should not interfere with the decisional independence of other ALJs. Reasonable docket control, case assignments, logistical matters and other administrative concerns are appropriate; provided, that these are done in an impartial manner and in no way operate to favor any particular outcome in any case.
appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

Comment
None.

Rule 2.14: Responding to Judicial and Lawyer Misconduct

(A) An ALJ having knowledge that another ALJ has committed a violation of this Code that raises a substantial question regarding the ALJ’s honesty, trustworthiness, or fitness as an ALJ in other respects shall inform the appropriate authority.

(B) An ALJ having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

(C) An ALJ who receives information indicating a substantial likelihood that another ALJ has committed a violation of this Code shall take appropriate action.

(D) An ALJ who receives information indicating that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

Comment
None.

Rule 2.15: Cooperation with Disciplinary Authorities

(A) An ALJ shall cooperate and be candid and honest with judicial and lawyer disciplinary and other official investigatory agencies, in a manner consistent with judicial confidentiality provisions provided by law.

(B) An ALJ shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of the ALJ or a lawyer.

Comment
Cooperation with investigations and proceedings of judicial and lawyer disciplinary agencies, as required in paragraph (A), instills confidence in ALJs’ commitment to the integrity of the administrative law adjudication system and the protection of the public.
AN ADMINISTRATIVE LAW JUDGE SHALL CONDUCT PERSONAL AND EXTRA-JUDICIAL ACTIVITIES IN A MANNER THAT WILL MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF THE ALJ’S OFFICE

Rule 3.1: Extrajudicial Activities in General

An ALJ may engage in extrajudicial activities, except as prohibited by law or this Code; however, when engaging in extrajudicial activities, an ALJ shall not:

(A) Participate in activities that will interfere with the proper performance of the ALJ’s judicial duties;

(B) Participate in activities that will lead to frequent disqualification of the ALJ;

(C) Participate in activities that would appear to a reasonable person to undermine the ALJ’s independence, integrity, or impartiality;

(D) Engage in conduct that would appear to a reasonable person to be coercive; or

(E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

Comment

The actions, participation or engagements that are prohibited under this Rule include any such activity within the realm and use of social media.

Rule 3.2: Appearance before Governmental Agencies and Consultation with Government Officials

An ALJ shall not appear voluntarily at a public hearing before, or otherwise consult with, a legislative body or official, except:

(A) In connection with matters concerning the law, the legal system, or the administration of justice;

(B) In connection with matters about which the ALJ acquired knowledge or expertise in the course of the ALJ’s official duties; or

(C) When the ALJ is acting in a self-represented capacity involving the ALJ’s legal or economic interests, or when the ALJ is acting in a fiduciary capacity.

Comment

The actions, participation or engagements that are prohibited under this Rule include any such activity within the realm and use of social media.
Rule 3.3: Testifying as a Character Witness

An ALJ shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

Comment

An ALJ who, without being subpoenaed, testifies as a character witness abuses the prestige of the ALJ's office to advance the interests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, an ALJ should discourage a party from requiring the ALJ to testify as a character witness.

Rule 3.4: Appointment to Governmental Positions

An ALJ shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless such appointment does not conflict with the ALJ's official duties and there is no appearance of conflict, bias or prejudice concerning the ALJ's official position.

Comment

An ALJ who, without being subpoenaed, testifies as a character witness abuses the prestige of the ALJ's office to advance the interests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, an ALJ should discourage a party from requiring the ALJ to testify as a character witness.

Rule 3.5: Use of Nonpublic Information

An ALJ shall not intentionally disclose or use nonpublic information acquired in an official capacity for any purpose unrelated to the ALJ's adjudicative duties.

Comment

An ALJ who, without being subpoenaed, testifies as a character witness abuses the prestige of the ALJ's office to advance the interests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, an ALJ should discourage a party from requiring the ALJ to testify as a character witness.
Rule 3.6: Affiliation with Discriminatory Organizations

(A) An ALJ shall not hold membership in any organization that practices discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) An ALJ shall not use the benefits or facilities of an organization if the ALJ knows or should know that the organization practices invidious discrimination or one or more of the bases identified in paragraph (A). An ALJ’s attendance at an event or facility of an organization that the ALJ is not permitted to join is not a violation of this Rule when the ALJ’s attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization’s practices.

Comment
None.

Rule 3.7: Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

(A) Subject to the requirements of Rule 3.1, an ALJ may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

1. assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization’s or entity’s funds;
2. soliciting contributions for such an organization or entity, but only from members of the ALJ’s family, or from ALJs over whom the ALJ does not exercise supervisory or appellate authority;
3. soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;
4. appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting their title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the ALJ may participate only if the event concerns the law, the legal system, or the administration of justice.

Comment
None.

(A) An ALJ shall not hold membership in any organization that practices discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) An ALJ shall not use the benefits or facilities of an organization if the ALJ knows or should know that the organization practices invidious discrimination or one or more of the bases identified in paragraph (A). An ALJ’s attendance at an event or facility of an organization that the ALJ is not permitted to join is not a violation of this Rule when the ALJ’s attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization’s practices.

(1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization’s or entity’s funds;
(2) soliciting contributions for such an organization or entity, but only from members of the ALJ’s family, or from ALJs over whom the ALJ does not exercise supervisory or appellate authority;
(3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;
(4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting their title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the ALJ may participate only if the event concerns the law, the legal system, or the administration of justice.
(5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization entity is concerned with the law, the legal system, or the administration of justice; and

(6) serving as an officer, director, trustee, or non-legal advisor of such an organization or entity, unless it is likely that the organization or entity:

(a) will be engaged in proceedings that would ordinarily come before the ALJ; or

(b) will frequently be engaged in adversary proceedings in the tribunal of which the ALJ is a member, or in any tribunal subject to the appellate jurisdiction of the tribunal of which the ALJ is a member.

(B) An ALJ may encourage lawyers to provide pro bono public legal services.

Comment

None.

Rule 3.8: Appointments to Fiduciary Positions

An ALJ acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to an ALJ personally.

Comment

None.

Rule 3.9: Service as Arbitrator or Mediator

(A) A full-time ALJ should not act as an arbitrator or a mediator or perform other judicial functions apart from the ALJ's official duties unless expressly authorized by law.

(B) A part time ALJ shall not act as an arbitrator or a mediator or perform other judicial functions apart from their official duties as a part-time ALJ if their impartiality might reasonably be questioned because of such work.

Comment

None.
Rule 3.10: Practice of Law

If the law of the jurisdiction permits, an ALJ may have a non-conflicting practice of law (e.g., drafting wills) so long as the duties of the ALJ’s office take precedence.

Comment

[1] In some jurisdictions, the compensation for ALJs is so low that well qualified individuals would not serve unless the ALJ could maintain a non-conflicting practice of law.

[2] Certain local governments hire ALJs on a contract basis with the expectation and understanding that the ALJ shall maintain a separate source of income such that the attorney performing ALJ duties is expected to earn income to support themselves through legal work outside their duties as an ALJ, as long as that work does not conflict or appear to conflict with their work as an ALJ.

[3] Rule 3.10 is optional and may be unacceptable in some jurisdictions.

Rule 3.11 Financial, Business, or Remunerative Activities

(A) An ALJ may hold and manage investments of the ALJ and members of the ALJ’s family.

(B) An ALJ shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that an ALJ may manage or participate in:

(1) a business closely held by the ALJ or members of the ALJ’s family; or

(2) a business entity primarily engaged in investment of the financial resources of the ALJ or members of the ALJ’s family.

(C) An ALJ shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:

(1) interfere with the proper performance of judicial duties;

(2) lead to frequent disqualification of the ALJ;

(3) involve the ALJ in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the tribunal on which the ALJ serves; or

(4) result in violation of other provisions of this Code.

Comment

[1] In some jurisdictions, the compensation for ALJs is so low that well qualified individuals would not serve unless the ALJ could maintain a non-conflicting practice of law.

[2] Certain local governments hire ALJs on a contract basis with the expectation and understanding that the ALJ shall maintain a separate source of income such that the attorney performing ALJ duties is expected to earn income to support themselves through legal work outside their duties as an ALJ, as long as that work does not conflict or appear to conflict with their work as an ALJ.

[3] Rule 3.10 is optional and may be unacceptable in some jurisdictions.
Rule 3.12: Compensation for Extrajudicial Activities

An ALJ may accept reasonable compensation for extrajudicial activities permitted by this Code or other law unless such acceptance would appear to a reasonable person to undermine the ALJ’s independence, integrity, or impartiality.

Comment
None.

Rule 3.13: Acceptance of Gifts, Loans, Bequests, Benefits, or Other Things of Value

(A) An ALJ shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the ALJ’s independence, integrity, or impartiality.

(B) Unless otherwise prohibited by law or by paragraph (A), an ALJ may accept the following:

(1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;
(2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending or impending before the ALJ would in any event require disqualification of the ALJ under Rule 2.11;
(3) ordinary social hospitality;
(4) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not ALJs or judges;
(5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not ALJs or judges;
(6) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not ALJs or judges, based upon the same terms and criteria;
(7) books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use; or

(8) gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner, or other family member of an ALJ residing in the ALJ’s household, but that incidentally benefit the ALJ.

(C) Unless otherwise prohibited by law or by paragraph (A), an ALJ may accept the following items:

(1) gifts incidental to a public testimonial;

(2) invitations to the ALJ and the ALJ’s spouse, domestic partner, or guest to attend without charge;

(a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or

b) an event associated with the ALJ’s educational, religious, charitable, fraternal or civic activities permitted by this Code, if the same invitation is offered to non-ALJs and non-judges who are engaged in similar ways in the activity as is the ALJ.

Comment

None

Rule 3.14: Reimbursement of Expenses and Waivers of Fees or Charges

(A) Unless otherwise prohibited by Rules 3.1 and 3.13 (A) or other law, an ALJ may accept reimbursement, if necessary, and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the ALJ’s employing entity, if the expenses or charges are associated with the ALJ’s participation in extrajudicial activities permitted by this Code.

(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the ALJ and, when appropriate to the occasion, by the ALJ’s spouse, domestic partner, or guest.

Comment

None

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(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the ALJ and, when appropriate to the occasion, by the ALJ’s spouse, domestic partner, or guest.

Comment

None
AN ADMINISTRATIVE LAW JUDGE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE ADMINISTRATIVE LAW JUDICIARY

Rule 4.1 Political and Campaign Activities of ALJs in General

(A) Except as permitted by law or by Rules 4.2 and 4.4, an ALJ shall not:

(1) act as a leader in, or hold office in, a political organization;

(2) make speeches on behalf of a political organization;

(4) publicly endorse or oppose a candidate for any partisan public office;

(4) publicly identify himself or herself as a candidate of a political organization;

(5) seek, accept, or use endorsements from a political organization;

(6) knowingly, or with reckless disregard of the truth, make any false or misleading statement;

(7) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any tribunal;

or

(8) in connection with cases, controversies, or issues that are likely to come before the tribunal, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of office.

(B) An ALJ shall take reasonable measures to ensure that other persons do not undertake, on behalf of the ALJ, any activities prohibited under paragraph (A).

Comment

[1] Certain portions of this Rule may be too stringent in local jurisdictions where an ALJ is hired through contract; therefore, some provisions may be considered optional.

Rule 4.2: Candidates for Appointive ALJ Positions

A candidate for appointment to an ALJ position may:

(A) Communicate with the appointing or confirming authority, including any selection, screening, or nominating commission or similar organization and

Comment

[1] Certain portions of this Rule may be too stringent in local jurisdictions where an ALJ is hired through contract; therefore, some provisions may be considered optional.
(B) Seek endorsements for the appointment from any person or organization other than a partisan political organization.

Comment

None.

Rule 4.3: Activities of ALJs Who Become Candidates for Nonjudicial Office

(A) Upon becoming a candidate for a non-judicial elective office, an ALJ shall resign from the ALJ office, unless permitted by law to continue to hold the ALJ office.

(B) Upon becoming a candidate for a non-judicial appointive office, an ALJ is not required to resign as an ALJ, provided that the ALJ complies with the other provisions of this Code.

Comment

None

EFFECTIVE DATE OF COMPLIANCE

A person to whom this Code becomes applicable should arrange their affairs as soon as reasonably possible to comply with it.

Comment

None

EFFECTIVE DATE OF COMPLIANCE

A person to whom this Code becomes applicable should arrange their affairs as soon as reasonably possible to comply with it.
I. Summary

This is the first time the House has adopted the Model Code and no previous versions of the Model Code were adopted by the House. The Resolution is necessary in order to protect the public interest in independent, impartial, and responsible decision-making in the administrative law adjudication process. By providing that members of the administrative law judiciary be held accountable under appropriate uniform ethical standards provided in the Model Code of Judicial Conduct for State Administrative Law Judges (hereinafter "Model Code," or "Code") and in light of the unique characteristics of particular positions in the administrative judiciary. For purposes of this recommendation, the administrative judiciary includes all individuals whose exclusive role in the administrative process is to preside and make decisions in judicial or quasi-judicial capacity in evidentiary proceedings, but does not include agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of an agency head.

The Resolution calls for state jurisdictions to adopt the Model Code in order to uniformly establish high standards of ethical accountability and to ensure decisional independence of administrative law adjudicators and freedom from improper agency influence. It shores up and supports the partial balance that State Legislatures have struck in their respective Administrative Procedure Acts to assure fair adjudicative hearings to the public by eliminating pro-agency bias and appropriately protecting administrative law judge and hearing officer independence from agency encroachment and interference while still preserving agency control over policy, and consistency in the application of the law, in those matters over which the respective legislatures have given the agency jurisdiction.

II. Introduction

State Administrative Procedure Acts are not adequate to ensure adjudicator accountability because their focus is on administrative procedures, not ethical conduct. A uniform code of judicial conduct, which closely follows the 2007 American Bar Association Model Code of Judicial Conduct for the judicial branch is an appropriate protection of administrative law judge and hearing officer independence and accountability.2 The Model Code will make administrative law judges and hearing officers accountable to appropriate ethical standards for adjudicators, while ensuring their decisional independence and freedom from improper agency influences.3 The Model Code uniformly protects administrative law judges and hearing officers from.

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3See Butz v. Economou, 436 U.S. 478 (1978) (the U.S. Supreme Court recognized ALJ adjudicatory functions as being the same as judicial branch adjudicatory functions). Also see Federal Maritime Commission v. South Carolina port Authority, 535 U.S. 743 (2002) [regarding administrative law adjudicatory proceedings compared to judicial branch proceedings, the Court observed that “if it walks, talks and squawks like a lawsuit, it is a lawsuit!”].
improper influences and permits them to engage in appropriate activities, with due regard for certain discreet differences between administrative law judges and judicial branch judges. The Model Code is necessary because administrative law judges and hearing officers are in the Executive Branch of Government and cannot be subject to a code for the judicial branch because of the separation of powers doctrine. Only one known jurisdiction, Colorado, has made its code of judicial conduct for the judicial branch applicable, by statute, to Colorado’s central panel of administrative law judges. The provision is made in the organic act for the Division of Administrative Hearings (now the Office of Administrative Courts).\footnote{For a discussion of ethical codes for ALJs, see Felter, Edwin L., Jr., “Special Problems of State Administrative Law Judges,” 53 Administrative Law Review 1449 (2001) [re-published in 8-10 Law and Justice: Journal of the United Lawyers Association 41 (2001-2003), New Delhi, India]}

III. The Problem

Because there is no uniformly adopted code of judicial conduct for administrative law adjudicators, their accountability to ethical standards varies widely. In some jurisdictions, the only code of conduct is the code for state employees. In jurisdictions where the adjudicators are licensed attorneys, they are accountable, as licensed attorneys, to the rules of professional conduct in effect for lawyers. Judicial and quasi-judicial conduct and misconduct differs substantially from standards for lawyer conduct. Judges are held to a higher standard of ethical conduct than lawyers. One of the few commonalities is that neither lawyer nor judge should break the law. For example, the rules of professional conduct for lawyers do not address an “appearance of impropriety” arising in cases. Indeed, in jurisdictions where administrative law adjudicators are charged with misconduct unique to adjudicating cases, and they are licensed attorneys, the attorney disciplinary authorities use the code of judicial conduct for the judicial branch as a measuring stick. If the administrative law adjudicator is not a licensed attorney, the disciplinary authorities have no jurisdiction over the individual and ordinary rules of conduct for government employees would apply and be administered by the governmental appointing authority. Such a system is inadequate to address judicial misconduct by an administrative law adjudicator.

The public expects decisional independence of administrative law adjudicators within the executive branch of government—in the same way it expects it from the judicial branch. There have been examples of egregious agency interference with the decisional independence of administrative law adjudicators.\footnote{For a discussion of ethical codes for ALJs, see Felter, Edwin L., Jr., “Special Problems of State Administrative Law Judges,” 53 Administrative Law Review 1449 (2001) [re-published in 8-10 Law and Justice: Journal of the United Lawyers Association 41 (2001-2003), New Delhi, India]}

III. Cases

administrative law judge (an at-will judge) was terminated because the Arkansas Workers’ Compensation Commission was not pleased with the outcomes in her cases. To vindicate her decisional independence, she filed a civil rights suit in the U.S. District Court. The U.S. District Court for the Eastern District of Arkansas, analogized the issue to teacher “free speech” rights and found that Judge Harrison was entitled to absolute immunity under the First Amendment for her quasi-judicial work product.3

IV. Similar Resolution

The most similar resolution, unanimously passed by the House of Delegates was the 2007 Model Code of Judicial Conduct (for the judicial branch), which is amended and reiterated year-to-year. The Model Code of Judicial Conduct for State Administrative Law Judges closely tracks the 2007 ABA Model Code in providing high ethical standards for administrative law adjudicators. Because administrative law adjudicators are in the executive branch, the judicial branch does not have jurisdiction over the ethical conduct of administrative law adjudicators, other than appellate jurisdiction in specific cases; or, jurisdiction insofar as the administrative law judge is a licensed attorney.

In 2001, the House of Delegates adopted Resolution 01A101B concerning the accountability and decisional independence of administrative law adjudicators. Resolution 01A101B was co-sponsored by numerous named entities, including the Administrative and Regulatory Practice Section of the ABA, and state bar associations.9

V. Conclusion

In the majority of jurisdictions in the United States, there are no uniform accountability measures for administrative law adjudicators. As illustrated in the two cases referenced above, resort to civil rights remedies may be the most effective mechanism to vindicate decisional independence. The Model Code of Judicial Conduct for State Administrative

Depositions of non-minority hearing officers illustrated more errors than Perry’s errors. Ultimately, it was revealed that the supervisors were not pleased with Perry’s not guilty/dismissal rate. Perry filed a discrimination claim and the Court of Appeals held that his decisions were “communicative acts” protected by the Constitution. A uniform code of judicial conduct would be more direct.


4See ABA Resolution 01A101B, which passed the House of Delegates by a vote of 297 to 2. In addition to the Administrative and Regulatory Practice Section, co-sponsors were the Standing Committee on Judicial Independence, the Dispute Resolution Section, Government and Public Sector Lawyers Division, the real Property, Probate and Trust Law Section, Senior Lawyers Division, Colorado Bar Association, Denver Bar Association, New York State Bar Association, and the Tennessee Bar Association.

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In the majority of jurisdictions in the United States, there are no uniform accountability measures for administrative law adjudicators. As illustrated in the two cases referenced above, resort to civil rights remedies may be the most effective mechanism to vindicate decisional independence. The Model Code of Judicial Conduct for State Administrative
Law Judges offers a simple, effective and uniform code of ethical standards to ensure accountability and decisional independence in administrative law adjudications. Many states look to the American Bar Association for guidance. The best example is that in 1997, the House of Delegates adopted the Model Act Creating a State Central Hearing Agency. At the time, there were approximately 12 state central hearing agencies and two city central panels. Now, there are 28 state central hearing agencies, three city central panels, and one county central hearing agency (Cook County, Illinois). Many of these central hearing agencies, created after 1997, are patterned after the 1997 ABA Model Act Creating a State Central Hearing Agency.

Respectfully submitted,

Hon. Mary E. Kelly
Chair, National Conference of the Administrative Law Judiciary
August 2018
1. Summary of Resolution

The Model Code of Judicial Conduct for State Administrative Law Judges (hereinafter the "Model Code" or "Code"), as American Bar Association Policy, will make administrative law judges and hearing officers accountable to appropriate ethical standards for adjudicators, while ensuring their decisional independence and freedom from improper agency influences. The Code uniformly protects administrative law judges and hearing officers from improper influences and permits them to engage in appropriate activities, with due regard for certain discreet differences between administrative law judges/hearing officers and judicial branch judges. This resolution adopts the Model Code which is necessary because administrative law judges and hearing officers are in the executive branch of government and cannot be subject to a code for the judicial branch, unless imposed on the executive branch judiciary by statute, because of the separation of powers doctrine. In many important parts, the judicial branch code is not relevant to executive branch judges, e.g., provisions concerning running for election (in partisan and non-partisan elections) or retention; campaign financing provisions. Consequently, the Model Code for State Administrative Law Judges is completely relevant for these executive branch judges. Agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of the agency head are not included as members of the administrative law judiciary.

2. Approval by Submitting Entity

The Judicial Division’s National Conference of the Administrative Law Judiciary voted on May 6, 2018 in approval of this resolution.

3. Has this or a similar resolution previously been presented to the House or Board of Governors

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 American Bar Association policies supporting judicial independence and accountability for administrative law judges. The Resolution is compatible with and would not affect existing American Bar Association policies.
Association policies. Past American Bar Association resolutions stressing the need for competent well-trained administrative law judges, operating with a large degree of independence from agency supervision to provide fair hearings consistent with due process include 88A112 (1988); 94A109 (1994); 95A115 (1995); 99A101 (1999); 01A101B (2001); 03A103 (2003); 05M114 (2005); 05A106A (2005); 09M112 (2009); and 11M124 (2011).

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 Resolution adopts a uniform Model Code of Judicial Conduct for State Administrative Law Judges (August 2018); and, it will be highly persuasive with legislative bodies for the purpose of their adoption of legislation consistent with the Model Code.

8. Cost to the Association (Both direct and indirect costs)
   It is anticipated that the costs of disseminating the Model Code to administrative law adjudication agencies will be de minimis (printing and postage).

9. Disclosure of Interest
   The only interest the National Conference of the Administrative Judiciary has is improving the quality of administrative justice in the United States.

10. Referrals
   The Resolution and Report will be distributed to each of the other Sections, Divisions, Forums, and Standing Committees of the Association in the version accepted and numbered for the agenda by the Rules and Calendar Committee.
11. Contact Persons (Prior to the meeting.)

Hon. Mary E. Kelly
Chair, National Conference of the Administrative Law Judiciary
California Unemployment Insurance Appeals Board
300 South Spring Street
Los Angeles, CA 90013-1259
Kelly2368@sbcglobal.net

Hon. Edwin L. Felter, Jr.
Member, National Conference of the Administrative Law Judiciary
Senior Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203
Ed.felter@state.co.us
(303) 866-5676 - direct

12. Contact Person (Who will present the Resolution and Report to the House?)

Hon. Larry J. Craddock
National Conference of the Administrative Law Judiciary Delegate to the House of Delegates
Administrative Law Judge (retired)
Craddock and Noelke, PLLC
P.O. BOX 5667
Austin, TX 78763
larrycraddock@gmail.com
EXECUTIVE SUMMARY

1. Summary of Resolution
The Model Code of Judicial Conduct for State Administrative Law Judges (hereinafter the "Code"), as American Bar Association Policy, will make administrative law judges and hearing officers accountable to appropriate ethical standards for adjudicators, while ensuring their decisional independence and freedom from improper agency influences. The Code uniformly protects administrative law judges and hearing officers from improper influences and permits them to engage in appropriate activities, with due regard for certain discreet differences between administrative law judges/hearing officers and judicial branch judges. The Code is necessary because administrative law judges and hearing officers are in the executive branch of government and cannot be subject to accountability under a code for the judicial branch because of the separation of powers doctrine, unless a legislature, by statute, makes it applicable. In many important parts, the judicial branch code is not relevant to executive branch judges, e.g., provisions concerning running for election (in partisan and non-partisan elections) or retention; campaign financing provisions. Consequently, the Model Code for State Administrative Law Judges is completely relevant for these executive branch judges. Agency heads, charged with managing the agency, are not subject to this code.

2. Summary of the Issue that the Resolution Addresses
State administrative law judges and hearing officers perform administrative law adjudications in basically the same manner as judicial branch judges. Nationwide, there are differing codes of conduct applicable to these adjudicators, including codes of conduct generally applicable to government employees, and rules of professional conduct for attorneys, if the adjudicators are licensed attorneys. These differing codes of conduct provide standards of ethical conduct that in many instances are lesser than the high standards of ethical judicial conduct provided in the 2007 American Bar Association Model Code of Judicial Conduct for State Administrative Law Judges (adopted as American Bar Association Policy in 2007). The diverse ethical codes for administrative law adjudicators adversely affects public expectations of decisional independence and public perceptions of impartiality and fairness. Adoption of a uniform model code of judicial conduct (the Model Code of Judicial Conduct for State Administrative Law Judges) as the policy of the American Bar Association would be highly persuasive to legislative bodies at all levels, including state and local bodies, as a way to improve public perceptions of administrative justice.

3. Please Explain How the Proposed Policy Position Will Address the Issue
An American Bar Association policy urging legislative bodies to adopt the Model Code of Judicial Conduct for State Administrative Law Judges will be highly persuasive and offer the governmental entities a viable alternative for improving public perceptions of impartiality and fairness. Adoption of the Model Code of Judicial Conduct for State Administrative Law Judges will provide a uniform standard of ethical conduct for administrative law judges and hearing officers, ensuring their independence and accountability, while maintaining the public’s confidence in the integrity of their decisions.
public perceptions of fairness, impartiality and decisional independence in
administrative justice by uniformly elevating standards of judicial conduct to a
uniform code that carefully tracks the 2007 American Bar Association Model Code
(in relevant part), applicable to judicial branch judges

4. Summary of Minority Views or Opposition Internal and/or External to the ABA that
have been identified

None.
RESOLVED, That the American Bar Association adopts the ABA Ten Guidelines on Court Fines and Fees, black letter and commentary, dated August 2018; and

FURTHER RESOLVED, That the American Bar Association urges all federal, state, local, territorial, and tribal legislative, judicial and other governmental bodies to apply the ABA Ten Guidelines on Court Fines and Fees.
GUIDE LINE 1: Limits to Fees

If a state or local legislature or a court imposes fees in connection with a conviction for a criminal offense or civil infraction, those fees must be related to the justice system and the services provided to the individual. The amount imposed, if any, should never be greater than an individual’s ability to pay or more than the actual cost of the service provided. No law or rule should limit or prohibit a judge’s ability to waive or reduce any fee, and a full waiver of fees should be readily accessible to people for whom payment would cause a substantial hardship.

COMMENTARY:

Many state and local legislatures have enacted mandatory surcharges and assessments, which seek to fund programs or services imposed when individual who is sentenced. Courts in many states have also imposed a broad range of “user fees” on criminal defendants, ranging from supervision fees to drug testing fees. Some fees are unrelated to the justice system or to the service provided. These surcharges, assessments, court costs, and user fees—collectively

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1 For example, Michigan requires judges to impose on people convicted of traffic and misdemeanor offenses a minimum state assessment in addition to any fines and costs. Hon. Elizabeth Hines, View from the Michigan Bench, National Center for State Courts 36, http://www.ncsc.org/~media/Microsoft%20Files/Trends%202017/View-from-Michigan-Bench-Trends-2017.pdf. The minimum assessment in Michigan misdemeanor cases is $125. See also id. § 36 & n.2 (“When James W. pleads guilty to ‘Driving Without a Valid Operator’s License on His Person,’ it is unlikely anyone is aware that a portion of the fines and costs he is ordered to pay may be used to support libraries, the Crime Victims’ Rights Fund, retirement plans for judges, or, in one state, construction of a new law school.”).


3 For example, the vast majority of revenue collected from mandatory driver’s license reinstatement fees in Arkansas goes to the Arkansas State Police. Ark. Code Ann. § 27-16-808. In California, a $4 fee is imposed for service provided.3 These surcharges, assessments, court costs, and user fees—collectively


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known as “fees”—have proliferated to the point where they can eclipse the fines imposed in low-
level offenses. Many states even impose “collection fees,” payable to private debt collection
firms for the cost of collecting other fees, and well as fines. All such fees imposed in
connection with a conviction or criminal offense or civil infraction should be eliminated because
the justice system serves the entire public and should be entirely and sufficiently funded by
general government revenue.

If imposed at all, fees should be commensurate with the service they cover, and consistent with
the financial circumstances of the individual ordered to pay, so that the fees do not result in
substantial hardship to the individual or his/her dependents. A judge should always be
permitted to waive or reduce any fee if an individual is unable to pay. Fees that are legislatively
mandated should be revised to permit such waiver or reduction based on inability to pay.

When an individual is unable to pay, courts should not impose fees, including fees for counsel,
diversion programs, probation, payment plans, community service, or any other alternative to the
payment of money. An individual’s ability to pay should be considered at each stage of
proceedings, including at the time the fees are imposed and before imposition of any sanction for
nonpayment of fees, such as probation revocation, issuance of an arrest warrant for nonpayment,
and incarceration. The consideration of a person’s ability to pay at each stage of proceedings is
critical to avoiding what are effectively “poverty penalties,” e.g., late fees, payment plan fees,
and interest imposed when individuals are unable to pay fines and fees.

See also The Criminalization of Poverty, at 53.
See Amer. Bar Ass’n, Resolution 110 (2004 AM), ABA Guidelines on Contribution Fees for Costs of Counsel in
Criminal Cases, Guideline 2 (“An accused person should not be ordered to pay a contribution fee that the person is
financially unable to afford.”).
GUIDELINE 2: Limits to Fines

Fines used as a form of punishment for criminal offenses or civil infractions should not result in substantial and undue hardship to individuals or their families. No law or rule should limit or prohibit a judge’s ability to waive or reduce any fine, and a full waiver of fines should be readily accessible to people for whom payment would cause a substantial hardship.

COMMENTARY:

Fines should be calibrated to reflect the financial circumstances of the individual ordered to pay, so that the fines do not result in substantial and undue hardship to the individual or his/her dependents. An individual’s ability to pay should be considered at each stage of proceedings, including at the time fines are imposed and before any sanction for nonpayment, such as probation revocation, issuance of an arrest warrant for nonpayment, or incarceration.

GUIDELINE 3: Prohibition against Incarceration and Other Disproportionate Sanctions, Including Driver’s License Suspensions.

A person’s inability to pay a fine, fee or restitution should never result in incarceration or other disproportionate sanctions.

COMMENTARY:

114

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66 COMMENTARY:
68

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66 COMMENTARY:
68

9 Amer. Bar Ass’n, Standards for Criminal Justice: Sentencing, Standard 18-3.16 (d) (“The legislature should provide that sentencing courts, in imposing fines, are required to take into account the documented financial circumstances and responsibilities of an offender.”) NTF Principle 2.3 states, “States should have statewide policies that set standards and provide for processes courts must follow when doing the following: assessing a person’s ability to pay; granting a waiver or reduction of payment amounts; authorizing the use of a payment plan; and using alternatives to payment or incarceration.” NTF Principle 6.2 urges that state law and court rules “provide for judicial discretion in the imposition of legal financial obligations.”
10 See Amer. Bar Ass’n, Resolution 111B (2016 AM), cmt. at 13 (urging the abolition of user-funded probation systems supervised by for-profit companies based on a detailed explanation of the Supreme Court’s decision in Bearden v. Georgia, 461 U.S. 660, 672 (1983), and the problem of debtors’ prisons—the unlawful incarceration of people too poor to pay court fines and fees). Council of Economic Advisers Issue Brief, Fines, Fees, and Bail: Payments in the Criminal Justice System That Disproportionately Impact the Poor (Dec. 2015) (“CEA Brief”), at 5-6, available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf.
11 Amer. Bar Ass’n, Standards for Criminal Justice: Sentencing, Standard 18.3.22(e) (“Non-payment of assessed costs should not be considered a sentence violation.”)
Despite the popular belief that “debtors’ prisons” have been abolished in the United States, people are still incarcerated because they cannot pay court fines and fees, including contribution fees for appointed counsel. In many states, people are incarcerated because they owe fines and fees and are unable to pay. Such incarceration has been documented in at least thirteen states since 2010. As the Brennan Center has explained, there are four “paths” to debtors’ prison: (1) many courts may revoke or withhold probation or parole upon an individual’s failure to pay; (2) some courts authorize incarceration as a penalty for failure to pay, such as through civil contempt; (3) some courts force defendants to “choose” to serve prison time rather than paying a

The BAAs oppose incarceration for inability to pay court fees for appointed counsel. E.g., Amer. Bar Ass’n, Resolution 110 (2004 AM), ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases. Guideline 3 (“Failure to pay a contribution fee should result in the denial of counsel at any stage of proceedings.”). Amer. Bar Ass’n, Resolution of the House of Delegates 111B (Aug. 2016) (commentary on Bearden and debtors’ prisons). Amer. Bar Ass’n, Resolution of the House of Delegates 112C (Aug. 2017) (urging governments to “prohibit a judicial officer from imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant’s inability to pay”). The reasoning underlying Resolution 112C’s principle against pretrial incarceration for inability to pay also applies to any stage of court proceedings that could lead to incarceration for inability to pay. NFP Principle 4.3 states that courts should make an ability-to-pay determination before ordering incarceration or probation revocation for failure to pay. Principle 4.3 states that courts should make an ability-to-pay determination before ordering license suspension for failure to pay.

court-imposed debt; and (4) many states authorize law enforcement officials to arrest individuals for failure to pay and to hold them while they await an ability-to-pay hearing.14

In the seminal 1983 Bearden decision, the U.S. Supreme Court ruled that courts may not incarcerate an individual for nonpayment of a fine or restitution without first holding a hearing on the individual’s ability to pay and making a finding that the failure to pay was “willful.”15 ABA policy reflects this principle.16 The Bearden case followed a line of cases in which the Supreme Court had attempted to make clear that individuals who are unable to pay a fine or fee should not be incarcerated for failure to pay.17 Unfortunately, the problem persists almost a half-century later.

Fines and fees that are not income-adjusted (i.e., are not set at an amount the person reasonably can pay) are regressive and have a disproportionate, adverse impact on low-income people and people of color.18 For these and other reasons, incarceration and other disproportionate

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14 Criminal Justice Debt at 20-26. See also Profiting from Probation at 51-52. This “harch reality” of people being incarcerated for failure to pay impossible-to-pay fees and fines “harks back to the days after the Civil War, when former slaves and their descendants were arrested for minor violations, slapped with heavy fines, and then imprisoned until they could pay their debts.” The only means to pay off their debts was through labor on plantations and farms. . . . Today, many inmates work in prison, typically earning far less than the minimum wage.” Alexander, The New Jim Crow, at 157.

15 Bearden v. Georgia, 461 U.S. 395 (1971) (“Imprisonment in such a case [of an ‘indigent defendant without the means to pay his fine’] is because the statute “works an invidious discrimination solely because he is unable to pay the fine”); Standards for Criminal Justice: Sentencing 18-3.22 (Sentencing courts should consider an individual’s ability to pay before determining whether to assess fines or fees and how much to assess).

16 See, e.g., Williams v. Illinois, 399 U.S. 235 (1970) (holding that an Illinois law requiring that an individual who was unable to pay criminal fines “work off” those fines at a rate of $5 per day violated the Equal Protection Clause because the statute “works an invidious discrimination solely because he is unable to pay the fine”); Tate v. Short, 401 U.S. 395 (1971) (“Improvement in such a case [of an “indigent defendant without the means to pay the fine” is not imposed to further any penal objective of the State. It is imposed to augment the State’s revenues but obviously does not serve that purpose [either, the defendant cannot pay because he is indigent].”).

17 Studies show that the imposition and enforcement of fines and fees disproportionately and regressively affect low-income individuals and families. See, e.g., CEA Brief, at 5-8. For example, in many jurisdictions black people disproportionately experience license suspensions for nonpayment of fines and fees, due in part to racial disparities in wealth and poverty. See Back on the Road California, Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California, at 27 (2016) (hereinafter “Stopped, Fined, Arrested”), http://ebclc.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf. These racial disparities in license suspension in turn contribute to racial disparities in conviction for driving on a suspended license, making black people in these states disproportionately vulnerable to the resulting steep financial penalties. See Legal Aid Justice Center, Driven by Dollars: A State-by-State Analysis of Driver’s License Suspension Laws for Failure to Pay Court Debt (2017), https://www.justice4all.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf. These racial disparities in license suspension in turn contribute to racial disparities in conviction for driving on a suspended license, making black people in these states disproportionately vulnerable to the resulting steep financial penalties. See Legal Aid Justice Center, Driven by Dollars: A State-by-State Analysis of Driver’s License Suspension Laws for Failure to Pay Court Debt (2017), https://www.justice4all.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf. For example, in many jurisdictions black people disproportionately experience license suspensions for nonpayment of fines and fees, due in part to racial disparities in wealth and poverty. See Back on the Road California, Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California, at 27 (2016) (hereinafter “Stopped, Fined, Arrested”), http://ebclc.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf. These racial disparities in license suspension in turn contribute to racial disparities in conviction for driving on a suspended license, making black people in these states disproportionately vulnerable to the resulting steep financial penalties. See Legal Aid Justice Center, Driven by Dollars: A State-by-State Analysis of Driver’s License Suspension Laws for Failure to Pay Court Debt (2017), https://www.justice4all.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf. These racial disparities in license suspension in turn contribute to racial disparities in conviction for driving on a suspended license, making black people in these states disproportionately vulnerable to the resulting steep financial penalties. See Legal Aid Justice Center, Driven by Dollars: A State-by-State Analysis of Driver’s License Suspension Laws for Failure to Pay Court Debt (2017), https://www.justice4all.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf. These racial disparities in license suspension in turn contribute to racial disparities in conviction for driving on a suspended license, making black people in these states disproportionately vulnerable to the resulting steep financial penalties. See Legal Aid Justice Center, Driven by Dollars: A State-by-State Analysis of Driver’s License Suspension Laws for Failure to Pay Court Debt (2017), https://www.justice4all.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf. These racial disparities in license suspension in turn contribute to racial disparities in conviction for driving on a suspended license, making black people in these states disproportionately vulnerable to the resulting steep financial penalties. See Legal Aid Justice Center, Driven by Dollars: A State-by-State Analysis of Driver’s License Suspension Laws for Failure to Pay Court Debt (2017), https://www.justice4all.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf. These racial disparities in license suspension in turn contribute to racial disparities in conviction for driving on a suspended license, making black people in these states disproportionately vulnerable to the resulting steep financial penalties.
sanctions, including driver’s license suspension, should never be imposed for a person’s inability to pay a fine or fee. The same principle applies with full force to restitution and forfeiture.

Although restitution and forfeiture are beyond the scope of these Guidelines, at minimum it is clear that a person who is unable to pay any court-imposed financial obligation—including restitution or forfeiture—must not be incarcerated or subjected to other disproportionate sanction for failure to pay.

Just as a person’s ability to pay should be considered in imposing a fine or fee in the first place, and must be considered when imposing incarceration for failure to pay, the same principles apply to other disproportionate sanctions short of incarceration. A disproportionate sanction for non-payment of court fines and fees includes any sanction with a substantial adverse impact on the life of the individual.

A common sanction used by courts in the vast majority of states for failure to pay a fine is the suspension of a driver’s license, often imposed without a hearing. People who are prohibited from driving often lose their ability to work or attend to other important aspects of their lives.

Suspending a driver’s license can lead to a cycle of re-incarceration, because many such individuals find themselves in the untenable position of either driving with a suspended license or losing their jobs, and because driving on a suspended license is itself an offense that may be

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sanctioned with incarceration.\textsuperscript{21} Suspending a driver’s license for nonpayment is therefore out of proportion to the purpose of ensuring payment and deterrent to that end.\textsuperscript{22}

Nothing in this Guideline is intended to preclude a court from issuing an arrest warrant to secure the court appearance of a defendant who failed to appear if the court determines that the defendant received actual notice of the hearing. Courts should endeavor to ensure that any defendants arrested on failure-to-appear warrants are expeditiously brought before a judicial officer. In such circumstances, no person should be jailed without a hearing on ability to pay; in no event should bail or the bond amount on the warrant be set purposely to correspond with the amount of any fines and fees owed.

\textbf{GUIDE-LINE 4: Mandatory Ability-To-Pay Hearings}

Before a court imposes a sanction on an individual for nonpayment of fines, fees, or restitution, the court must first hold an “ability-to-pay” hearing, find willful failure to pay a fine or fee the individual can afford, and consider alternatives to incarceration.

\textbf{COMMENTARY:}

As set forth in Guideline 3, if a person is unable to pay a fine or fee, he or she should not be incarcerated or subjected to any other disproportionate sanction, including suspension of a driver’s license. There must also be procedures to ensure protection of that right, including a hearing where a court determines whether an individual is able, or unable, to pay the fine or fee at issue. In other words, at minimum the procedures set forth in \textit{Bearden} must precede any incarceration or imposition of any other sanction for nonpayment of a fine or fee.\textsuperscript{23} These

\textsuperscript{21} See Department of Justice “Dear Colleague” Letter (March 14, 2016), https://www.courts.wa.gov/subsite/mjc/docs/DOD3DearColleague.pdf (”Department of Justice Guidance”), at 6 (“In many jurisdictions, courts are also authorized—and in some cases required—to initiate the suspension of a defendant’s driver’s license to compel the payment of outstanding court debts. If a defendant’s driver’s license is suspended because of failure to pay a fine, such a suspension may be unlawful if the defendant was deprived of his due process right to establish inability to pay.”). See also Criminal Justice Debt at 24-25 (explaining the consequences of driver’s license suspensions).

\textsuperscript{22} In Robinson, a federal court in Tennessee ordered the restoration of driver’s licenses for individuals whose licenses had been suspended for nonpayment finding that a license suspension is “not merely out of proportion to the underlying purpose of ensuring payment, but affirmatively destructive of that end.” 2017 WL 4418134, at *7. The court held that “taking an individual’s driver’s license away to try to make her more likely to pay a fine is not using a shotgun to do the job of a rifle: it is using a shotgun to treat a broken arm. There is no rational basis for that.” Id. at *9.

\textsuperscript{23} See Bearden, 461 U.S. at 667-69 (incarceration for failure to pay a fine and restitution); Turner v. Rogers, 564 U.S. 431, 449 (2011) (incarceration for failure to pay child support); Robinson, 2017 WL 4418134, at *8-9 (driver’s license suspension). See also Department of Justice Guidance at 3 (“Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to

\textsuperscript{24} In Robinson, a federal court in Tennessee ordered the restoration of driver’s licenses for individuals whose licenses had been suspended for nonpayment finding that a license suspension is “not merely out of proportion to the underlying purpose of ensuring payment, but affirmatively destructive of that end.” 2017 WL 4418134, at *7. The court held that “taking an individual’s driver’s license away to try to make her more likely to pay a fine is not using a shotgun to do the job of a rifle: it is using a shotgun to treat a broken arm. There is no rational basis for that.” Id. at *9.

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procedures must apply whenever a sanction is being sought for nonpayment of a fine or fee, including in connection with deferred sentencing, implementation of a suspended incarceration sentence, or extension or revocation of probation, parole, or other form of supervision.

Courts must also provide adequate and meaningful notice of an ability-to-pay hearing to people alleged to have failed to pay, including notice of the hearing date, time and location, the subject matter to be addressed, and advisement of all applicable rights, including any right to counsel.24

GUIDELINE 5: Prohibition against Deprivation of Other Fundamental Rights

Failure to pay court fines and fees should never result in the deprivation of fundamental rights, including the right to vote.

COMMENTARY:

Payment of court fines and fees should never be tied to a person’s ability to exercise fundamental rights,25 which include the right to vote and the right to the care, custody, and control of one’s children.26 Yet, in certain states, the exercise of these fundamental rights is conditioned on the payment of court fines and fees by statute or through court practice.

pay was willful... Further, a court’s obligation to conduct indigency inquiries endures throughout the life of a case.

24 In connection with the NTF Principles, the National Task Force on Fines, Fees and Bail Practices also published a “Bench Card for Judges” entitled Lawful Collection of Legal Financial Obligations, available at http://www.ncsc.org/-/media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx. The Bench Card explains the importance of affording “Adequate Notice of the Hearing to Determine Ability to Pay,” and recognizes that such notice “shall include” notice of: the hearing date and time; the total amount due; that the court will evaluate the person’s ability to pay at the hearing; that the person should bring any documentation or information the court should consider in determining ability to pay; that incarceration may result only if alternative measures are not adequate to meet the state’s interests in punishment and deterrence or the court funds that the person had the ability to pay and willfully refused; the right to counsel; and that a person unable to pay can request payment alternatives, including, but not limited to, community service and/or reduction in the amount owed. See also Department of Justice Guidance at 5 (“Courts should ensure that citations and summonses adequately inform individuals of the provisions against them, the amount owed or other possible penalties, the date of their court hearing, the availability of alternate means of payment, the rules and procedures of court, their rights as a litigant, or whether in-person appearance is required at all. Gaps in this vital information can make it difficult, if not impossible, for defendants to fairly and expeditiously resolve their cases.”).

25 The term “fundamental right” as used in this principle does not include freedom from incarceration, which is addressed in Guidelines 3 and 4.

26 See Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (referring to “the political franchise of voting” as “a fundamental political right, because [it is] preservative of all rights”); Reynolds v. Sims, 377 U.S. 533, 561-562 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously addressed in Guidelines 3 and 4.

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For example, court fines and fees can effectively serve as a poll tax because certain states, including Georgia, require payment of all outstanding court fines and fees before a person convicted of a felony can regain his or her ability to vote. 27 In other states, reported nonpayment or willful nonpayment of fines and fees can lead to a revocation of voting rights. 28 And researchers have found that in states where people are prohibited from voting “while incarcerated or under other forms of criminal justice supervision,” people can suffer from voting restrictions as a result of “additional sanctions associated with or triggered by nonpayment,” such as violation of conditions of supervision and revocation of probation. 29 Although not required by state statute, there are also troubling reports that parents have been denied contact with their children until they have made payment on outstanding court fees—a deprivation of their fundamental right to make decisions concerning the care, custody, and control of their children. 30

The deprivation of fundamental rights, such as the right to vote, or to the care, custody, and control of one’s children, should never result from inability to pay or even a willful failure to pay by a person with means. No government interest in collecting court fines and fees, or in achieving punishment and deterrence through such collection, warrants the deprivation of such fundamental rights.

28 Id. (“In Washington, failure to make three payments in a twelve-month period can lead to a revocation of voting rights. The court can also revoke voting rights if they determine that a person has willfully failed to comply with the terms of payment.”).
29 Id. (“In Missouri, Illinois, and New York, nonpayment of legal financial obligations can be considered a violation of conditions of supervision which can potentially lead to an extension of supervision or revocation of probation and parole. In Minnesota, probation can be extended for up to five years for unpaid restitution and probation can be revoked for failure to pay for mandatory conditions of probation.”).
30 In 2017, a Youth Court Judge in Mississippi entered an order prohibiting a mother from having contact with her four-month-old baby until she paid her court fees in full, and was reported to have taken similar action with respect to other parents. The University of Mississippi School of Law, MacArthur Justice Center Initiated Demands that Led to Mississippi Youth Court Judge Resigning (Oct. 26, 2017), https://law.olemiss.edu/macarthur-justice-center-initiated-demands-that-led-to-mississippi-youth-court-judge-resigning.
GUIDELINE 6: Alternatives to Incarceration, Substantial Sanctions, and Monetary Penalties

For people who are unable to pay fines or fees, courts must consider alternatives to incarceration and to disproportionate sanctions, and any alternatives imposed must be reasonable and proportionate to the offense.

COMMENTARY:

Fines seek to punish and deter—goals that can often be served fully by alternatives to incarceration and disproportionate sanctions like driver’s license suspension. Reasonable alternatives include: an extension of time to pay; reduction in the amount owed; and waiver of the amount owed. Frequently, the most reasonable alternative to full payment of a fine that a person cannot afford is reduction of the fine to an amount that an individual can pay.

As addressed above, fees seek to recoup court costs, generate revenue for programs through surcharges or assessments, or cover the cost of services related to the justice system. Fees should only be imposed if, among other things, the individual is able to pay. If a person who has been required to pay a fee subsequently cannot afford to pay, the fee should be waived entirely or reduced to an amount the person can pay.

Judges must have the authority to waive any or all fines and fees if the person has no ability to pay. Any non-monetary alternatives to payment of a fine, such as community service, treatment, or other social services, should be developed in line with the individual’s circumstances. Participation in these alternatives should never be conditioned on the waiver of due process rights, such as the right to a hearing or to counsel. Nor should additional fees be imposed as a condition of participating in the alternative ordered.

Courts should not charge fees or impose any penalty for an individual’s participation in community service programs or other alternative sanctions. Courts should consider an individual’s financial situation, mental and physical health, transportation needs, and other factors such as school attendance and caregiving and employment responsibilities, when deciding whether and what type of alternative sanctions are appropriate.

Courts should not charge fees or impose any penalty for an individual’s participation in community service programs or other alternative sanctions. Courts should consider an individual’s financial situation, mental and physical health, transportation needs, and other factors such as school attendance and caregiving and employment responsibilities, when deciding whether and what type of alternative sanctions are appropriate.
Any non-monetary alternatives should be reasonable and proportional in light of the individual’s financial, mental, and physical capacity, any impact on the individual’s dependents, and any other limitations, such as access to transportation, school, and responsibilities for caregiving and employment. Non-monetary alternatives should also be proportional to the offense and not force individuals who cannot pay to provide free services beyond what is proportional.

GUIDELINE 7: Ability-to-Pay Standard

Ability-to-pay standards should be clear and consistent and should, at a minimum, require consideration of at least the following factors: receipt of needs-based or means-tested public assistance; income relative to an identified percentage of the Federal Poverty Guidelines; homelessness, health or mental health issues; financial obligations and dependents; eligibility for a public defender or civil legal services; lack of access to transportation; current or recent incarceration; other fines and fees owed to courts; any special circumstances that bear on a person’s ability to pay; and whether payment would result in manifest hardship to the person or dependents.

COMMENTARY:

Courts should apply a clear and consistent standard to determine an individual’s ability to pay court fines and fees.15

All court actors, including judges, prosecutors, probation officers, and defenders, should be trained in the standards used in their jurisdiction to determine ability to pay and the constitutional protections for people who cannot afford to pay court-ordered financial obligations.

GUIDELINE 8: Right to Counsel

An individual who is unable to afford counsel must be provided counsel, without cost, at any proceeding, including ability-to-pay hearings, where actual or eventual incarceration could be a consequence of nonpayment of fines and/or fees. Waiver of counsel must not be permitted unless the waiver is knowing, voluntary and intelligent, and the individual first has been offered a meaningful opportunity to confer with counsel capable of explaining the implications of pleading guilty, including collateral consequences.

15 The National Task Force’s “Bench Card” (http://www.ncsc.org/~/media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.pdf), a step-by-step guide for state and local judges to use to protect the rights of people who cannot afford to pay court fines and fees, includes a set of factors judges should consider when making an ability-to-pay determination.
COMMENTARY:

No indigent person should be incarcerated without being offered the assistance of court-appointed counsel to ensure that due process standards are met and that all potential defenses are considered. Such counsel should be provided in all proceedings “regardless of their denomination as felonies, misdemeanors, or otherwise.” Moreover, counsel should be offered whenever eventual incarceration is a possible result regardless of whether the proceeding at issue is denominated “criminal” or “civil.” The cost to the court of providing counsel is not a legitimate justification for the failure to provide counsel when it is required by law.

It is longstanding ABA policy that, “[n]o waiver of counsel be accepted unless the accused has at least once conferred with a lawyer.” This ensures that an individual who intends to waive counsel has a full understanding of the assistance that counsel can provide. Judges have the primary responsibility for ensuring that counsel is appointed, that individuals receive effective counsel, and that counsel has a full understanding of the assistance that counsel can provide. Judges have the primary responsibility for ensuring that counsel is appointed, that individuals receive effective counsel for indigent litigants in such “quasi-criminal” matters.

Amer. Bar Ass’n, Resolution 114 (MY 2018), https://www.americanbar.org/news/reporter_resources/midyear-meeting-2018/house-of-delegates/resolutions/114.html (urging federal, state, local, territorial and tribal governments “to ensure that counsel is appointed, that individuals receive effective counsel, and that counsel has a full understanding of the assistance that counsel can provide.”

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assistance of counsel, 41 and that any waivers of counsel are knowing and voluntary. 42 Judges
should never encourage unrepresented persons who qualify for public defense services to waive
counsel. 43 “An accused should not be deemed to have waived the assistance of counsel until the
entire process of offering counsel has been completed before a judge and a thorough inquiry into
the accused’s comprehension of the offer and capacity to make the choice intelligently and
understandingly has been made.” 44 Accordingly, prosecutors should not seek waivers of the	right to counsel from unrepresented accused persons. 45 Only after the defendant has properly
waived counsel may a prosecuting attorney “engage in plea discussions with the defendant,” and
“where feasible, a record of such discussions should be made and preserved.” 46

GUIDE LINE 9: Transparency

Information concerning fines and fees, including financial and demographic data, should be
publicly available.

41 Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (“We think the matter, for the most part, should be left to the
good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the
Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges
should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal
cases in their courts.”)

42 Id. See also Johnson v. Zerbst, 304 U.S. 458, 465 (1947) (“The constitutional right of an accused to be represented
by counsel invokes, of itself, the protection of a trial court, in which the accused whose life or liberty is at stake-in
without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of
determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the
right to counsel, whether there is a proper waiver should be clearly determined by the trial court.”)

43 See Model Code of Judicial Conduct, Rule 2.6 (providing that a judge must “accord to every person who has a
legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law,” and should not “act in
a manner that coerces any party into settlement”).

44 Amer. Bar Ass’n, Standards for Criminal Justice: Providing Defense Services 5-8.2. See also id. (“A waiver of
counsel should not be accepted unless it is in writing and of record.”)

45 Amer. Bar Ass’n, Standards for Criminal Justice: Prosecution Function 3-5.1(e) (“The prosecutor should not
approach or communicate with an accused unless a voluntary waiver of counsel has been entered or the accused’s
counsel consents.”). See also Model Rules of Professional Conduct, Rule 3.8(c) (“Prosecutors shall not “seek to
obtain from an unrepresented accused a waiver of important pretrial rights.”); id. Rule 3.8(b) (“Prosecutors shall
make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining,
counsel and has been given reasonable opportunity to obtain counsel”); id. Rule 4.1 (providing that officers of the
court should not fail to disclose material facts when dealing with persons other than clients).

46 Amer. Bar Ass’n, Standards for Criminal Justice: Prosecution Function 3-4.1(b) (4th ed. 2015),
https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html (“A
prosecutor should not use illegal or unethical means to obtain evidence or information, or employ, instruct, or
encourage others to do so.”).
Courts should track and timely make available to the public data documenting: a) court revenue and expenditures, including the aggregate amount of fines and any fees imposed, the aggregate amount of fines and any fees collected, and the aggregate cost of collecting fines and fees; b) the amount of fines and fees imposed, waived, and collected in each case; c) any cost to the court of administering non-monetary alternatives to payment, including community service and treatment programs; and d) demographic data regarding people ordered to pay fines and fees. The need for transparency is especially compelling with respect to private probation companies.

GUIDELINE 10: Collection Practices

Any entities authorized to collect fines, fees, or restitution, whether public or private, should abide by these Guidelines and must not directly or indirectly attempt to thwart these Guidelines in order to collect money; nor should they ever be delegated authority that is properly exercised by a judicial officer, such as the authority to adjudicate whether a person should be incarcerated for failure to pay. Any contracts with collection companies should clearly forbid intimidation, prohibit charging interest or fees, mandate rigorous accounting, outlaw reselling, and otherwise avoid incentivizing harmful behavior. Contracts should include some mechanism for monitoring compliance with these prohibitions.

COMMENTARY:

Many jurisdictions have awarded contracts to private companies to collect fines and fees, for diversion programs, or to supervise probation. Others have created a public agency or office responsible for collections of fines and fees. Often these entities, and especially those that are “for-profit” companies, have an interest in maximizing collections, and thus face inherent conflicts of interest.

47 “Timely” means as soon as feasible after the information is collected.
48 The cost to the court of administering any non-monetary alternative to payment should never be imposed on the defendant or respondent.
49 See National Center for State Courts, Principles for Judicial Administration 11 (2012) (requiring transparency and accountability through the use of performance measures and evaluation at all levels of the court system). See also Amer. Bar Ass’n, Resolution 302 (MY 2011) (urging state and local governments to identify and engage in best practices for court funding to insure protection of their citizens, efficient use of court resources, and financial accountability). NTF Principle 3.2 provides that “[a]ll courts should demonstrate transparency and accountability in the collection of fines, fees, costs, surcharges, assessments, and restitution, through the collection and reporting of financial data and the dates of all case dispositions to the state’s court of last resort or administrative office of the courts.”
50 Profiting from Probation, at 18 (“A good place for state governments to start would be to require basic transparency about the revenues probation companies extract from probationers. No state does this now.”).
conflicts of interest when charging fees for diversion or probation, seeking to collect fines and fees, and informing probationers of their right to counsel in probation revocation hearings. Often these entities have imposed additional fees when people cannot immediately pay fines and fees, have misinformed indigent people facing incarceration for nonpayment of their right to counsel in such proceedings, and have failed to help courts identify people whose debt should be waived, reduced, or converted to carefully thought-out non-monetary alternatives. Therefore, courts and state and local governments must be the hallmark of our justice system. Therefore, courts and state and local governments ensure that all entities that collect fines and fees or administer diversion or probation, including for-profit companies, abide by these Guidelines. Courts should only forward for collection those cases in which an individual has been found to have willfully failed to pay following a court hearing in adherence to these Guidelines. Any contracts with collection companies should clearly forbid intimidation, prohibit charging interest or fees, mandate rigorous accounting, outlaw reselling, and otherwise avoid incentivizing harmful behavior. Contracts should also include some mechanism for monitoring compliance with these prohibitions.

The integrity of the criminal justice system depends on eliminating such conflicts of interest. These conflicts thwart the fair and neutral provision of justice that is integral to due process and must be the hallmark of our justice system. Therefore, courts and state and local governments ensure that all entities that collect fines and fees or administer diversion or probation, including for-profit companies, abide by these Guidelines. Courts should only forward for collection those cases in which an individual has been found to have willfully failed to pay following a court hearing in adherence to these Guidelines. Any contracts with collection companies should clearly forbid intimidation, prohibit charging interest or fees, mandate rigorous accounting, outlaw reselling, and otherwise avoid incentivizing harmful behavior. Contracts should also include some mechanism for monitoring compliance with these prohibitions.

51 See Amer. Bar Ass’n, Resolution 111B (2016 AM) and Report (condemning the use of for-profit companies for user-funded probation with reasoning that supports the principle against the use of for-profit companies to collect court fines and fees).

52 Department of Justice Guidance at 8; Profiting from Probation at 42-44.

52 See Rodríguez v. Providence Community Corrections, 155 F. Supp. 3d 758, 771 (M.D. Tenn. Dec. 17, 2017) (finding that a for-profit collection company’s failure to inquire into ability to pay before stacking fees, effectively revoking probation, raised due process and equal protection concerns).

53 See Rodríguez v. Providence Community Corrections, 155 F. Supp. 3d 758, 771 (M.D. Tenn. Dec. 17, 2017) (finding that a for-profit collection company’s failure to inquire into ability to pay before stacking fees, effectively revoking probation, raised due process and equal protection concerns).
In July 2016, in the face of increasing racial tensions, retaliatory violence against police officers, and a growing sense of public distrust in our nation’s justice system, the ABA created the Task Force on Building Public Trust in the American Justice System. The Task Force wrote a Report, received by the ABA Board of Governors in February 2017, that calls on the ABA and state and local bar entities to: (1) encourage the adoption of best practices for reforming the criminal justice system; (2) build consensus about needed reforms and work to carry them out; and (3) educate the public about how the criminal justice system works.1

In August, 2017, incoming ABA President Hilarie Bass appointed a Working Group on Building Public Trust in the American Justice System to continue the work of the Task Force. The Working Group chose to focus its efforts on one particular issue causing distrust of the justice system—the imposition and enforcement of excessive fines and fees. The Working Group chose to focus first on this topic because it adversely impacts millions of Americans and has contributed significantly to negative public perceptions of the justice system. After a year of study and broad-based consultation within and outside the ABA, the Working Group has developed Ten Guidelines on Court Fines and Fees (the “Guidelines”), which we now propose be adopted by the ABA House of Delegates.

Every day in the United States, courts impose myriad financial obligations on individuals who have been charged with criminal offenses or civil infractions. These include fines imposed as part or all of the punishment levied against them for low-level offenses, such as traffic tickets or civil ordinance violations, as well as misdemeanors and felonies.2 They also include fees, which, are not imposed to punish or deter offenses but to raise revenue or fund services.3 Some fees are legislatively-mandated assessments or charges to recoup court costs, while others are “user fees” assessed to help fund the justice system, including costs associated with probation, public defenders, diversion programs, and court costs, as well as other essential government services. They also include orders of forfeiture and restitution, which are not the focus of these

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2 The term “fines” includes monetary penalties imposed by a court as punishment for a criminal offense or civil infraction. For purposes of these Guidelines, restitution and forfeiture are not included in the definition of “fines and fees.”

3 The term “fees” includes fees, court costs, state and local assessments, and surcharges imposed when a person is convicted of criminal offenses and civil infractions. The term, as used in these Guidelines, does not include civil filing fees.
Guidelines, although several of the principles underlying these Guidelines apply to forfeiture and restitution as well.4 The imposition and enforcement of these fines and fees disproportionately harm the millions of Americans who cannot afford to pay them, entrenching poverty, exacerbating racial and ethnic disparities, diminishing trust in our justice system, and trapping people in cycles of punishment simply because they are poor. In communities around the country, millions of people are incarcerated, subjected to the suspension of driver’s and occupational licenses, or prohibited from voting simply because they cannot afford to pay fines or fees imposed by courts. Even children are incarcerated for failure to pay fines or fees, even though children almost by definition lack a personal ability to pay such fines or fees.

An estimated 10 million Americans owe more than $50 billion resulting from their involvement in the criminal justice system.5 Some are sentenced solely to the payment of fines and fees. Others have been sentenced to prison terms in addition to any fines and fees imposed. According to the most recently available numbers, approximately two-thirds of people in prison have been assessed court fines and fees.6 This remarkable statistic persists even though people sent to prison often have little prospect of earning enough money to pay their debt: 65 percent of prisoners do not have a high school diploma, and 15 to 27 percent of people leaving prison or jail expect to go to a homeless shelter upon release and as many as 60 percent remain unemployed a year after release.7

Studies show that the imposition and enforcement of fines and fees disproportionately and regressively affect low-income individuals and families.8 Communities of color are particularly devastated for reasons that include the longstanding racial and ethnic wealth gap,9 higher rates of

4 For example, as noted below with respect to Guideline 3, a person who is unable to pay an order of restitution should not be incarcerated for failure to pay.


8 See, e.g., Council of Economic Advisers Issue Brief, Fines, Fees, and Bail: Payments in the Criminal Justice System That Disproportionately Impact the Poor (Dec. 2015) (“CEA Brief”), at 5-8.

9 A 2013 Pew Research Center study of federal data found that the median wealth of white households was 13 times the median wealth of black households, and 10 times the median wealth of Latino households. See Rakesh Kochhar & Richard Fry, Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession, Pew Research Center (Dec. 12, 2014), http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession.
poverty and unemployment, and the over-policing of communities of color, for reasons that include racial and ethnic profiling. For example, in many jurisdictions black people disproportionately experience license suspensions for nonpayment of fines and fees, due in part to racial disparities in wealth and poverty. These racial disparities in license suspension in turn contribute to racial disparities in conviction for driving on a suspended license, making black people in these states disproportionately vulnerable to the resulting steep financial penalties. Such racial disparities in the adverse impact of the imposition and enforcement of court fines and fees also contribute to tension between law enforcement and courts on the one hand and the communities of color they serve on the other, as documented in a 2015 report by the U.S. Department of Justice.

The application of fines and fees is not limited to adults in the criminal justice system. Frequently fines and fees are imposed on juveniles and their families in connection with the over-policing of communities of color, for reasons that include racial and ethnic profiling. For example, in many jurisdictions black people disproportionately experience license suspensions for nonpayment of fines and fees, due in part to racial disparities in wealth and poverty. These racial disparities in license suspension in turn contribute to racial disparities in conviction for driving on a suspended license, making black people in these states disproportionately vulnerable to the resulting steep financial penalties. Such racial disparities in the adverse impact of the imposition and enforcement of court fines and fees also contribute to tension between law enforcement and courts on the one hand and the communities of color they serve on the other, as documented in a 2015 report by the U.S. Department of Justice.
young person’s involvement with the juvenile justice system. A recent report on Alameda County, California, showed that total fees to families for juvenile involvement added up to approximately $2,000 for an average case.

Bedrock constitutional principles of due process and equal protection of the law apply when courts impose and collect fines and fees. More than thirty years ago, the U.S. Supreme Court ruled in Bearden v. Georgia, 461 U.S. 660 (1983), that it is unconstitutional to incarcerate people solely for their inability to pay fines or restitution. For decades, the Court has warned that the justice system must not treat those with money more favorably than those without. Yet these practices endure.

The effect is that poor people are punished because of their poverty, in violation of basic constitutional principles guaranteeing fairness and equal treatment of rich and poor in the justice system. This harms us all. When people are jailed, or their driver’s licenses are suspended, because they cannot afford to pay court fines or fees, they face heightened barriers to employment and education, disrupting families and undermining community stability. Similarly, requiring fees to access diversion or treatment programs, such as “drug courts,” creates a two-tiered system of justice—one for the rich and one for the poor. These effects detract from public trust in our justice system, including our law enforcement officials and our courts.

Although fines are an appropriate sanction in certain circumstances, the Guidelines seek to ensure that no one is subjected to disproportionate sanctions, including incarceration, simply because they do not have the money to pay an otherwise appropriate fine or fee.

An important objective of the Guidelines is to eliminate any and all financial incentives in the criminal justice system to impose fines or fees. The justice system serves the entire public and should be entirely and sufficiently funded by general government revenue. The total funding for any given court or court system should not be directly affected by the imposition or collection of fines or fees (as defined for purposes of the Guidelines). This core principle was adopted by the National Task Force on Fines, Fees and Bail Practices, established by the Conference of Chief Justice. The effect is that poor people are punished because of their poverty, in violation of basic constitutional principles guaranteeing fairness and equal treatment of rich and poor in the justice system. This harms us all. When people are jailed, or their driver’s licenses are suspended, because they cannot afford to pay court fines or fees, they face heightened barriers to employment and education, disrupting families and undermining community stability.

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Justices and the Conference of State Court Administrators. In December 2017, the Task Force issued its “Principles on Fines, Fees, and Bail Practices” (the “National Task Force Principles” or “NTF Principles”),14 which were endorsed in 2018 by the Access, Fairness and Public Trust Committee of the Conference of Chief Justices.15 Principle 1.5 of the NTF Principles states, “Courts should be entirely and sufficiently funded from general governmental revenue sources to enable them to fulfill their mandate. Core court functions should generally not be supported by revenues generated from court-ordered fines, fees, or surcharges.”

“Requiring users to pay for judicial services is, in many ways, anathema to public access to the courts.”20 All components of the justice system, including courts, prosecutors, public defenders, pre-trial services, and probation, should be sufficiently funded from public revenue sources and not reliant on fees, costs, surcharges, or assessments levied against criminal defendants or people sanctioned for civil infractions. As a Louisiana federal court held in December 2017, where judges in a given jurisdiction are responsible for both (a) “managing fines and fees revenue” that fund court operations, and (b) “determining whether criminal defendants are able to pay those same fines and fees,” such judges face an impermissible “institutional incentive to find that criminal defendants are able to pay fines and fees.”21


17 273 U.S. 510, 532 (1927) (holding that due process was violated where a court’s revenue, and the judge’s salary, depended in part on the imposition and collection of court fines and fees).
The justice system should not be used as a revenue source for government services. State and local governments should not depend on fines and fees imposed in the justice system for general revenue or to fund particular services inside or outside the criminal justice system. "When courts are pressured to act, in essence, as collection arms of the state, their traditional independence suffers." In addition, a number of ABA policies include guidelines designed to protect the right to counsel and to ensure that the poor do not disproportionately suffer because of their indigence. The current resolution and guidelines build on ABA policies, the NTF principles, and existing law to create straightforward, coherent, and focused guidelines that can assist courts, administrators, legislators, and advocates seeking to remedy harms presented by the imposition and collection of fines and fees in the justice system. The Guidelines are also intended to be readily accessible and useful for members of the public, including non-lawyers. In this way, the Guidelines serve the original three goals set out in the Task Force report: (1) to encourage the adoption of best practices; (2) to establish consensus around needed reform; and (3) to educate the public. The Guidelines will thus help in building public trust in the American justice system.

22 Amer. Bar Ass’n, Standards for Criminal Justice: Sentencing, Standard 18-2.2 (i) (“Economic sanctions include fines, monetary awards payable to victims, and mandatory community service. The legislature should not authorize imposition of economic sanctions for the purpose of producing revenue.”). See Amer. Bar Ass’n Resolution 117A (AM 2008) (urging Congress to support quality and accessible justice by ensuring adequate, stable, long-term funding for tribal justice systems) (citing ABA resolution 10A (AM 2004), adopting Report of the American Bar Foundation Commission on State Court Funding (2004)).

23 See id. The history behind court-imposed fees and fines—and incarceration for failure to pay—is closely tied to practices that arose during Reconstruction. As Professors Harris, Evans and Beckett have explained, monetary sanctions were commonplace in the South, “where their imposition was the foundation of the convict lease system that existed from emancipation through the 1940s.” Drawing Blood from Stones, 15 AM. J. Sociology at 1758. “Charged with fees and fines several times their annual earnings, many southern prisoners were leased by justice officials to corporations who paid their legal debt in exchange for inmates’ labor in coal and steel mines as well as on railroads, quarries, and farm plantations. Collected fees and fines were used to pay judges’ and sheriffs’ salaries. Monetary sanctions were thus integral to systems of criminal justice, debt bondage, and racial domination in the American South for decades.” Id. (citations omitted). See also Michelle Alexander, The New Jim Crow (2012), at 31 (“During Reconstruction) vagrancy laws and other laws defining activities such as ‘mischief’ and ‘insulting gestures’ as crimes were enforced vigorously against blacks. The aggressive enforcement of these criminal offenses opened up an enormous market for convict leasing, in which prisoners were contracted out as laborers to the highest private bidder. Douglas Blackmon, in [Slavery by Another Name: The Re-en enslavement of Black People in America from the Civil War to World War II (2008)], describes how tens of thousands of African Americans were arbitrarily arrested during this period, many of them hit with court costs and fines, which had to be worked off in order to secure their release.”).

24 Criminal Justice Debt at 2. See also id. at 30; Katherine Beckett & Alexes Harris, On cash and conviction: Monetary sanctions as misguided policy, 18 Criminology & Public Policy 505, 511 (2011) (“On cash and conviction”) ("If the state compels penal targets to use (often expensive and ineffective) state ‘services,’ then the government is obligated to pay for them. Indeed, this fiscal obligation is an important check on government power.").
Respectfully submitted,
Robert N. Weiner, Chair
Working Group on Building Public Trust in the American Justice System
Section on Civil Rights and Social Justice
August 2018
1. Summary of Resolution(s). This resolution urges federal, state, local, territorial, and tribal legislative, judicial and other government bodies to promulgate law and policy consistent with and otherwise adhere to, the proposed guidelines for the imposition and collection of court fines and fees.

2. Approval by Submitting Entity. This resolution was passed by the Working Group on Building Public Trust in the American Justice System on May 2, 2018.

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?

- 04A110, adopting ABA Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases
- 04A107, adopting Report of the American Bar Foundation Commission on State Court Funding
- 10M192C
- 11M302
- 16A111B
- 17M112C
- 18M114

ABA Standards for Criminal Justice: Sentencing, Standards 18.2.2 (ii), 18.3.16 (d) & 18.3.22(e)

ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings (2010)

ABA Standards for Criminal Justice: Providing Defense Services 5-5.1 & 5-5.2 (1992)

None of these policies would be affected by the adoption of this resolution.

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

6. Status of Legislation. (If applicable) N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

This policy will enable the ABA and relevant ABA committees to provide guidance to courts, legislatures, and advocates on the ground working to expose and end practices leading to modern-day debtors’ prisons, through amici curiae in appropriate cases, for example.

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 2018 Annual Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

Judicial Division
Section of State and Local Government Law
Government and Public Sector Lawyers Division
Litigation
Young Lawyer’s Division
Section on Civil Rights and Social Justice
Criminal Justice Section
Law Practice Division
Solo, Small Firm and General Practice Division
Ethics and Professional Responsibility
Commission on Veteran’s Legal Services
Standing Committee on Public Education
Commission on Disability Rights
Commission on Hispanic Legal Rights & Responsibilities
Commission on Homelessness and Poverty
Center for Human Rights
Commission on Immigration
Coalition on Racial & Ethnic Justice
Commission on Youth at Risk
Law Student Division
Standing Committee on Legal Aid and Indigent Defendants
Standing Committee on the Delivery of Legal Services
Commission on Women in the Profession
Standing Committee on Pro Bono and Public Service
Diversity Entities
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Robert Weiner  
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601 Massachusetts Ave NW  
Washington, DC 20001  
Robert.Weiner@apks.com

Malia Brink  
Assistant Counsel for Public Defense - ABA SCLAID  
1050 Connecticut Ave NW  
Washington, DC 20036  
Malia.Brink@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.)

Robert Weiner – Chair, Section on Civil Rights and Social Justice and Chair, ABA Working Group on Building Public Trust in the American Justice System

Arnold & Porter  
601 Massachusetts Ave NW  
Washington, DC 20001  
Robert.Weiner@apks.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

   This Resolution adopts the ABA Ten Guidelines on Court Fines and Fees and urges federal, state, local, territorial, and tribal legislative, judicial and other governmental bodies to promulgate law and policy consistent with, and otherwise to adhere to, the Guidelines.

2. Summary of the Issue that the Resolution Addresses

   This resolution is intended to address the fundamental unfairness created when people are subjected to disproportionate sanctions, including imprisonment, simply because they do not have the ability to pay a fine or fee for a criminal offense or civil infraction.

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

   A policy position from the ABA will provide much needed leadership and guidance to federal, state, local, territorial, and tribal legislative, judicial and other government bodies, and to advocates before those bodies, on how to lawfully impose and enforce court fines and fees and how to address ongoing constitutional violations.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

   None known.
RESOLVED, That the American Bar Association adopts the American Bar Association Standards for Accreditation of Legal Plans dated August 2018.
SECTION 1: POLICY STATEMENT
1.01 This document establishes standards by which the American Bar Association will accredit a group, entity or organization as a Legal Plan. The Standards require that an accredited Legal Plan demonstrates that it provides affordable access to legal services; and that if those services are provided through a Legal Plan attorney, the Legal Plan demonstrates that Legal Plan attorney is required to have the requisite training and qualifications to participate in the Legal Plan. These Standards are designed to enable the Association to evaluate thoroughly the objectives, standards and procedures of Applicants and to facilitate public access to Legal Plan services. They are also intended to foster vigorous, effective and competent representation of clients covered by Legal Plans.

SECTION 2: DEFINITIONS
2.01 As used in these Standards:

(A) "Legal Plan" is any group, entity or organization, which charges a fee for document preparation, consultation services or legal representation to members of the Legal Plan. This includes phone consultation to assist a client in preparation of documents and/or the referral of clients to attorneys where the attorneys receive a fee or provide a free consultation.

(B) "Applicant" means a Legal Plan organization which applies to the American Bar Association for accreditation or re-accreditation under these Standards.

(C) "Association" means the American Bar Association.

(D) "Legal Plan Attorney" means an attorney who is part of that Legal Plan and provides services to Legal Plan members under the Legal Plan.

(E) "Standards" means the American Bar Association Standards for Accreditation of Legal Plans.

(F) "Legal Plan Standards Committee" means Standing Committee on Group and Prepaid Legal Services which will review applications for accreditation and re-accreditation.

SECTION 3: AUTHORITY
3.01 The authority to grant and withdraw accreditation and to grant reaccreditation is vested in the Association.

3.02 Accreditation under these Standards of any Legal Plan by the Association is not intended to, and shall not be interpreted to, preempt nor usurp the authority of states to regulate the practice of law.
SECTION 4: REQUIREMENTS FOR ACCREDITATION OF LEGAL PLANS

In order to obtain accreditation by the Association, an Applicant must demonstrate that the Legal Plan operates in accordance with the following standards:

4.01 Purpose of Legal Plans – The Applicant shall demonstrate that the Legal Plan is dedicated to providing affordable access to quality legal services.

4.02 Legal Plan Attorneys – For those offerings under the Legal Plan provided by Legal Plan Attorneys, the Legal Plan shall have in place an application and screening process for all potential Legal Plan Attorneys. The Legal Plan shall establish minimum requirements for those attorneys and capture those requirements in a contract signed by the attorney agreeing to such requirements.

The minimum requirements are as follows:

(A) The Legal Plan Attorney shall be validly licensed with applicable state entities governing the licensure of attorneys in the applicable jurisdictions;

(B) The Legal Plan Attorney shall be in good standing with the State Bar and actively disclose any past or present disciplinary matters to the Legal Plan;

(C) The Legal Plan Attorney shall be engaged in the practice of law;

(D) The Legal Plan Attorney shall, even if practicing virtually, have access to a physical location suitable to meet and respond to Legal Plan members and in compliance with any applicable state ethical rules, except where a legal plan which otherwise meets the requirements of these guidelines additionally retains an attorney whose practice includes only telephone access services.

(E) The Legal Plan Attorney shall have a minimum of two (2) years in practice/related experience OR have a Senior Mentor (defined as having ten (10) or more years in practice). A clerkship with a criminal or civil judge equates to the requisite experience;

(F) The Legal Plan Attorney shall be familiar with the Legal Plan under which they provide services and complete any required Legal Plan specific training, which includes customer service standards required by the Legal Plan;

(G) The Legal Plan Attorney shall maintain a professional malpractice/liability policy and provide to the Legal Plan proof of such coverage on an annual basis;

(H) The Legal Plan Attorney shall accept the Legal Plan’s fee schedule;

(I) The Legal Plan Attorney shall agree to monitor, maintain and update their information or profile with the Legal Plan which is used to display to Legal Plan members.
The Legal Plan shall conduct annual certification reviews of Legal Plan Attorneys.

An Applicant shall submit an affidavit and supporting documents to the Standing Committee on Group and Prepaid Legal Services certifying that they require their Legal Plan Attorneys to meet the requirements above.

Legal Plan Services - A Legal Plan shall include in its Plan an offering some form of in-office, in-person services with a Legal Plan Attorney. A Legal Plan shall also include in its offering both paid- in-full and discounted legal services for its members for the core practice areas which include at a minimum, but are not limited to: Wills/Estate Planning, Traffic matters, Family Law, Civil Matters, Administrative Matters, Financial Matters, and Real Estate Matters. Though a Legal Plan may include the above in its online or telephonic legal services, the plan shall not be limited to those offerings.

Other Services - If legal services are provided, by someone other than an attorney, to a member through a Legal Plan, that person shall be supervised by someone who is licensed to provide such services in that jurisdiction.

Member Complaints – The Legal Plan shall have in place a formal process by which to receive and address client complaints.

Attorney Issues – The Legal Plan shall have in place a formal process by which to address Legal Plan Attorney issues, including termination from the Legal Plan, if appropriate.

Organizational Capabilities – the Applicant shall demonstrate that it possesses the organizational and financial resources to provide the benefits under the Legal Plan on a continuing basis and that it adheres to any applicable state or federal requirements.

Nondiscrimination – The Applicant shall not discriminate against any lawyers seeking to become Legal Plan Attorneys 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 attorneys seeking to become Legal Plan Attorneys.

Legal Plan Services - A Legal Plan shall include in its Plan an offering some form of in-office, in-person services with a Legal Plan Attorney. A Legal Plan shall also include in its offering both paid- in-full and discounted legal services for its members for the core practice areas which include at a minimum, but are not limited to: Wills/Estate Planning, Traffic matters, Family Law, Civil Matters, Administrative Matters, Financial Matters, and Real Estate Matters. Though a Legal Plan may include the above in its online or telephonic legal services, the plan shall not be limited to those offerings.

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SECTION 5: ACCREDITATION PERIOD AND RE-ACCREDITATION

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

5.02 The Standing Committee on Group and Prepaid Legal Services shall issue a certificate of accreditation if their review shows that the Legal Plan’s rules, policies, and procedures meet the Standards.

5.03 To retain Association accreditation, a Legal Plan shall be required to apply for re-accreditation prior to the end of its initial accreditation period and every two years thereafter. The Legal Plan shall be granted re-accreditation upon a showing of continued compliance with these Standards.

SECTION 6: REVOCATION OF ACCREDITATION

6.01 A Legal Plan’s accreditation by the Association may be revoked upon a determination that the Legal Plan has ceased to exist, or has ceased to operate in compliance with these Standards.

SECTION 7: AUTHORITY TO IMPLEMENT STANDARDS

7.01 Consistent with these Standards, the Standing Committee on Group and Prepaid Legal Services shall:

(A) Interpret these Standards;

(B) Adopt rules and procedures for implementing these Standards, and amend such rules and procedures as necessary;

(C) Adopt an appropriate fee schedule to administer these Standards;

(D) Consider applications by any Legal Plan for accreditation or re-accreditation under these Standards, evaluate those requests in accordance with the Standards and recommend approval by the Association of such requests when it deems the Legal Plan has met the requirements as set forth in these Standards; and

(E) Recommend the revocation of accreditation in accordance with the provisions of Section 6.01 of these Standards.

SECTION 8: ADOPTION AND AMENDMENT

8.01 These Standards become effective upon their adoption by the House of Delegates of the Association.

8.02 The power to approve an amendment to these Standards is vested in the House of Delegates; however, the House will not act on any amendment until it has first received and considered the advice and recommendations of the Legal Plans Standards Committee.
The purpose of this Resolution is to ensure that, at a minimum, Legal Plans are providing affordable access to legal services in furtherance of bridging the access to justice gap for all Americans. As Legal Plans currently help citizens of moderate to modest means—a group not currently addressed by legal aid organizations, it is imperative the Legal Plans demonstrate they adhere to minimum standards set by the American Bar Association. This adherence will not only ensure affordable access of legal services to this important population but also help foster vigorous, effective, and competent representation of clients covered by Legal Plans.

The key components of the Standards are defined in Section 2.

Section 3 of the Standards grants the American Bar Association with the authority to grant, reject or withdraw accreditation or re-accreditation.

Section 4 of the Standards states the minimum standards by which the Legal Plan must adhere to be accredited by the American Bar Association, including:

1. The Legal plan is dedicated to providing affordable access to quality legal services;
2. If a Legal Plan attorney is involved, that attorney must apply to the Legal Plan, meet minimum requirements to become a member of the Legal Plan attorney network, and be reviewed every year to ensure continued compliance with these minimum requirements;
3. The Legal Plan must offer, at a minimum, certain components to its plan to ensure affordable access for the most utilized legal issues;
4. If the Legal Plan provides legal services by someone other than an attorney, that person must be supervised by an attorney;
5. The Legal Plan must have a formal complaint process;
6. The Legal Plan must have a formal process by which to address issues and complaints raised about the attorney;
7. The Legal Plan must demonstrate that it adheres to any state or federal regulations that are applicable to its business and that it has financial security to ensure it can provide affordable access to its members; and
8. The Legal Plan must not discriminate in any way against any attorneys applying to become members of the Legal Plan’s attorney network.

Section 5 of the Standards states that accreditation will be granted for a period of two years and that a Legal Plan must reapply before the end of that second year for re-accreditation.

Section 6 of the Standards grants the American Bar Association that right to revoke any accreditation upon substantiated information that the Legal Plan is no longer meeting the requirements set forth in these Standards.
Section 7 of the Standards defines that the Standing Committee on Group and Prepaid Legal Services will act on behalf of the American Bar Association to do the following:

1. Interpret the Standards;
2. Create procedures for implementing the Standards (including administrative processes such as how to apply, where applications and reviews are housed, and so on);
3. Create a fee for the application for accreditation and re-accreditation. The fee will be used to support the administrative function described in number 2 above;
4. Review applications for accreditation and re-accreditation and approve or deny such applications; and
5. Withdraw or revoke a Legal Plan’s accreditation if they are no longer in compliance with these Standards.

Section 8 of the Standards grants the American Bar Association’s House of Delegates the authority to amend these Standards.

Respectfully submitted,

Keri Coleman Norris
Chair, Standing Committee on Group and Prepaid Legal Services

Respectfully submitted,

Keri Coleman Norris
Chair, Standing Committee on Group and Prepaid Legal Services
Submitting Entity: The Standing Committee on Group and Prepaid Legal Services (the Standing Committee).

Submitted By: Keri Coleman Norris, Chair of the Standing Committee

1. Summary of Resolution(s). The purpose for this Resolution is to set Standards to ensure Legal Plans at a minimum, are providing affordable access to legal services in furtherance of bridging the access to justice gap for all Americans.

2. Approval by Submitting Entity. Approved by the Standing Committee on Group and Prepaid Legal Services on October 27, 2017.

3. Has this or a similar resolution been submitted to the House or Board previously? The Standing Committee is not aware of any similar resolution.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? There are currently no policies regarding legal plans that will be affected by the adoption of this Resolution.

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

6. Status of Legislation. (If applicable) n/a

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If this Resolution is adopted, the following steps will be taken to implement the Standards.
   a. Processes (including regarding the application and other administrative tasks) will be developed and implemented by the Standing Committee;
   b. Notification to all Legal Plans will be written and sent;
   c. News article will be written and released for information to general public and those developing Legal Plans; and
   d. Applications will be reviewed by the Legal Plans Standards Committee and notifications will be sent out to applicants regarding their status.

8. Cost to the Association. (Both direct and indirect costs) This Resolution anticipates a low staff cost which should be offset by the application fees by the plans seeking approval.
   1. to help with the development of the application;
   2. to act as receiver of the applications and any other information provided to the Standing Committee;
   3. to set calendar for the Standing Committee to meet to review applications and information; and
   4. to help write and distribute the notification to Legal Plans and the news article to the public.

GENERAL INFORMATION FORM

Submitting Entity: The Standing Committee on Group and Prepaid Legal Services (the Standing Committee).

Submitted By: Keri Coleman Norris, Chair of the Standing Committee

1. Summary of Resolution(s). The purpose for this Resolution is to set Standards to ensure Legal Plans at a minimum, are providing affordable access to legal services in furtherance of bridging the access to justice gap for all Americans.

2. Approval by Submitting Entity. Approved by the Standing Committee on Group and Prepaid Legal Services on October 27, 2017.

3. Has this or a similar resolution been submitted to the House or Board previously? The Standing Committee is not aware of any similar resolution.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? There are currently no policies regarding legal plans that will be affected by the adoption of this Resolution.

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

6. Status of Legislation. (If applicable) n/a

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If this Resolution is adopted, the following steps will be taken to implement the Standards.
   a. Processes (including regarding the application and other administrative tasks) will be developed and implemented by the Standing Committee;
   b. Notification to all Legal Plans will be written and sent;
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   d. Applications will be reviewed by the Legal Plans Standards Committee and notifications will be sent out to applicants regarding their status.

8. Cost to the Association. (Both direct and indirect costs) This Resolution anticipates a low staff cost which should be offset by the application fees by the plans seeking approval.
   1. to help with the development of the application;
   2. to act as receiver of the applications and any other information provided to the Standing Committee;
   3. to set calendar for the Standing Committee to meet to review applications and information; and
   4. to help write and distribute the notification to Legal Plans and the news article to the public.
It is anticipated the fees paid by the applicants will help offset the costs identified above.

9. Disclosure of Interest. (If applicable) None

10. Referrals. None

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

   Keri Coleman Norris, Chair of the Standing Committee
   LegalShield, 1 Prepaid Way
   Ada, OK 74820
   580-421-7900
   kerinorriss@legalshieldcorp.com.

   Stephen D. Williams
   Standing Committee Member
   50 Main Street
   Flemington, New Jersey 08822
   908-284-0074
   steve@sdwilliamslaw.com or cnjatty@aol.com

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

   Keri Coleman Norris, Chair of the Standing Committee
   LegalShield, 1 Prepaid Way
   Ada, OK 74820
   580-421-7900
   kerinorriss@legalshieldcorp.com.

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EXECUTIVE SUMMARY

1. Summary of the Resolution
The purpose for this Resolution is to ensure Legal Plans at a minimum, are providing affordable access to legal services in furtherance of bridging the access to justice gap for all Americans. As Legal Plans currently help moderate to modest means citizens – a group not currently addressed by legal aid organizations, it is imperative the Legal Plans demonstrate they adhere to minimum standards set by the American Bar Association. This adherence will not only ensure affordable access of legal services to this important population but also help foster vigorous, effective and competent representation of clients covered by Legal Plans.

2. Summary of the Issue that the Resolution Addresses
This Resolution was developed to ensure as access to justice efforts are increased to help bridge the gap, that the Legal Plan Industry be recognized as a legitimate, affordable solution for a large group of citizens whose needs are not yet really being addressed – the moderate to modest to higher income consumers. It is imperative that we ensure minimum standards are being met by entities providing services under Legal Plans to meet this goal. The Legal Plan industry has been working collectively over the last years to help provide solutions for affordable legal services, and wants to continue to be viable in this effort to bridge the gap.

3. Please Explain How the Proposed Policy Position Will Address the Issue
The issue is Legal Plans need to provide a credible, affordable solution to citizens. This Resolution helps guide them to providing such a solution and to become a credible, effective Plan that will help those consumers whose needs are not being met elsewhere.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
We are not aware of any other views at this time.

We are not aware of any other views at this time.
RESOLVED, That the American Bar Association urges Congress to amend the Air
Carrier Access Act ("ACAA"), 49 U.S.C. § 41705 (1986), to establish a private right of
action for violations of the ACAA and to provide equitable and legal relief, including
compensatory and punitive damages, as well as reasonable attorneys' fees, reasonable
expert fees, and costs to plaintiffs who prevail in such actions.
I. Introduction

In today's global economy, air travel is essential for individuals with disabilities to fully participate in society, compete in the job market, and enjoy the many opportunities available to other Americans, such as traveling for recreation and visiting family members. The U.S. Census Bureau estimates that approximately 56.7 million people in the United States have one or more disabilities—18.7 percent of the population. Yet, people with disabilities routinely report problems in gaining equal access to travel by commercial aviation.

The most recent report from the Department of Transportation (DOT) indicates that in 2016, 32,445 complaints were filed with 184 domestic and foreign air carriers regarding disability-related incidents. The 34 U.S. carriers reported receiving 27,842 disability-related air travel complaints for the 2016 calendar year; the 150 foreign carriers, 4,603 complaints. This compares with the previous year's report showing 26,401 complaints to 176 domestic carriers and 4,429 complaints to foreign carriers—an increase of approximately 5 percent. Nearly half of the complaints reported in 2016 (14,591) concerned the failure to provide adequate assistance to persons using wheelchairs. Other top complaints received by domestic carriers included seating accommodations and service animals.

In 1986, Congress passed the Air Carrier Access Act (ACAA), which prohibits disability-based discrimination in air travel. The Act was passed as a result of the U.S. Supreme Court's ruling in Department of Transportation v. Paralyzed Veterans of America that air carriers are not subject to Section 504 of the Rehabilitation Act of 1973, as amended, unless they receive direct federal financial assistance. The need for widespread civil rights protections for people with disabilities in air travel led the United States have one or more disabilities—18.7 percent of the population. Yet, people with disabilities routinely report problems in gaining equal access to travel by commercial aviation.

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Paralyzed Veterans of America and the broader disability community to advocate for the passage of a statute that would end disability-based discrimination.

Four years after the ACAA’s passage, the DOT promulgated regulations implementing the Act. As interpreted by the regulations, the ACAA “prohibits both U.S. and foreign carriers from discriminating against passengers on the basis of disability; requires carriers to make aircraft, other facilities, and services accessible; and requires carriers to take steps to accommodate passengers with a disability.” The ACA and its regulations further prohibit carriers, either directly or indirectly, from:

1. requiring individuals with disabilities to accept special services that are not requested;
2. excluding individuals with disabilities, or denying such individuals, the benefit of air transportation services available to others (with limited exceptions); and
3. taking adverse action against individuals with disabilities as a result of their assertion of rights protected by this part of the ACAA.

Although the ACA improved the air travel experience of people with disabilities, widespread discrimination against people with disabilities continues. Individuals continue to encounter frequent and significant violations of their civil rights when they travel by air. Substantial barriers include:

- damaged assistive devices,
- inaccessible aircraft, lavatories, and communication media,
- poorly trained and delayed assistance,
- inadequate treatment of service animals,
- inadequate disability cultural competency, and
- a lack of suitable seating accommodations.

For many years, federal courts recognized an implied private right of action to enforce the ACAA. However, this changed in 2001 when the U.S. Supreme Court decided Alexander v. Sandoval. This decision served as the catalyst for several federal circuit courts to find that the ACAA does not provide for a private right of action.

However, a private right of action under the ACAA is essential to effectively enforcing the civil rights of persons with disabilities by providing them with meaningful redress for their losses. Civil penalties levied against an airline do nothing for individuals who have suffered a loss as a result of discrimination. Further, plaintiffs who

* * *

2 Id. § 382.1.
3 Id. § 382.11.
5 Id. at 2.
7 Id. § 382.1.
8 Id. § 382.11.
10 Id. at 2.
12 Id. § 382.1.
13 id. § 382.11.
15 Id. at 2.
17 Id. § 382.1.
18 Id. § 382.11.
prevail in a civil action brought under the ACAA should be entitled to obtain equitable and legal relief, including compensatory and punitive damages. For the private action to benefit claimants, it must be accompanied by a statutory right to reasonable attorneys fees, reasonable expert fees, and costs in order to minimize the cost of litigation to plaintiffs and maximize the incentive of potential defendants to stop discriminatory policies and practices.

This resolution urges Congress to amend the ACAA to establish a private right of action and provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and the costs to plaintiffs who prevail in such actions. These amendments are necessary in order to bring the ACAA in line with its original spirit and purpose: the protection of the civil rights of air travelers with disabilities.

II. Current System for ACAA Enforcement

Under the ACAA, the Aviation Consumer Protection Division (ACPD)—part of the DOT’s Office of the Assistant General Counsel for Aviation Enforcement and Proceedings (Enforcement Office)—is primarily responsible for enforcing the ACAA. The Act provides that aggrieved individuals may seek informal resolution of a complaint by contacting an airline carrier’s complaint resolution official, filing a complaint with the airline, or filing a complaint either online or via letter with the ACDP. Air travelers who want to file a formal complaint with the DOT must do so in accordance with 14 C.F.R. Part 302’s administrative enforcement procedure. Those dissatisfied with the DOT’s response may file a petition for review with a federal circuit court.

If the DOT finds that the airline has violated the ACAA on the basis of disability, the agency is authorized to issue a cease and desist order proscribing the unlawful conduct by the carrier in the future, require prompt corrective action by the airline, and/or assess civil penalties up to $11,000 per violation payable to the government. Civil fines are rare and typically invoked only in cases involving a pattern or practice of discrimination. However, the DOT is not authorized to award monetary damages to the party who has been subjected to discrimination in violation of the ACAA.


15 14 C.F.R. § 382.159(a); 14 C.F.R. pt. 302.

16 See, e.g., Love v. Delta Airlines, 310 F.3d 1347, 1356 (11th Cir. 2002).


18 Letter from Paralyzed Veterans of America and Allied Organizations (American Council of the Blind, Bazelon Center for Mental Health Law, Disability Rights Education & Defense Fund, Eastseas, National Council on Independent Living, National Disability Rights Network, National Multiple Sclerosis Society, United Spinal Association) to The Honorable Frank LoBiondo, Chairman, and Honororable Rick Larsen (Ranking Member), House Transportation and Infrastructure Committee, Subcommittee on Aviation, at 2-3 (Mar. 23, 2017).

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Initially, federal courts interpreted the ACAA as providing individuals with disabilities aggrieved by the actions of air carriers with an implied private right of action. However, that changed in 2001 when the U.S. Supreme Court decided Alexander v. Sandoval, which restricted the circumstances in which a court could determine the existence of an implied private right of action under a federal statute. Sandoval held that private rights of action to enforce federal law must be created by Congress, and statutory intent is determinative in deciding whether a statute creates not just a right, but also a private remedy.

Based on Sandoval, the Eleventh Circuit held that the ACAA does not grant litigants a private right of action. The Tenth Circuit agreed with the Eleventh Circuit’s reasoning and found no private right of action under the ACAA. The Second Circuit and Fifth Circuit have also held that the ACAA does not provide a private right of action. Thus, unless federal law is changed, passengers with disabilities are limited to seeking remedies, if any, that may be available under state law.

III. Need for Resolution

Private Right of Action

Although a complaint to the DOT may eventually result in the airline being fined, it does not reimburse the complainant for his or her loss. In contrast to the ACA, other federal civil rights statutes include both a private right of action by aggrieved individuals, as well as a fee-shifting provision to serve as incentive for the enforcement of important legal rights.

Plaintiffs who prevail under the ACA should be entitled to obtain equitable and legal relief, including punitive damages. By providing aggrieved travelers with disabilities with a legal vehicle to obtain a remedy for violations of their civil rights, Congress will not only strengthen the protection of civil rights of persons with disabilities, but also bring the ACA into conformity with similar civil rights laws. As the National Council on Disability aptly noted in 1999, “[t]he ultimate test of any civil rights law is the extent to which litigants a private right of action. Thus, unless federal law is changed, passengers with disabilities are limited to seeking remedies, if any, that may be available under state law.

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Plaintiffs who prevail under the ACA should be entitled to obtain equitable and legal relief, including punitive damages. By providing aggrieved travelers with disabilities with a legal vehicle to obtain a remedy for violations of their civil rights, Congress will not only strengthen the protection of civil rights of persons with disabilities, but also bring the ACA into conformity with similar civil rights laws. As the National Council on Disability aptly noted in 1999, “[t]he ultimate test of any civil rights law is the extent to which
which people in the protected class can count on the law for real protection.29 By amending the ACAA to allow for a private right of action, "Congress will be ensuring that meaningful redress is available to victims of discrimination," and that disability-based discrimination by air carriers will be deterred.30

There are currently efforts underway to amend the ACAA in order to create a private cause of action. Legislation introduced in the 115th Congress (January 3, 2017-January 3, 2019) includes a private right of action for any person aggrieved by the violation by an air carrier of the ACAA or its regulations, and allows a court that finds in favor of the plaintiff to award equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and the cost of the action to the plaintiff.31

Fee-Shifting Provision

More than 150 federal statutes include provisions entitling a successful plaintiff in litigation to recover attorneys’ fees in order to encourage lawsuits considered in the public interest.32 If successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by involving the injunctive powers of the federal courts.33 In the civil rights context, fee-shifting statutes provide for complete enforcement of rights Congress has deemed worthy of special protection.

Absent amendment of the ACAA to authorize an award of reasonable attorneys’ fees, reasonable expert fees, reasonable expert fees, and costs to prevailing plaintiffs, consumers with disabilities will be deterred from filing ACAA lawsuits due to the expense of doing so. “The importance of private rights of action as a means of implementing and enforcing public policy has long been recognized in a wide variety of areas. Where the interests advanced by private litigation vindicate important public policies, Congress often authorizes attorney fee awards to remove some of the disincentives for public interest litigation.”34

29 NATIONAL COUNCIL ON DISABILITY, supra note 13, at 4.
32 NATIONAL COUNCIL ON DISABILITY, supra note 13, at 4.
Civil rights lawsuits of this nature often involve significant legal issues, but relatively small monetary amounts. As a result, despite the importance of the rights at issue, lawyers have little financial incentive to take such cases on a contingency basis, absent an ability by a prevailing plaintiff to recover attorneys’ fees. Amendment of the ACAA to include a provision allowing a successful complainant to recover reasonable attorneys’ fees, reasonable expert fees, and costs would not only encourage individuals protected by the ACAA to enforce their civil rights, but also create a credible threat of enforcement against airlines, encouraging them to comply with the requirements of the ACAA.

IV. Now Is Time for Action

There is a dire need for Congress to amend the ACAA, and the ABA can play an instrumental role toward that end by adopting this Resolution. As the world’s national representative of the legal profession, the ABA has a long history of championing equal rights. In particular, the ABA has a policy that all Americans should have access to the courts. One of the ABA’s missions is to advance the rule of law, which it carries out in part by “assur[ing] meaningful access to justice for all persons”, including access to the courts, “promot[ing] full and equal participation in the justice system by all persons,” and eliminating bias in the justice system.35

The ABA has a responsibility to take a leadership role on the important civil rights issues that are the subject of this resolution. Adoption of this resolution would demonstrate the Association’s commitment to the protection of the civil rights of individuals with disabilities and set a strong example for other organizations to support legislation to strengthen enforcement of the ACAA. Adoption would also foster the ABA’s goal of increasing diversity in the legal system by championing the right under federal law for individuals with disabilities to be free from discrimination during air travel and to have meaningful redress for violations of the ACAA.

Respectfully submitted,

Robert T. Gonzales, Chair
Commission on Disability Rights
August 2018

35 www.americanbar.org/about_the_aba/aba-mission-goals.html.
1. Summary of Resolution(s).
This resolution calls on Congress to amend the Air Carrier Access Act, 49 U.S.C. § 41705 (1986), to establish a private right of action and to provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys' fees, reasonable expert fees, and costs to plaintiffs who prevail in such actions.

2. Approval by Submitting Entity.
Approved by Commission on Disability Rights on March 23, 2018.

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

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
N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
The policy will allow the ABA to comment on and encourage current and proposed legislation amending the Air Carrier Access Act, as well as interpretations thereof.

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

None

10. Referrals.
- Section of Civil Rights and Social Justice
- Commission on Law and Aging
- Tort Trial and Insurance Practice Section
116A

- Section of Litigation
- Young Lawyers Division
- Law Student Division
- Senior Lawyers Division
- Solo, Small Firm and General Practice Division
- Forum on Air and Space Law

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

Amy Allbright, Director
ABA Commission on Disability Rights
1050 Connecticut Ave., NW, Ste. 400
Washington, DC 20036
202-662-1575 (office)
amy.allbright@americanbar.org

12. Contact Name and Address Information. Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Robert T. Gonzales, Chair
Commission on Disability Rights
410-547-0900
r.gonzales@hyltongonzales.com
EXECUTIVE SUMMARY

1. Summary of the Resolution
This resolution calls on Congress to amend the Air Carrier Access Act, 49 U.S.C. § 41705 (1986), to establish a private right of action and to provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and costs to plaintiffs who prevail in such actions.

2. Summary of the Issue that the Resolution Addresses
People with disabilities routinely report problems in gaining equal access to travel by commercial aviation. For many years, federal courts recognized an implied private right of action to enforce the ACA. This changed in 2001 when the U.S. Supreme Court decided Alexander v. Sandoval. This decision served as the catalyst for several federal circuit courts to find that the ACA does not provide for a private right of action.

However, a private right of action is essential to effectively enforcing the civil rights of persons with disabilities who suffer discrimination by providing them with meaningful redress for their losses. Civil penalties levied against an airline do nothing for individuals who have suffered a loss as a result of discrimination. Plaintiffs who prevail in a civil action brought under the ACA should be entitled to obtain equitable and legal relief, including compensatory and punitive damages. Further, for the private action to benefit claimants, it must be accompanied by a statutory right to reasonable attorneys’ fees, reasonable expert fees, and costs in order to minimize the cost of litigation to plaintiffs and maximize the incentive of potential defendants to stop discriminatory policies and practices.

3. Please Explain How the Proposed Policy Position will address the issue
The policy position will allow the ABA to comment on and encourage current and proposed legislation amending the Air Carrier Access Act, as well as interpretations thereof.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
Some members of the ABA Tort Trial & Insurance Practice Section and Forum on Air & Space Law do not support a private right of action under the ACA.

1. Summary of the Resolution
This resolution calls on Congress to amend the Air Carrier Access Act, 49 U.S.C. § 41705 (1986), to establish a private right of action and to provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and costs to plaintiffs who prevail in such actions.

2. Summary of the Issue that the Resolution Addresses
People with disabilities routinely report problems in gaining equal access to travel by commercial aviation. For many years, federal courts recognized an implied private right of action to enforce the ACA. This changed in 2001 when the U.S. Supreme Court decided Alexander v. Sandoval. This decision served as the catalyst for several federal circuit courts to find that the ACA does not provide for a private right of action.

However, a private right of action is essential to effectively enforcing the civil rights of persons with disabilities who suffer discrimination by providing them with meaningful redress for their losses. Civil penalties levied against an airline do nothing for individuals who have suffered a loss as a result of discrimination. Plaintiffs who prevail in a civil action brought under the ACA should be entitled to obtain equitable and legal relief, including compensatory and punitive damages. Further, for the private action to benefit claimants, it must be accompanied by a statutory right to reasonable attorneys’ fees, reasonable expert fees, and costs in order to minimize the cost of litigation to plaintiffs and maximize the incentive of potential defendants to stop discriminatory policies and practices.

3. Please Explain How the Proposed Policy Position will address the issue
The policy position will allow the ABA to comment on and encourage current and proposed legislation amending the Air Carrier Access Act, as well as interpretations thereof.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
Some members of the ABA Tort Trial & Insurance Practice Section and Forum on Air & Space Law do not support a private right of action under the ACA.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to:

a) enact laws and adopt policies that prohibit the use of out-of-school suspension and expulsion of pre-kindergarten through second grade students, except in cases where: (1) the student poses an imminent threat of serious physical harm to self or others that cannot be reduced or eliminated through the use of age-appropriate school-based behavior interventions and supports, and (2) the duration of the exclusion is limited to the shortest period practicable;

b) require ongoing training of teachers, administrators, and other school staff on alternatives to school exclusion, including, but not limited to, the development and effective use of functional behavior assessments and behavior intervention plans, the implementation of social emotional learning programs, the use of restorative practices and trauma-informed practices, the identification and evaluation of students with disabilities, and the implementation of individualized academic and behavior supports for students with disabilities; and

c) provide sufficient funding and resources to ensure the provision of alternatives to school exclusion as set forth in paragraph (b); and

FURTHER RESOLVED, That the American Bar Association supports the adoption of policies and procedures that instruct teachers, school administrators, and other school staff to contact law enforcement officers in response to the behavior of a student in pre-kindergarten through second grade only where there is an imminent threat of serious physical harm to the student or others that cannot be reduced or eliminated through the use of age-appropriate school-based behavioral interventions and supports.
I. The Relationship to Existing ABA Policy

Over the years, the American Bar Association (ABA) has adopted resolutions encouraging law and policy changes that address the continuing push-out of school-age students based on behavior. In 2001, the ABA opposed zero tolerance policies that "have a discriminatory effect, or mandate either expulsion or referral of students to juvenile or criminal court, without regard to the circumstances or nature of the offense or the student’s history." These policies require school officials to hand down specific, consistent harsh punishment, typically suspension or expulsion, when students break particular rules, regardless of the circumstances, the reasons for the behavior, or the student’s history of discipline problems.

In 2009, the ABA passed a resolution urging “federal and state legislatures to pass laws and national, state, and local education, child welfare, and juvenile justice agencies to implement and enforce policies” that help advance the rights of students to remain in and complete school, while at the same time promoting a safe and supportive school environment for all children. The resolution also included a call to "limit exclusion from and disruption of students’ regular educational programs as a response to disciplinary problems,” as well as to “reduce criminalization of truancy, disability-related behavior, and other school-related conduct.”

Most recently, in 2016 the ABA “urged all federal, state, territorial and local legislative bodies and governmental agencies to adopt policies, legislation, and initiatives designed to eliminate the school to prison pipeline,” recognizing the disproportionate impact of over-discipline on students of color, students with disabilities, and LGBTQ students, resulting in disparate push-out rates and juvenile justice system or prison interactions. The resolution also urged supporting legislation that eliminates the use of suspensions, expulsions, and referrals to law enforcement for lower-level offenses.

This resolution builds upon these policies to ensure that students remain in school and learning. It focuses on our youngest learners—students in pre-kindergarten and early childhood education—recognizing the unique developmental and educational needs of these students.

3 Id.
5 Id.
through second grade. Their experiences can have a profound impact on their later academic performance and social behavior.  

II. The Problem and Its Impact on Students and Families

Promoting positive outcomes for youth begins in early childhood, when young children are undergoing critical development. During their early years, children undergo rapid brain development, including neural connections related to sensory growth, use of language, cognitive abilities, and social-emotional well-being. Given the importance of this stage in a child’s development, it is essential that educational experiences are positive, and that our educational systems refrain from imposing harm through negative practices such as suspension and expulsion.

Suspension and expulsion—negative disciplinary consequences by which children are removed from the learning environment—have been linked to significant and devastating short- and long-term consequences for students. First and foremost, removal from school results in a loss of critical instructional time. During the pre-kindergarten through second grade years, students are building the foundational skills needed for reading, writing, and math. Accordingly, frequent removal of students from school can lead to an achievement gap. School removal may also delay identification of underlying needs and disabilities that require further intervention and support. Challenging behavior may be a result of trauma in the home and/or community, or related to learning, developmental, or emotional disabilities. These issues will not be addressed or remediated through school removal. For this age group, delays in acknowledging trauma or in identification of disabilities can have profound effects on student achievement.

Additionally, through suspension and expulsion, students miss out on important non-academic opportunities, such as engaging in valuable social skill development with peers and school personnel. At-risk and vulnerable students are impacted further when they are deprived of access to vital non-academic services. For example, low-income students may rely on school for consistent nutrition in the form of free and reduced-price meals. Students may also rely on school for consistent nutrition in the form of free and reduced-price meals. Students who are deprived of access to vital non-academic services. For example, low-income students may rely on school for consistent nutrition in the form of free and reduced-price meals.

6 See U.S. DEP'TS OF EDUC. & HEALTH AND HUM. SERVS., ED-HHS, POLICY STATEMENT ON EXPULSION AND SUSPENSION POLICIES IN EARLY CHILDHOOD SETTINGS (2014), https://www.acf.hhs.gov/sites/default/files/ecd/expulsion_suspension_final_paper.pdf (hereinafter Policy Statement) (noting “Suspension and expulsion can influence a number of adverse outcomes across development, health, and education”) and “expulsion or suspension early in a child’s education is associated with expulsion or suspension in later school grades.”). See also Kristen P. Kremer et al., Behavior Problems and Children’s Academic Achievement: A Test of Growth –Curve Models with Gender and Racial Difference, 67 CHILDREN & YOUTH SERVS. REV. 95 (Aug. 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5436811 (hereinafter Policy Statement) (noting “Suspension and expulsion can influence a number of adverse outcomes across development, health, and education”) and “expulsion or suspension early in a child’s education is associated with expulsion or suspension in later school grades.”). See also Kristen P. Kremer et al., Behavior Problems and Children’s Academic Achievement: A Test of Growth –Curve Models with Gender and Racial Difference, 67 CHILDREN & YOUTH SERVS. REV. 95 (Aug. 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5436811 (noting “Suspension and expulsion can influence a number of adverse outcomes across development, health, and education”) and “expulsion or suspension early in a child’s education is associated with expulsion or suspension in later school grades.”). See also Kristen P. Kremer et al., Behavior Problems and Children’s Academic Achievement: A Test of Growth –Curve Models with Gender and Racial Difference, 67 CHILDREN & YOUTH SERVS. REV. 95 (Aug. 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5436811 (noting “Suspension and expulsion can influence a number of adverse outcomes across development, health, and education”) and “expulsion or suspension early in a child’s education is associated with expulsion or suspension in later school grades.”). See also Kristen P. Kremer et al., Behavior Problems and Children’s Academic Achievement: A Test of Growth –Curve Models with Gender and Racial Difference, 67 CHILDREN & YOUTH SERVS. REV. 95 (Aug. 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5436811 (noting “Suspension and expulsion can influence a number of adverse outcomes across development, health, and education”), and “expulsion or suspension early in a child’s education is associated with expulsion or suspension in later school grades.”). See also Kristen P. Kremer et al., Behavior Problems and Children’s Academic Achievement: A Test of Growth –Curve Models with Gender and Racial Difference, 67 CHILDREN & YOUTH SERVS. REV. 95 (Aug. 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5436811 (noting “Suspension and expulsion can influence a number of adverse outcomes across development, health, and education”), and “expulsion or suspension early in a child’s education is associated with expulsion or suspension in later school grades.”)

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breakfasts and lunches. Schools that employ a “wraparound” approach to providing supportive services, such as medical, counseling, or other social services, also impede access to those services when the student is removed.

Long-term school and adult life outcomes are negatively impacted for students as well. Students who experience even a single incident of out-of-school removal have an increased risk of school dropout, academic failure, decreased school engagement, and increased risk of involvement with the juvenile justice and adult criminal systems. Suspension and expulsion play a large role in the “school-to-prison pipeline.”

Students are not the only individuals negatively impacted when schools suspend or expel them. Parents and families may experience high levels of stress due to having to find alternative forms of child care and education for their children. This situation is especially difficult for families without adequate financial resources, working families who cannot take time away from work to care for their school-age children, and families living in areas with a lack of childcare options. In addition to suspended students and their families, students and staff who remain in the school building also feel the effects of suspension and expulsion. School climate, which in part describes the relationships within and views held by students and staff members of the school, often deteriorates when administrators overemphasize a punitive approach to perceived “problem” behavior. Studies have shown that schools with high rates of suspension often are associated with negative views of school climate.

Apart from the harmful effects of school removal on students and their communities, more and more often the administration of school discipline is associated with bias and discrimination. Research and data demonstrate great disparities in the use of suspension and expulsion by race, gender, and disability. The U.S. Department of Education’s Office for Civil Rights (OCR) collects data on discipline practices throughout the nation’s public schools. OCR recently released data collected following the 2015-2016 school year. The data paints a stark picture. Although students with disabilities receiving services under the Individuals with Disabilities Education Act (IDEA), the federal special education law, made up only 12% of the total enrollment population in the 2015-2016 school year, they accounted for 26% of out-of-school suspensions and 24% of expulsions. Similarly, Black male students accounted for 8% of enrollment, but were 25% of the students who received an out-of-school suspension and 23% of students expelled. Black female students also accounted for 8% of students enrolled, but represented 14% of students who received an out-of-school suspension and 10% of

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11 Id. at 4.
12 Id. at 13.
13 Am. Psychological Ass’n, supra note 1.
16 Id. at 4.
students who were expelled.¹⁷

Research has identified a number of factors contributing to these disparities, including implicit bias on the part of school staff and resulting discriminatory application of disciplinary policies.¹⁸ Stereotypes related to race, gender, and disability held by teachers and administrators may lead to judging and reacting differently to the behavior of different groups of students.¹⁷ Students of color have been found to be suspended more than their white peers for “subjective” or “soft offenses,” such as disrespect, disruption, and disorderly conduct.²⁵

Given the potential profound consequences for youth, their families, and communities, as well as the problems with the fair administration of these disciplinary practices, it is essential that policymakers, educators, and community members take actions to limit, and in time eliminate, the use of suspension and expulsion for our youngest learners.

III. Legislation Banning or Limiting the Suspension of Elementary School Children

Recognizing the well-documented negative impact of school exclusion, there has been a national trend toward limiting, and in some cases, banning the suspension and expulsion of elementary school students.²¹ Such legislation has been enacted in California,²² Connecticut,²³ Maryland,²⁴ New Jersey,²⁵ Oregon,²⁶ and Texas.²⁷ Local jurisdictions have likewise taken steps to ban suspension of young elementary school students who were expelled.¹⁷

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students, including Denver,28 the District of Columbia,29 Houston,30 New York City,31 Philadelphia,32 Seattle,33 and St. Louis.34

A strong argument can be made that this policy should apply to all elementary school grades, recognizing the developmental stages of this student population, as has been done in select jurisdictions. However, several states and jurisdictions have applied the policy only to the youngest grades, such as pre-kindergarten to second grade. An age range that encompasses pre-kindergarten through second grade aligns with the current practice of both the education and delinquency systems, which consider the cognitive development of young children when distinguishing younger children from older children. Early learning standards for children often apply from birth to age eight, with high stakes testing starting in third grade.35 Young children are also treated differently in the justice system because of the limited capacity to form and understand intent.36 Young children in this age group are still developing the tools for learning and success in the educational environment.

Through this resolution, the ABA will urge all states to enact laws and adopt policies that sharply reduce the use of out-of-school suspension and expulsion of pre-kindergarten through second grade students.

Limited Exceptions to Exclusion Ban

This resolution allows for a limited exception of a suspension and expulsion ban: Where the student poses an imminent threat of serious physical harm to self or others that cannot be reduced or eliminated through the use of age-appropriate school-based behavior interventions and supports, and the duration of the exclusion is limited to the shortest period practicable.37

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35 No Child Left Behind Act required schools that received federal funds to assess students starting in third grade. The Every Student Succeeds Act likewise requires state testing for third graders.
36 For example, in Maryland, Massachusetts, and New York, a child under seven cannot be adjudicated delinquent. MD. CODE ANN., CTNS. & JUD. PROC. § 3-8A-05(d) (West 2018); MASS. GEN. LAWS ANN. ch. 119, § 52 (West 2018); N.Y. FAM. CT. ACT § 301.2 (LexisNexis 2016).
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The exception contains two important limitations: First, as discussed below, before disciplining the student the school must consider the use of appropriate behavior interventions and supports. Second, suspensions or expulsions must be limited to the shortest period practicable, as was recommended in the 2009 ABA Resolution related to students’ right to remain in school.38 For example, under Maryland law passed in 2017,29 a student in pre-kindergarten through second grade can only be suspended if the limited exception of imminent threat of harm applies, or the student brings a firearm to school, as per the Gun Free Schools Act.40 However, even in those situations, the student can only be excluded for up to five days, giving the school system time to put in place any supports or interventions or other responses to the behavior. Additionally, during any time of exclusion, the student should be provided work to stay on track academically.

IV. Alternatives to Suspension and Expulsion

Providing a positive school climate is the best practice for preventing problematic behavior and resulting school exclusion. Doing so leads to positive benefits for the overall school community, including fewer discipline problems, better attendance, higher student motivation and engagement, and higher academic achievement across grade levels.39 Successful and proven alternatives to suspension and school exclusion have been discussed and known for years, and should not be new to educators and state policy-makers.42

Almost a decade ago, the ABA set forth a comprehensive list of alternatives to suspension and expulsion, including proactive tools that school systems should consistently implement.43 That report is as relevant today as it was in 2009, and yet we continue to need to advocate for their implementation and the resources to ensure that these interventions and strategies are done effectively and with fidelity.44 The list of proactive strategies and responses to concerning behavior is not exhaustive, but serves as guidance regarding the alternatives to imposing suspension or expulsion on students who may be too young to understand the connection between their behavior and the school exclusion. As set forth in this resolution, the requirement of ongoing training of teachers, administrators, and other school staff on alternatives to school exclusion is essential to their success in keeping our youngest learners in school.

38 ABA Resolution 09A118B, supra note 2, at 10.
43 ABA Resolution 09A118B, supra note 2, at 9-10.
Training for School Administrators, Teachers, and Other Staff

In order to effectively change the culture of school discipline, school administrators, teachers, and staff will need to embrace a new mindset and be provided with the tools to carry out this new vision. Part of this shift involves addressing cultural competency and implicit bias. As discussed earlier, educators’ personal bias and preconceived notions about students based on their race and gender have contributed to the disproportionate use of school discipline for students of color, male students, and students with disabilities. Therefore, it is imperative that educators receive training to understand and address their own bias and the cultural differences that may negatively impact their instruction and disciplinary methods.

School districts will also need to identify the alternatives to suspension, including the examples expanded upon below, that will work for their schools and provide training in these methods. Training could include professional development, coaching, and technical assistance. It is critical that school staff feel supported and capable to manage the school and classroom settings without the use of school removal.

School-wide Positive Proactive Behavior Intervention Programs

School-wide Positive Behavior Interventions and Supports (PBIS) is a well-known systemic approach that includes proactive and positive approaches to behavior and tiered interventions to address the varying needs of students. PBIS provides evidence-based strategies to schools in establishing a positive school culture by: setting universal expectations for behavior throughout the school; teaching school rules and social-emotional skills in the classroom; positively reinforcing appropriate student behavior; using effective classroom management strategies to provide early intervention for problematic behavior; and developing a continuum of graduated responses and interventions for more serious behavior.

Functional Behavior Assessments and Behavior Intervention Plans

Under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act, school systems have an obligation to meet the needs of students with disabilities and provide accommodations and academic and behavioral supports and services. Under federal law, school systems also have the obligation to locate, identify, and evaluate students to determine if they have a disability, referred to as “child-find.” Identified students are provided “a free appropriate public education,” and for those students with behavior problems, a functional behavior assessment is the first step in determining the need for and development of an intervention plan.

PBIS Positive Behavioral Interventions & Supports

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issues, the school student must provide positive behavior supports and interventions.52 When school systems fail to provide those supports, students are more likely to display behaviors that result in suspension.

There are opportunities through the development of an individualized education plan (IEP) to address behavior issues for students identified as having a disability.53 The IEP team should develop IEP goals that address behavior and the contributing social, emotional, and academic needs, as well as identify the behavior interventions and supports to be provided to the student.

An important tool available to school systems for students with disabilities is the functional behavior assessment (FBA) and behavior intervention plan (BIP) process.54 When conducting an FBA for a student, the school must collect data, identify with specificity the concerning behavior, and try to determine the “function” of the behavior. The FBA seeks to understand the what, why, when, and where as it relates to the behavior.55 Once the school’s IEP team understands the behavior, it can then develop an individualized BIP, which may dictate how the classroom environment needs to be altered, what strategies need to be put in place to reduce the behavior, and how staff should respond when the behavior occurs. The goal is to teach and reward appropriate replacement behavior. School staff with specific training, such as a school psychologist, social worker, or board certified behavior analyst, should conduct the FBA and help develop the BIP.

FBAs and BIPs are effective tools that should be available for all children with challenging behavior, not just students with disabilities. Rather than suspending young elementary school students, school staff can develop and implement BIPs that support both the student and the teacher in addressing the student’s concerning behavior.

Restorative Practices

The use of restorative practices to promote a positive school climate and to address behavior is an effective alternative to suspension. Restorative practices promote positive relationships, provide tools for resolving conflicts, and address the harm that resulted from the behavior.56 Although there are a wide variety of measures that may be considered restorative practices, the common goal is to improve relationships and to move away from punitive disciplinary responses. The focus is on accountability, community safety, and the social, emotional, and academic needs of the student.

Although there are a wide variety of measures that may be considered restorative practices, the common goal is to improve relationships and to move away from punitive disciplinary responses. The focus is on accountability, community safety,
and developing competencies.\textsuperscript{57} While restorative practices in schools are used to proactively build relationships and improve school climate, they are also used in response to a specific conflict. As described by an educator:

There are several restorative practices used in school, such as restorative conferencing, circles to repair harm, and restorative peer juries. Ideally, the person who was harmed, the person who did the harm, and the community—other affected parties, classmates, bystanders, friends, staff, family members, elders, or neighbors—come together in a facilitated process to talk about the harm and how people were affected by it, identify needs and obligations as a result of the harm, identify possible solutions, and come to agreement through consensus.\textsuperscript{48}

However, such “restorative circles” are just one example of effective restorative practices. A whole-school model of restorative practices has various tiers of intervention and “establishes common values and norms, promotes a sense of belonging to the school community, and builds trusting relationships, leaving fewer students in crisis.”\textsuperscript{59}

Teaching Social-Emotional Competencies

When young students engage in challenging behavior, there may be other skill deficits related to emotional regulation that are contributing to the behavior. Rather than suspend as a response to the behavior, schools need to teach young children the skills and competencies they need for academic success. Social-emotional learning (SEL) programs are evidence-based approaches to teaching the skills students need to regulate their emotions and manage their behavior. More specifically, “[s]ocial and emotional learning (SEL) is the process through which children and adults acquire and effectively apply the knowledge, attitudes, and skills necessary to understand and manage emotions, set and achieve positive goals, feel and show empathy for others, establish and maintain positive relationships, and make responsible decisions.”\textsuperscript{60} Research has affirmed the long-term benefits of SEL programs, including improved academic achievement, mental health, and social skills.\textsuperscript{57}

Engaging Students Academically and Meeting Learning Needs

Just as a young student may have deficits in social and emotional skills, he or she may have unidentified academic struggles that are contributing to the behavior. It is

\begin{itemize}
  \item \textsuperscript{57} \textit{JOHNS HOPKINS SCHOOL OF EDUCATION, INSTITUTE FOR EDUCATION POLICY, RESTORATIVE PRACTICES IN SCHOOLS (May 2017)}, http://edpolicy.education.jhu.edu/wp-content/uploads/2017/05/OSEP- RestorativePractices midtermfinal2-05-17.pdf.
  \item \textsuperscript{58} Nancy Riastenberg, \textit{Applying the Framework: Positive Youth Development and Restorative Practices}, http://www.irp.educ.edu/pdf/beth/06-riestenberg.pdf.
  \item \textsuperscript{59} ABA Resolution 09A116B, supra note 2, at 2.
  \item \textsuperscript{60} What is SEL? The Collaborative for Academic, Social, and Emotional Learning, https://casel.org/what-is-sel/; see also Yale Center for Emotional Intelligence, http://ei.yale.edu/curier/curier-overview/.
  \item \textsuperscript{61} See SEL Impact, The Collaborative for Academic, Social, and Emotional Learning, https://casel.org/impact/.
  \end{itemize}
not difficult to understand how low academic skills could have a connection to challenging behavior. A student who is struggling in reading or math may act out as a way to avoid academic demands. Multi-Tiered Systems of Support (MTSS), a framework of supports to help struggling students, may be an appropriate intervention that addresses behavior linked to academic performance. MTSS is based on the premise that students should be provided with effective curriculum, students should be universally screened to identify areas of concern, and supports for struggling students should be increased as necessary to enable the student to make progress. Supports may be instructionally and/or behaviorally based.

**Trauma-Informed Practices**

Burgeoning research on trauma has demonstrated that exposure to traumatic events, including physical/sexual abuse, neglect, family/community violence, bullying, or loss of loved ones, can play a role in the development of a child, including altering the structure of the brain. Over the past several years, there has been a movement to design and implement trauma-informed practices within schools. This includes “being informed about and sensitive to trauma, and providing a safe, stable, and understanding environment for students and staff.” Staff in trauma-informed school settings work to ensure that policies and practices do not re-harm children, and they avoid punishing students for behaviors related to their trauma.

**V. Funding and Resources**

This resolution calls for sufficient funding and resources to ensure that the alternatives to suspension are available to support students and teachers and school staff. Funds for training and resources are necessary to avoid unintended consequences of a suspension ban for this young population of students, such as increased use of law enforcement, undocumented or illegal informal “send homes,” mental health emergency petitions, or the overuse of in-school suspension.

Schools across the country make use of IDEA funds, including funds that may be used for Coordinated Early Intervening Services (CEIS); funds made available to states and school districts to serve students through Title I of the Elementary and Secondary Education Act (ESEA), reauthorized in 2015 as the Every Student Succeeds Act; federal and state grants, such as the Safe Schools/Healthy Students grants administered by the Departments of Education, Justice, and Health and Human Services; and Medicaid funds, which may be used to support services available to students for behaviors related to their trauma.

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special education students. However, states should consider where they will appropriate and how they will allocate additional resources to support the development and implementation of effective alternatives to inappropriate school discipline.

As noted by experts in this field, "where remedies call for widespread systemic change, in order to successfully replace counterproductive practices with more effective disciplinary alternatives, it is critically important that educators be fully supported with resources and training."66

VI. The Role of Law Enforcement

This resolution further supports the adoption of policies and procedures that instruct school administrators and staff to limit police involvement with students in pre-kindergarten through second grade only to those situations where the behavior of a student poses an imminent threat of serious physical harm to self or others and age-appropriate school-based interventions and supports have been exhausted. Such a policy is appropriate given the young age of this population and the risk of criminalizing behavior that is related to either a disability or to the development of a young child. Students at this age are developing skills to manage their emotions and appropriately respond to challenging situations. Students with disabilities may have additional needs that require specialized interventions. For example, a young child with an emotional disability who has difficulty managing his emotions, may engage in unsafe behavior. When school personnel lack the training or resources to respond to challenging behavior, including those related to a disability, they may resort to involving law enforcement.

As was stated in the report accompanying the 2009 ABA Resolution:

Schools too often criminalize the behavior of students with disabilities by making inappropriate referrals to law enforcement authorities rather than addressing the behavior as an educational issue. Although the 1997 reauthorization of IDEA added a provision stating that "[n]othing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities..." such referrals cannot be made in an effort to circumvent the obligations of the school district. Under IDEA, the school is required to address the behavior of students with disabilities by providing appropriate special education and related services that meet students’ individualized needs. Referral of a student with a disability to law enforcement for school-related behavior may also implicate the student’s rights under Section 504 of the Rehabilitation Act of 1973.67

66 Skiba & Losen, supra note 42, at 10.
67 ABA Resolution 09A118B, supra note 2, at 8.

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VII. Conclusion

Given the significant consequences associated with the use of suspension and expulsion, it is critical that we significantly reduce the reliance on these punitive disciplinary measures to address challenging behaviors, especially for our youngest learners. School systems should be making every effort to ensure that students are afforded the opportunity to remain in class with access to both academic and non-academic supports. By shifting focus to implementation of alternatives to suspension and expulsion, schools will more appropriately address challenging student behavior and the underlying causes, which should also reduce the incidence of these behaviors.

Respectfully submitted,

Robert T. Gonzales, Chair
Commission on Disability Rights
August 2018
1. **Summary of Resolution(s):**

This resolution urges federal, state, local, territorial, and tribal governments to enact laws and adopt policies prohibiting out-of-school suspension and expulsion of pre-kindergarten through second grade students, except where the student poses an imminent threat of serious physical harm to self or others that cannot be reduced or eliminated through age-appropriate school-based behavior interventions and supports, and the duration of the exclusion is limited to the shortest period practicable. The resolution also urges these governments to require ongoing training of school staff on alternatives to school exclusion, and to provide sufficient funding and resources to ensure the provision of these alternatives. Finally, the resolution calls upon the ABA to support policies and procedures that instruct school personnel to contact law enforcement officers in response to pre-kindergarten through second grade students’ behavior only where there is an imminent threat of serious physical harm to the student or others that cannot be reduced or eliminated through the use of age-appropriate school-based behavioral interventions and supports.

2. **Approval by Submitting Entity.**

Approved by Commission on Disability Rights on March 23, 2018.

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 2001, the ABA opposed zero tolerance policies that “have a discriminatory effect, or mandate either expulsion or referral of students to juvenile or criminal court, without regard to the circumstances or nature of the offense or the student’s history.” ABA Resolution 01M103B, http://www.americanbar.org/content/dam/aba/directories/policy/2001_my_103b.authcheck ckdam.pdf These policies require school officials to hand down specific, consistent harsh punishment, typically suspension or expulsion, when students break particular rules, regardless of the circumstances, the reasons for the behavior, or the student’s history of discipline problems.

In 2009, the ABA passed a resolution urging “federal and state legislatures to pass laws and national, state, and local education, child welfare, and juvenile justice agencies to implement and enforce policies” that help advance the rights of students to remain in and complete school, while at the same time promoting a safe and supportive school environment for all children. The resolution also included a call to “limit exclusion from and disruption of students” regular educational programs as a response to disciplinary

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Most recently, in 2016 the ABA "urged all federal, state, territorial and local legislative bodies and governmental agencies to adopt policies, legislation, and initiatives designed to eliminate the school to prison pipeline," recognizing the disproportionate impact of over-discipline on students of color, students with disabilities, and LGBTQ students, resulting in disparate push-out rates and juvenile justice system or prison interactions. The resolution also urged supporting legislation that eliminates the use of suspensions, expulsions, and referrals to law enforcement for lower-level offenses. ABA Resolution 16A115, https://www.americanbar.org/groups/child_law/resources/attorneys/school-to-prison-pipeline.html.

This resolution builds upon these policies to ensure that students remain in school and learning. It focuses on our youngest learners—students in pre-kindergarten through second grade. Their experiences can have a profound impact on their later academic performance and social behavior.

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. Recognizing the well-documented negative impact of school exclusion, there has been a national trend toward limiting, and in some cases, banning the suspension and expulsion of elementary school students. Such legislation has been enacted in California, Connecticut, Maryland, New Jersey, Oregon, and Texas. Local jurisdictions have likewise taken steps to ban suspension of young elementary school students, including Denver, the District of Columbia, Houston, New York City, Philadelphia, Seattle, and St. Louis.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The policy will allow the ABA to comment on the continuing push-out of school-age students based on behavior, as well as encourage current and proposed legislation and policies that prohibit the use of out-of-school suspension and expulsion of pre-kindergarten through second grade students.

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

9. Disclosure of Interest: (If applicable) None
10. **Referrals.**
- Section of Civil Rights and Social Justice
- Section of Litigation
- Section of State and Government Law
- Government and Public Sector Lawyers Division
- Center on Children and the Law
- Commission on Youth at Risk
- Young Lawyers Division
- Solo, Small Firm and General Practice Division

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

   Amy Allbright, Director
   ABA Commission on Disability Rights
   1050 Connecticut Ave., NW, Ste. 400
   Washington, DC 20036
   202-662-1575 (office)
   amy.allbright@americanbar.org

12. **Contact Name and Address Information.** Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

   Robert T. Gonzales, Chair
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EXECUTIVE SUMMARY

1. Summary of the Resolution
This resolution urges federal, state, local, territorial, and tribal governments to enact laws and adopt policies prohibiting out-of-school suspension and expulsion of pre-kindergarten through second grade students, except where the student poses an imminent threat of serious physical harm to self or others that cannot be reduced or eliminated through age-appropriate school-based behavior interventions and supports, and the duration of the exclusion is limited to the shortest period practicable. The resolution also urges these governments to require ongoing training of school staff on alternatives to school exclusion, and to provide sufficient funding and resources to ensure the provision of these alternatives. Finally, the resolution calls upon the ABA to support policies and procedures that instruct school personnel to contact law enforcement officers in response to pre-k through second grade students’ behavior only where there is an imminent threat of serious physical harm to the student or others that cannot be reduced or eliminated through the use of age-appropriate school-based behavioral interventions and supports.

2. Summary of the Issue that the Resolution Addresses
This resolution builds upon these policies to ensure that students remain in school and learning. It focuses on our youngest learners—students in pre-kindergarten through second grade. Their experiences can have a profound impact on their later academic performance and social behavior.

3. Please Explain How the Proposed Policy Position will address the issue
The policy position will allow the ABA to comment on the continuing push-out of school-age students based on behavior, as well as encourage current and proposed legislation and policies that prohibit the use of out-of-school suspension and expulsion of pre-kindergarten through second grade students.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
None as of this writing.

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None as of this writing.
RESOLVED, That the American Bar Association urges all courts and other appropriate
government entities to interpret Titles II and III of the Americans with Disabilities Act
(ADA) to apply to technology, and goods and services delivered thereby, regardless of
whether the technology exists solely in virtual space or has a nexus to a physical space;

FURTHER RESOLVED, That the American Bar Association urges all courts and other
appropriate government entities to interpret Titles II and III of the ADA to ensure that
technology is accessible to, and usable by, individuals with disabilities in a manner that
protects their privacy and independence; and

FURTHER RESOLVED, That the American Bar Association urges that all technology
relating to the provision of legal services be equally accessible to people with a wide
range of abilities and disabilities and, in particular, be accessible through assistive
technologies that permit individuals with visual, hearing, manual, and other disabilities to
meaningfully use this technology.
I. Introduction

Ever-emerging technologies are transforming the way we live and work in the 21st century—connecting billions of people through the internet; improving access to goods and services; and redefining commerce, education, governance, and the workplace. However, technology is only beneficial if it reflects the diversity of everyone, and is usable by and accessible for people of all abilities. Accessibility refers to development, design, business processes and training that allow people who have disabilities to consume and interact with websites, mobile applications and other digital technology. Despite the fact that one in five Americans has a disability, websites, mobile applications, kiosks, and other technologies are frequently inaccessible. Individuals with disabilities are excluded from taking advantage of employment, educational, and commercial opportunities, engaging in social activities, and keeping abreast of what is happening in the world. Accordingly, digital accessibility is a civil rights issue.

With commerce shifting to the internet and mobile technologies, many litigants are asking courts to apply the Americans with Disabilities Act (ADA) to the digital realm, which was in its infancy when Congress enacted the Act in 1990. Courts are divided on the ADA’s applicability to the internet and other technology. In 2010, the U.S. Department of Justice (DOJ) began the process of developing accessibility guidelines for public websites under Title III of the ADA. These regulations would have clarified accessibility requirements for websites of public accommodations and state and local governments. However, in July 2017, the DOJ rulemakings were placed on the department’s “inactive list;” and on December 26 officially withdrawn.4

It is against this backdrop of continuing uncertainty surrounding the ADA’s application to technology that we bring this resolution urging all courts and other appropriate government entities to interpret Titles II and III of the ADA to apply to technology, and goods and services delivered thereby, regardless of whether it exists solely in virtual space or has a nexus to a physical establishment. We further urge all courts and appropriate government entities to interpret Titles II and III to ensure that technology is accessible to, and usable by, individuals with disabilities in a manner that protects their privacy and independence.

2 42 U.S.C. § 12101 et seq.
3 Id. §§ 12181-189.
5 42 U.S.C. § 12101 et seq.
6 Id. §§ 12181-189.
8 42 U.S.C. §§ 12131-165.
For purposes of the resolution, "technology" is defined as all new hardware, software, applications, websites, e-commerce and sharing economy entities, and other innovations, goods, or services arising therefrom. This resolution should not be construed in a limiting manner. As innovation is unpredictable, it is reasonable to assume that new and currently unforeseen technologies, software, and various technology-based goods and services will develop and emerge in the coming years. It is essential that the ADA and corresponding rights be understood to cover not only the technology of 1990, but also modern technology and new developments as they arise in the future.

The legal profession faces the same disruption from technology as other service professions, and new developments will profoundly impact the profession and the clients it serves. As technology changes the way legal services are accessed and delivered, innovation must be digitally inclusive for lawyers, their clients, law students, judges, and everyone else within the legal ecosystem. Accordingly, this resolution urges that all technology relating to the provision of legal services be equally accessible to people with a wide range of abilities and disabilities and, in particular, be accessible through assistive technologies that permit individuals with visual, hearing, manual, and other disabilities to meaningfully use this technology.

II. Need for the Resolution

Technology is evolving at an exponential rate. The need for digital inclusiveness is greater than ever. According to the U.S. Census Bureau, more than 56 million Americans have a disability. Yet, for many people with disabilities the internet, mobile applications, and other technologies are frequently inaccessible. Technology has enormous potential for promoting social inclusion for individuals with disabilities, from facilitating telework and online education to keeping abreast of what is happening in the world. Accordingly, we must eliminate the virtual barriers that have been built, ensuring that people with disabilities can fully enjoy the goods, services, privileges, and advantages available to other members of the general public and are not marginalized by society.

The ADA & Websites

In 1990, Congress passed the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." The ADA prohibits discrimination in all aspects of society—from employment to government services to businesses to telecommunications. Throughout the last two decades, there has been a debate about whether the ADA’s non-discrimination requirements apply to websites.

7 Id.
8 42 U.SC. § 12101(b)(1).

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7 Id.
8 42 U.SC. § 12101(b)(1).
The ADA ensures equal access to goods and services from “places of public accommodation,” which the Act defines as private entities that affect commerce and that fall into one of 12 business categories, including retail stores, hotels, restaurants, entertainment venues, and offices of lawyers. However, since the internet as we know it today was functionally nonexistent when the ADA was drafted and enacted, the Act is unsurprisingly silent regarding the online and “cloud-based” provision of goods and services. Most cases involving the ADA and website accessibility arise under Title III of the ADA and turn on whether a website should be considered a “place of public accommodation.”

Throughout the country, courts have expressed differing opinions about whether Title III applies to the internet. The DOJ, the federal agency charged with promulgating regulations and enforcing Titles II and III of the ADA, has taken the position that Title II covers Internet web site access, and that Title III covers access to web sites of public accommodations. To date the DOJ’s position has manifested primarily in the forms of settlement agreements, amicus briefs, and statements of interest. For enforcement actions, the DOJ uses the World Wide Web Consortium’s Web Accessibility Content Guidelines (WCAG) 2.0, the most widely accepted standards for digital accessibility, as a baseline for compliance with the ADA.

In 2010, the DOJ began the process of developing accessibility guidelines for public websites under Title III. These regulations would have clarified accessibility requirements for websites of public accommodations and state and local governments. However, in July 2017, the DOJ rulemakings were placed on the department’s “inactive list,” an indication that the agency was no longer focusing on them. This list, and on December 26 officially withdrawn, leaving courts and litigants—who had hoped for DOJ guidance—in a state of uncertainty.

The U.S. Courts of Appeals for the Third, Sixth, Ninth, and Eleventh Circuits interpret “places of public accommodation” under the ADA to only apply to places with physical structures. Therefore, in website accessibility cases arising in those jurisdictions, plaintiffs must establish that websites with goods or services are tied to a physical location, such as a retailer that sells its products in both an online store and a brick-and-mortar store. Under this view, the ADA would not govern businesses operating solely on the Internet without any physical locations.

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Id. § 12181(7).

https://www.w3.org/TR/WCAG20/.


Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000).

By contrast, the First\textsuperscript{17} and Seventh\textsuperscript{18} Circuits do not require that "places of public accommodation" involve a business with a physical structure, reasoning that the site of a sale is irrelevant; what matters is whether goods or services are offered to the public. In those jurisdictions, the ADA applies if that business meets one of the 12 categories the ADA considers a "place of public accommodation." The ADA would therefore apply to businesses operating only on the internet.

Cases involving digital inclusiveness can also involve Title II of the ADA. Under Title II, qualified individuals with disabilities shall not be excluded from "participation in or be denied the benefits of the services, programs, or activities of a public entity."\textsuperscript{19} Title II's requirements are commonly referred to as "program accessibility." Unlike Title III, there is little dispute that covered websites, such as the websites of state and local governments, are subject to the ADA, and as previously mentioned the DOJ's position on this question has been clear for some time.

In 2003, the DOJ published a technical assistance document called "Accessibility of State and Local Government Websites to People with Disabilities," which states that under Title II state and local governments must provide equal access to programs, services, or activities, subject to the ADA's standard exception.\textsuperscript{20} The DOJ explains that one way for state and local governments to comply with the ADA is to ensure that a government website is accessible to people with disabilities. More recently, in 2010 the DOJ stated in its Advance Notice of Proposed Rulemaking, "There is no doubt that the Web sites of state and local government entities are covered by [Title II of the ADA]."\textsuperscript{21}

Without further DOJ regulations, especially regarding Title III, courts will have to decide if and how the ADA applies to the accessibility of websites and other digital technology. To aid the courts, the first resolved clause would make the ADA's position clear that the ADA should apply to websites and other digital technology, whether accessed over computers, mobile devices, or other means. Under Titles II and III, the second resolved clause would ensure that, in removing barriers to access, courts and other appropriate government entities protect the privacy and independence of individuals with disabilities. The proposed resolved clauses work in tandem to balance accessibility and privacy in opening the digital frontier to everyone.

\textsuperscript{17} Carparts Distribution, Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F. 12, 19 (1st Cir. 1994).
\textsuperscript{19} 42 U.S.C. § 12132.
Digital Barriers for Attorneys with Disabilities

The legal profession evolves with the technology that transforms it, as legal technology companies forge the tools essential for lawyers to ply their trade. Unfortunately, many attorneys with disabilities do not have equal access to the digital tools so vital to their profession. Now and in the future, technology will define how lawyers find clients (and vice-versa); interact with them, other attorneys, and courts; practice law; and manage their businesses. The final resolved clause is intended to help dismantle these digital barriers by encouraging legal tech companies and law firms to ensure equal access to all attorneys and the public.

Attorneys and consumers must have equal access to all these tools, regardless of their abilities. To that end, the final resolved clause encourages lawyers, law firms, legal technology companies, or other entities involved in the delivery of legal services, to ensure accessibility. The resolution promotes the creation of technology equally accessible to people with a wide range of abilities and disabilities, including through assistive technologies that permit individuals with visual, hearing, manual, and other disabilities to meaningfully use this technology.

As the ABA Commission on the Future of Legal Services found, “[a]dvancements in technology and other innovations continue to change how legal services can be accessed and delivered.” Failing to promote full and equal participation in the profession (ABA Goal III) or assure meaningful access to justice for all persons (ABA Goal IV) undermines the Association’s mission. These goals can only be accomplished if the legal profession and organizations that provide technology for the delivery of legal services are committed to digital accessibility and inclusion.

III. Existing ABA Policy

In August 2007, the ABA House of Delegates adopted policy urging all those in the legal profession to make their websites accessible to persons with visual, hearing, manual, and other disabilities. A decade later, technology has transformed the world significantly, requiring the ABA to broaden its perspective on digital inclusiveness. Commerce through technology is no longer restricted to websites, as people now, more than ever before, use mobile technologies to buy goods and service or to ply their trades.

When the House adopted this policy, lawyers primarily provided legal services to the public and used technology far less extensively than today to deliver their services. Since then, many other legal services providers have used technology to create self-help tools for those needing legal help and gateways for more affordable legal advice.

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When the House adopted this policy, lawyers primarily provided legal services to the public and used technology far less extensively than today to deliver their services. Since then, many other legal services providers have used technology to create self-help tools for those needing legal help and gateways for more affordable legal advice.
Moreover, technological tools have made lawyers more competent, economical, and efficient.

The proposed resolution is consistent with long-standing ABA policies articulated in the report accompanying this resolution. In February 1991, the ABA’s House of Delegates made member benefits accessible to members with disabilities “to the maximum extent feasible,” creating a task force to best implement the ADA within the ABA and the legal profession and making the ABA’s programs and activities accessible to lawyers with disabilities. In 1999, the ABA amended Goal IX—later changed to Goal III—to add lawyers with disabilities and to commit to the “full and equal participation” of lawyers with disabilities in the legal profession.

Thus, just as the ADA was enacted for a different time, so too was this policy. The surge in website accessibility lawsuits is trying to keep the ADA relevant and responsive to today’s digitally-dependent world. The proposed resolution is meant to keep the ABA’s position on the importance of digital inclusiveness, inside and out of the courts, current as well.

IV. The Path to Digital Accessibility and Inclusion

Although the DOJ has not promulgated web or digital accessibility standards, it has looked primarily to standards from the World Wide Web Consortium (W3C) for guidance. The W3C is an international body that develops web standards through its staff, member organizations, and the public. In 1997, the W3C launched the Web Accessibility Initiative (WAI) to achieve web functionality for people with disabilities by developing software protocols and technologies, creating guidelines for the use of technologies, educating the industry, and conducting research and development. Since then, the WAI has developed web and mobile technology standards, the WCAG 2.0, the most widely accepted standards for digital accessibility.

WCAG 2.0 offers a vast array of recommendations to create web content more usable in general and more accessible to a people with disabilities, “including blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, limited movement, speech disabilities, photosensitivity and combinations of these.” A technical standard, the WCAG has 12 guidelines organized under four principles: perceivable, operable, understandable, and robust. Each guideline has the levels, A, AA, and AAA, of testable success criteria. WCAG 2.0 AA is the level most widely followed.

While the WCAG standards initially focused upon the accessibility of websites, WAI working groups have expanded WCAG 2.0 AA to include guidance for mobile

24 ABA Resolution 91M102.
26 http://www.w3.org/TR/WCAG20/
27 https://www.w3.org/WAI/intro/wcag.php#whtail2.

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While the WCAG standards initially focused upon the accessibility of websites, WAI working groups have expanded WCAG 2.0 AA to include guidance for mobile
technologies. Through an online guidance, “Mobile Accessibility: How WCAG 2.0 and Other W3C/WAI Guidelines Apply to Mobile,” the WAI explains how WCAG 2.0 applies to mobile web content, mobile web apps, native apps, and hybrid apps using web components inside native apps. Thus, law firms and legal tech companies that build law-related websites and apps for the legal profession and consumers have ample guidance to ensure digital inclusion for everyone.

However, having the means to achieve digital accessibility and inclusion and the desire to do so are not the same thing. Businesses in general, and law firms and legal tech companies specifically, have been slow to embrace the principles of WCAG 2.0 AA and the moral imperative that is digital accessibility and inclusion. Through the proposed resolution, the ABA must urge courts and appropriate government entities to apply the ADA to attain maximum digital accessibility and inclusion—not only for websites, but also for all digital technology used in commerce and other spheres—and urge the legal profession and its technology partners to pledge their commitment to achieving this goal. As the world evolves through technology, no one in the profession—or the public it serves—should be left behind.

Respectfully submitted,

Robert T. Gonzales, Chair
Commission on Disability Rights
August 2018
1. Summary of Resolution(s).

This resolution urges all courts and other appropriate government entities to interpret Titles II and III of the Americans with Disabilities Act (ADA) to: (1) apply to technology, and goods and services delivered thereby, regardless of whether the technology exists solely in virtual space or has a nexus to a physical space, and (2) ensure that technology is accessible to and usable by individuals with disabilities in a manner that protects their privacy and independence. The resolution further urges that all technology relating to the provision of legal services be equally accessible to people with a wide range of abilities and disabilities.

2. Approval by Submitting Entity.

Approved by Commission on Disability Rights on March 23, 2018.

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

Yes.

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

In August 2007, the ABA House of Delegates adopted policy urging all those in the legal profession to make their websites accessible to persons with visual, hearing, manual, and other disabilities. American Bar Association Resolution 07A108, https://www.americanbar.org/content/dam/aba/directories/policy/2007_am_108.authcheckdam.pdf. A decade later, technology has transformed the world significantly, requiring the ABA to broaden its perspective on digital inclusiveness. Commerce through technology is no longer restricted to websites, as people now, more than ever before, use mobile technologies to buy goods and service or to ply their trades.

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

N/A.


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

The policy will allow the ABA to comment on and encourage current and proposed legislation and administrative interpretation and guidance regarding the applicability of the Americans with Disabilities Act and other disability rights legislation to technology.

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

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

- Section of Civil Rights and Social Justice
- Section of Science & Technology Law
- Law Practice Division
- Business Law Section

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

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Washington, DC 20036
202-662-1575 (office)
amy.allbright@americanbar.org

12. Contact Name and Address Information. Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Robert T. Gonzales, Chair
Commission on Disability Rights
410-547-0900
r.gonzales@hyltongonzales.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges all courts and other appropriate government entities to interpret Titles II and III of the Americans with Disabilities Act to: (1) apply to technology, and goods and services delivered thereby, regardless of whether the technology exists solely in virtual space or has a nexus to a physical space, and (2) ensure that technology is accessible to and usable by individuals with disabilities in a manner that protects their privacy and independence. The resolution further urges that all technology relating to the provision of legal services be equally accessible to people with a wide range of abilities and disabilities.

2. Summary of the Issue that the Resolution Addresses

The need for digital inclusiveness is greater than ever. According to the U.S. Census Bureau, more than 56 million Americans have a disability. Yet, for many people with disabilities the internet, mobile applications, and other technologies are inaccessible. Technology has enormous potential for promoting social inclusion for individuals with disabilities, from facilitating telework and online education to keeping abreast of what is happening in the world. Accordingly, we must eliminate the virtual barriers that have been built, ensuring that people with disabilities are not marginalized by society.

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

The policy position will allow the ABA to comment on and encourage current and proposed legislation and administrative interpretation and guidance regarding the applicability of the Americans with Disabilities Act and other disability rights legislation to technology.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None at this time.
RESOLUTION

RESOLVED, That the American Bar Association urges Congress to approve appropriations to the Library of Congress necessary to enable the United States Copyright Office to adequately staff, maintain, modernize, and enhance its services, facilities, databases, studies, and digital projects; and

FURTHER RESOLVED, That the American Bar Association urges Congress to pass legislation providing the Copyright Office with funds for an improved infrastructure, budget, and financial autonomy.
Given the ever-increasing importance of copyright law in American society, and, as discussed in this Report, the importance of United States Copyright Office (the “Office”) role and operations to the public and American social and commercial organizations and to the ABA members that represent and advise them, this Resolution advocates for better funding for the Office, so that the Office might better serve the public interest and be better positioned to tackle the challenges of copyright in the twenty-first century.

Congress created the United States Copyright Office in 1897 as a department within the Library of Congress charged with processing copyright registrations, maintaining public records, and acquiring deposit copies of copyrighted works for the Library’s use. The Office remains part of the Library of Congress today, but its functions and responsibilities have dramatically multiplied over the last 100-plus years. Among other things, the Office:

- Examines and registers claims to copyright in works of authorship;  
- Records assignments, transfers, terminations, and other information relevant to ownership of those works;  
- Maintains a record of designated agents of online service providers under the Digital Millennium Copyright Act;  
- Provides copyright information, records and reference services to the general public through its website, databases, and public information service; administers the mandatory deposit provisions, as well as certain statutory licenses, in the Copyright Act; and  
- Conducts the rulemaking proceedings related to the Register of Copyright’s statutory duties and in connection with 17 U.S.C. § 1201 concerning technological protection for copyrighted works.

In addition, the Office provides support to Congress by conducting studies on modern issues confronting copyright, such as its recent inquiries into the creation of a copyright small claims tribunal, the revision of the Copyright Act’s libraries and archives exception, and music

1 See generally 17 U.S.C. §§ 101 et seq. (2016); see also Joshua L. Simmons, The Next Great Copyright Office, LANDSLIDE, July/August 2015, at 22

2 “Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.” 17 U.S.C. § 102(a).


licensing practices. The Office also plays an active role in shaping and addressing international copyright matters, as it participates in negotiations concerning various trade agreements and treaties, and provides legal assistance to foreign executive agencies and courts.

The growth of the Office reflects the expansion and increasing sophistication of copyright industries—including the film, music, media, publishing, and software industries and other copyright-dependent sectors—as well as the broader scope of the copyright law itself. New works and new uses of works have become subject to copyright law over the years, and new exceptions and statutory licenses have been added to ensure the availability of copyrighted works in appropriate circumstances. Over time, international issues have occupied more of the Office’s attention. Unfortunately, the resources allocated to the Office have not kept pace with the needs of its users. This inhibits its ability to develop new solutions to operational and policy matters by imposing budget and infrastructure limitations and the consequential impact on operations affects the people and organizations comprising its constituencies and their legal counsel.

The Copyright Office serves the needs of many different constituencies. Perhaps the most obvious are those that rely on the Office to fulfill its mission “to promote creativity by administering and sustaining an effective national copyright system”: the general public, individual copyright owners and the copyright industries, which are a vital segment of the U.S. economy, and their legal counsel. As is apparent to even the most casual industry observer, the business models in the copyright industries are changing with unprecedented speed, as different sectors experiment with different means of disseminating copyrighted works in the digital environment. Beyond these industries, the Office also serves individual copyright owners—who face challenges distinct from corporate owners—and users of copyrighted material, including individuals, vital institutions such as libraries, archives, and educational institutions, and large corporations whose principal business is the dissemination of copyrighted materials. Of course, given the complexities of copyright law, this division is not usually so simple, as many users are often owners and vice versa. Despite their classification, however, the Office’s constituents share the common trait that they are accustomed to the dynamic, fast-moving information age, where they have immediate, twenty-four-hour access to whatever information they seek. The present budgetary limitations on the Office have impeded it from addressing this major need of the community it serves.

The Office could modernize to address the needs of its current constituents and those it will serve in years to come. It is critical that the Office receive the independent funding necessary to rework its systems in a manner that will encourage registration and recordation, swiftly provide critical information about the copyright status of existing works, combat the


6 For example, in 1990, Congress added an exception to the first sale doctrine that allows owners of copyright in computer programs to control the rental of copies, see 17 U.S.C. § 109(b)(1)(A), and also expanded copyrightable subject matter to include architectural works, see id. § 102(a)(8).

7 Copyright Office Circular 1a, http://copyright.gov/cir/cir1a

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The Office could modernize to address the needs of its current constituents and those it will serve in years to come. It is critical that the Office receive the independent funding necessary to rework its systems in a manner that will encourage registration and recordation, swiftly provide critical information about the copyright status of existing works, combat the
“orphan works” problem, and facilitate a better understanding of copyright overall. Some of these essential improvements are summarized as follows:

- **Registration:** The Office could improve registration by revising the user interface to be more informative and user friendly; updating the system software to provide greater flexibility and interoperability with other systems, thus simplifying the registration process; making the deposit copy required for registration separate from the deposit copy required for the Library of Congress, which would enable electronic form to suffice for the former and relieve certain applicants of having to file hard copy editions at the same time as their applications.

- **Recordation:** The Office could improve recordation by making information regarding transfers, assignments, and security interests accessible to the public promptly by reengineering the recordation system to allow for submission of recordation materials in electronic form, with prompt processing, and if the copyright is registered, linking the recordation records with the registration, so that a search for one document would provide a full record with all of the relevant information returned together.

- **Enhanced Security:** The Office could improve security by ensuring that it has in place appropriate security measures to prevent unauthorized access to digital works, especially tests, answer books, source codes, and unpublished works.

- **Upgraded Databases:** The Office’s databases could be improved by digitizing pre-1978 records and making them publicly available on a searchable, easy to use interface; linking records to other trusted databases within the creative industries; and implementing software to enable image or music searches, or even linking to existing, trusted databases established in the creative fields to serve this function.

These operational goals are of course enticing, and the impact on operations would reduce current uncertainties (e.g., such as uncertain or untimely records of ownership, transfer and liens) and facilitate public access to records for the Office’s constituencies and their legal counsel. These goals, however, are not attainable unless the issues of infrastructure, budget, and financial autonomy are also addressed.

First, the Copyright Office needs a sophisticated, well-functioning IT system that can accommodate its present needs and be easily modified as those needs evolve. Currently, the Office operates through the Library of Congress’s IT system and its existing software, developed and managed with the Library’s different priorities in mind. Under this arrangement, the Office often has to compete with other Library departments for IT services, and given the interconnectedness of the IT system, it is difficult for the Office to make even minor changes to its online form, as those changes are often put on a waiting list for months before they are

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8 The term “orphan works” refers to works the ownership of which is unknown or unknowable through reasonable attempts to locate or identify the copyright owners. See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS AND MASS DIGITIZATION 9 (2015), http://www.copyright.gov/office/reports/orphan-works2015.pdf. The Copyright Office sees this as problematic as it prevents “good faith actors from securing permission to make productive uses of copyrighted works.” See id. at 1.

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implemented. Furthermore, the recommendations resulting from several recent Copyright Office studies could place additional responsibilities on the Office moving forward. With a more robust IT system to manage applications, recordation, and other digital records, the Copyright Office will be better positioned to participate in these various initiatives. Considering the general public and the vital segment of the economy that the Office serves, it is essential that the Office be given a budget adequate to improve its IT capabilities.

Second, the Office needs funding that realistically reflects the scope of its responsibilities and the volume of its work. In recent years, the Office’s funding has failed to keep up with its expanding role, greatly inhibiting its ability to engage in long-term improvement projects, and even basic operations. For example, the Office’s travel budget is so limited that Office personnel are often unable to attend important meetings pertaining to international trade agreements and treaties. This financial constraint is readily apparent in the Office’s databases, which, as noted, are extremely out of date and largely unhelpful for users. Additionally, because of budget cuts, the Office is now operating far fewer full time employees than its authorized ceiling of 439. Especially in light of proposed legislation that would increase the Office’s responsibilities—such as the Copyright Alternative in Small-Claims Enforcement Act of 2017)—the Office needs to add personnel who can facilitate critical improvements identified by the Register, perhaps including copyright lawyers, technical professionals, and registration and recordation specialists.

The Office needs the means to fund much needed improvement projects, yet the law does not permit the Office to raise its fees to fund such improvements. While the prior Register suggested that the Office’s fee-setting authority be made more flexible, the flexibility to innovate with respect to fees still cannot cover the costs of the improvement projects the Office must undergo. Moreover, there is the possibility that increasing fees will discourage registration and recordation, thus undermining the ultimate goal of creating a comprehensive, robust, and accurate database of copyright information.

Third, and relatedly, the Office needs greater financial autonomy to improve its ability to set and manage its budget so that it can make and effectively implement changes that will benefit the copyright system at large, including the authority to set its own budget. Currently, the Office

* The FY2018 Consolidated Appropriations Act, Pub. L. No. 115-141, became law on March 23, 2018, providing a total appropriation of $72,011,000 for the Copyright Office. The Library of Congress recently submitted its FY2019 budget submission to Congress in January, proposing the following six programmatic increases for Copyright Office funding in FY2019: (1) $12.121 million for continuing IT modernization activities; (2) $5 million for digitizing Copyright Office records; (3) $2.059 million to increase registration-related staffing; (4) $0.562 million for increased legal staffing; (5) $1.1 million to retain a temporary contractor to reduce its recordation backlog and modernize recordation protocol; and (6) $1.328 million for long-term storage that will accommodate the Copyright Act’s physical deposit requirements. See LIBRARY OF CONGRESS, FISCAL 2019 BUDGET JUSTIFICATION 104-113 (2018), https://www.loc.gov/ports/oc-static/about/reports-budget/documents/documents/budgets/2019.pdf.


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budget is a line item on the larger budget presented to the Library of Congress. This does not always reflect the Office’s needs as submitted to the Library, however, because the Library must balance the budgetary requests of its many other departments, too. Moreover, many of the improvement projects noted above require a multi-year commitment, which is simply not possible given the unsteady nature of the Office’s current budget. To effectively manage substantial improvement projects, the Office needs the ability to build up a reserve account and be afforded a multi-year budget cycle. The purpose of this Resolution is to urge adequate funding of the Office; the Resolution is not intended to provide support for reducing funding of other divisions of the Library of Congress.

In sum, the Copyright Office’s responsibilities are only growing, as the speed of technological innovation, the needs of the public (as both users and creators of material subject to copyright), the increasing importance of international markets, and the potentially high stakes of infringement in our current setting make its activity increasingly important for more and more Americans. Given this reality, the Office should be given greater funding to better reflect the realities of its critical role in the U.S. economy. To meet the needs of the twenty-first century, the Office should be given improved financial autonomy to set and manage its own budget, make its own determinations regarding where funds should be allocated to best further its objectives, and obtain the IT support that is essential to its modernization. Such changes will position the Office to engage with the copyright communities in meaningful ways that will promote the exchange of information and ideas and improve the American copyright system overall, without reducing funding to other divisions within the Library of Congress.

Respectfully submitted,

Scott F. Partridge, Chair
Section of Intellectual Property Law
August 2018
1. **Summary of Resolution**

The Resolution calls on the ABA to urge Congress to approve appropriations to the Library of Congress for the Copyright Office necessary to enable the Copyright Office to adequately staff, maintain, modernize, and enhance its services, facilities, databases, studies, and digital projects. It further calls on the ABA to urge Congress to support the Copyright Office in its efforts to make available information regarding the copyright system of the United States and the copyright systems of the world by funding improvements to its infrastructure and its ability to set and manage its budget.

2. **Approval by Submitting Entity:**

This Resolution was approved on April 18, 2018 by the Council of the Section of Intellectual Property Law.

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 how would they be affected by its adoption?**

At its 2018 Mid-Year Meeting, the House of Delegates passed Resolution 109, which was co-sponsored by the Standing Committee on the Law Library of Congress, the Section of Intellectual Property Law and others, urging Congress to support funding for the Law Library. Resolution 109 and this Resolution take the same approach to addressing similar issues facing these two parts of the Library of Congress—urging Congress to approve appropriations necessary to enable them to adequately staff, maintain, modernize, and enhance services, facilities, databases, studies, and digital projects. This Resolution is consistent and compatible with Resolution 109.

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.**

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

Adoption of this Resolution will enable the ABA to urge Congress to adopt policy and implement policy with appropriations in its advocacy efforts on behalf of the Copyright Office that is attuned to current-day and future significant needs.

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

Member and GAO staff time

9. Disclosure of Interest. (If applicable)

None

10. Referrals.

The Standing Committee on the Law Library of Congress reviewed and commented on earlier drafts of the Report and Resolution. The Resolution and Report will be distributed to each of the other Sections, Divisions, Forums, and Standing Committees of the Association in the version accepted and numbered for the agenda by the Rules and Calendar Committee.

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

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Susan Barbieri Montgomery
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S.Montgomery@northeastern.edu

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges Congress to approve continued levels of appropriations to the Library of Congress necessary to enable the Copyright Office to adequately staff, manage, modernize, and enhance its services, facilities, and digital projects. The Resolution also calls on Congress to support the Copyright Office in its efforts to make available access to copyright information regarding domestic policies and the copyright status of various works, as well as international matters with which the Office is involved, by funding improvements to its infrastructure and its ability to set and manage its budget.

2. Summary of the Issue that the Resolution Addresses

The Resolution addresses the consistent need for adequate congressional funding for the United States Copyright Office, which is a part of the Library of Congress, through appropriations to the Library. As the representative of the nation’s legal profession, the American Bar Association must stand in support of the Copyright Office to ensure its continued operation, improvement, and sharing of copyright information, which is essential to its constituencies, including professionals in the legal and creative industries and members of the American public in general, and their legal counsel.

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

The proposed policy Resolution addresses the issue by identifying current and future needs of the Copyright Office and stating clearly an ABA position informed by a cross-section of Association expertise.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None known.
RESOLVED, That the American Bar Association urges the federal government to recognize that service by persons who otherwise meet the standards for accession or retention, as applicable, in the United States Armed Forces should not be restricted, and transgender persons should not be discriminated against, based solely on gender identity.
REPORT

Introduction

This Resolution is consistent with ABA policy. Previously, the ABA has urged federal, state, local, and territorial governments to enact laws prohibiting discrimination on the basis of actual or perceived gender identity or expression in employment and public accommodations. See 06A122B.

This Resolution enables the ABA to specifically address any and all discriminatory actions perpetuated by the federal government to bar service in the United States Armed Forces based on one's gender identity.

This accompanying report will address three key arguments as follows:

I. Transgender individuals openly serving in the Armed Forces will have an insignificant impact on military readiness.
   a. Transgender individuals openly serving in the Armed Forces will have only a marginal impact on an ability to deploy or serve.
   b. Unit cohesion will not be affected by allowing transgender individuals to serve openly in the Armed Forces.

II. Costs associated with providing health care for transgender individuals is negligible.

III. The transgender service ban violates the constitutional guarantees of Equal Protection Clause and Due Process.
   a. The transgender service member ban violates the Equal Protection Clause of the Fifth Amendment to the United States Constitution.
   b. The transgender service member ban violates the Due Process Clause of the Fifth Amendment to the United States Constitution

Background

Historic federal policy restricted or prohibited transgender persons from military service. The reasons for that policy were grounded in prejudice and ignorant of medical science. Beginning in 2015, the Department of Defense (“DoD”) began a review of existing regulations and considering both medical evidence and military expertise. Based that review, the Secretary of Defense (“SecDef”) announced new policy in June 2016 that allowed for transgender military personnel to serve openly and to receive necessary medically care. In July 2017, a new president announced his decision to bar transgender people from serving in the military “in any capacity.”

I. A subsequent memorandum directed SecDef to provide recommendations to implement this new ban. On February 22, 2018, SecDef made such recommendations and on March 23, 2018, the Administration announced a new policy regarding the service of transgender individuals in the United States Armed Forces. It states that, while SecDef and other executive branch officials will have some latitude in implementing the policy, “persons with a history or
diagnosis of gender dysphoria — including individuals who the policies state may require substantial medical treatment, including medications and surgery — are disqualified from military service, except under limited circumstances.\(^2\) The Administration’s new policy provides that: Transgender persons with a history or diagnosis of gender dysphoria\(^1\) are disqualified from military service, except under the following limited circumstances:

a. if they have been stable for 36 consecutive months in their biological sex prior to accession;

b. Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and

c. currently serving Service members who have been diagnosed with gender dysphoria since the previous administration’s policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.

II. Transgender persons who require or have undergone gender transition are disqualified from military service.

III. Transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.

Evolution of the Current Policy

For decades, transgender individuals could not serve openly in the U.S. Armed Forces. The repeal in 2011 of the U.S. Government’s policy commonly referred to as “Don’t Ask, Don’t Tell,”\(^2\) allowed open service by gay, lesbian, and bisexual service members; however, transgender individuals were still barred from openly serving in or joining the U.S. Armed Forces.\(^3\) This ban was effective via enlistment health screening regulations which denied individuals the ability to enlist if they had a “[c]urrent or history of psychosexual conditions (302), including but not limited to transsexualism, exhibitionism,

\(^{1}\) The report underlying this new policy distinguishes between “gender dysphoria” (which is defined as a “marked incongruence between one’s experienced/expressed gender and assigned gender” that is “associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.”) and transgender, which contains a much broader segment of society.


transvestism, voyeurism, and other paraphilias."4 Unlike Don’t Ask, Don’t Tell, this policy was not a law mandated by Congress, but an internal military policy.5

On June 30, 2016, the DoD announced that it would allow transgender individuals already in uniform to begin serving openly and ordered the military branches to begin preparing to accept new transgender recruits by July 1, 2017.6 That policy was the result of a lengthy review process by high-ranking military personnel, supported by a RAND Corporation study, which concluded that permitting transgender people to serve would have, at most, an insignificant adverse effect on military readiness or effectiveness.

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On June 30, 2017, the SecDef delayed the required implementation of policies allowing the enlistment of transgender individuals.7

On August 25, 2017, the President issued a memorandum to the SecDef and the Secretary of Homeland Security banning transgender people from military service.8 This was despite the fact that, effective March 23, 2018, the Armed Forces would "return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016," no longer permitting transgender individuals to serve openly in the military, and no longer authorizing the use of the Departments’ resources to fund sex-reassignment surgical procedures. The President’s directive also continued indefinitely DoD’s delay in implementing the June 2016 open service policy on accessions. The President stated, “In my judgment, the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments’ longstanding policy and practice [forbidding service by transgender service members] would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year’s policy changes would not have those adverse effects.”


5 Despite this, studies suggest that the propensity of transgender individuals to serve in the U.S. military is as much as twice that as cisgender individuals. In the Harvard Kennedy School's 2013 National Transgender Discrimination Survey, 20% of transgender respondents reported having served in the armed forces, compared with 10% of cisgender respondents. Harrison-Quintana, Jack; Jody L. Herman, “Still Serving in Silence: Transgender Service Members and Veterans in the National Transgender Discrimination Survey,” LGBTQ Policy Journal 3(2013) (Retrieved 17 November 2013); Brydum, Sunnivie, “Trans Americans Twice As Likely to Serve in Military, Study Reveals,” The Advocate (1 August 2013) (Retrieved 17 November 2013).


negative effects.” As a result of that memorandum, transgender people would have been barred from accession (entry into the military), and currently serving transgender service members would no longer be eligible for service as of March 23, 2018.

In August-September 2017, four law suits were filed to stop implementation of the policy articulated in the August 25, 2017 Memorandum; in all four cases federal courts have issued preliminary injunctions stopping the implementation of the policy as stated in the August 25, 2017 Memorandum. Under the court rulings the DoD was required to begin accepting transgender recruits on January 1, 2018 — and has reportedly accepted at least one transgender recruit so far. To date all these courts have continued injunctions against the implementation of the new policy, at least pending further briefing, and the military services have acknowledged that they will comply with the court rulings, i.e., they will continue to allow transgender military service members to enlist and serve in the U.S. Armed Forces in accordance with the 2016 policy memorandum.

On September 14, 2017 the SecDef issued a memorandum providing interim guidance to the U.S. Armed Forces. This interim guidance explained that accession of transgender individuals would be suspended immediately, and created a “panel of experts” to consider the issues raised by accession and retention of transgender individuals.

The panel of experts issued a report in February 2018 entitled “Department of Defense Report and Recommendations on Military Service by Transgender Persons,” which was adopted by the Secretary of Defense and forwarded to the White House. The policies recommended by the DoD were adopted by the President in White House March 23, 2018 Memorandum for the Secretary of Defense, Subject: “Military Service by Transgender Individuals,” which also withdrew the August 25, 2017 Memorandum. It states that while the SecDef and other executive branch officials will have some latitude in implementing the policy, “persons with a history or diagnosis of gender dysphoria — including individuals who the policies state may require substantial medical treatment, including medications and surgery — are disqualified from military service except under limited circumstances.” Basically, the policy provides that:

I. Transgender persons with a history or diagnosis of gender dysphoria are disqualified from military service, except under the following limited circumstances:


10 The Secretary of Defense announced shortly after receiving the memo that transgender troops could continue serving while the Pentagon studied the issue. Since then, at least one transgender service member underwent sex reassignment surgery.
a. if they have been stable for 36 consecutive months in their biological sex prior to accession;

b. Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and

c. currently serving Service members who have been diagnosed with gender dysphoria since the previous administration’s policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.11

II. Transgender persons who require or have undergone gender transition are disqualified from military service.

III. Transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.

The proposed policy does not issue a blanket bar on transgender individuals. It allows transgender individuals without a diagnosis of gender dysphoria to serve in their “biological” sex. It treats those with a diagnosis of gender dysphoria in a manner consistent with the U.S. Armed Forces treatment of individuals with mental conditions described in the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), while ignoring that the current DSM no longer classifies being transgender as a mental health condition. The progression of the DSM view regarding being transgender is similar to that of being homosexual, which also is no longer considered to be a mental health condition. The proposed policy supports this discriminatory treatment on a review of medical literature that purportedly shows those with gender dysphoria suffer from higher than usual rates of mental health conditions, including anxiety, depression, and substance abuse disorders. It also refers to studies purportedly showing this condition leads to increased rates of suicide.

Legal Standards

There are two issues to be addressed here. First, the standards for military accession, i.e., the standards for joining the military. Second, the standards for retention in the military, i.e., the standards applied for those who are already in the military.

Accession Standards

Joining the United States military is not the same as applying for a civilian job. For example, Title VII of the Civil Rights Act of 1964, which ensures all individuals are treated equally before the law with respect to civilian employment, does not apply to the military profession. In order to serve in the military, you must be qualified under current federal legal standards. A 2016 study conducted by the government-funded RAND Corporation for the Pentagon estimated that nearly 4,000 transgender troops were serving on active duty and in the reserves. Military LGBT advocacy groups put the estimate much higher, at around 15,000.

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laws and regulations or have an appropriate waiver. There are, among other requirements, age, citizenship, physical, education, height/weight, criminal record, medical, and drug history standards that can exclude one from joining the military. Most relevant to this situation, generally, a person will not be eligible to serve if they have a medical condition that falls into one of these categories: (1) applicants must be free of contagious diseases that would likely endanger the health of other personnel; (2) applicants must be free of medical conditions or physical defects that would require excessive time lost from duty for necessary treatment or hospitalization; (3) applicants must be medically capable of satisfactorily completing required training, and medically adaptable to the military environment without geographical area limitations; and (4) applicants need to be medically capable of performing duties without aggravation of existing physical defects or medical conditions.

Nonetheless, denying one the right to serve in the U.S. Armed Forces can be considered an "injury" which could be in violation of the Equal Protection Clause of the Constitution. Denying one the right to serve can be a legally cognizable right.12 And, although there may be other reasons for denying one’s desire to serve, the injury here would be "in the denial of an equal opportunity to compete, not the denial of the job itself."13

The Equal Protection Clause prohibits government action “denying to any person the equal protection of the laws.”14 Discrimination on the basis of transgender status is likely subject to “intermediate scrutiny,” as a quasi-suspect classification.15 A policy subject to intermediate scrutiny must be supported by an “exceedingly persuasive justification.” The policy must serve important governmental objectives, and the government must show “that the discriminatory means employed are substantially related to the achievement of those objectives.”16

Retention Standards
Unlike accession standards, which are set by the DoD, retention standards are set by individual services. However, as stated above, such standards are subject to intermediate scrutiny with regard to any regulations controlling the continued service of transgender service members, and serving service members have the protection of the Equal Protection Clause.

12 See generally Int’l Brotherhood of Teamsters v. United States, 431 U.S. 324, 365-66 (1977) (“When a person’s desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as in he who goes through the motions of submitting an application.”).
15 Ball v. Massanari, 254 F.3d 817, 823 (9th Cir. 2001) (gender is a quasi-suspect classification); Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (discrimination based on a person’s failure “to conform to socially-constructed gender expectations” is a form of gender discrimination).
To be clear, many of the arguments made in support of this policy have been made, in much the same terms, to deny equal opportunity to serve to blacks, women, and most recently, gay and lesbian Americans. With all these groups, the arguments have proven to be hollow and, when the policy inevitably changed, the U.S. Armed Forces continued to be an effective fighting force. And while the opinion of experienced military officers in support of this policy must be given weight, in all the prior instances experienced military officers articulated reasons in support of the discriminatory policies, which were subsequently proven unnecessary. For example, the legislation and litigation involving women serving in the military, and even being subject to registering for the draft, frequently invoked the standard of “fitness for combat,” just as this new policy does. Military experts and experienced military officers argued that women could not be expected to meet the standards required for combat duty. In fact, until 1976 the mission of the United States Military Academy at West Point invoked the concept of “combat leadership” resulting in the exclusion of women from West Point. Today, women have served as the senior cadet at West Point, have repeatedly served in combat in the Middle East (regardless of their official military occupational specialty), have now earned the coveted Ranger Tab, serve in combat positions including as Infantry officers in the U.S. Army, and fighter pilots in the U.S. Air Force. And that these discriminatory notions result from “professional military judgment acquired from hard-earned experience leading service members in peace or war” does not make them immune from critique; all of the prior discriminatory policies shown to be unnecessary were supported by such judgments.

Many experienced military leaders, active and retired, have argued that the 2016 policy was totally consistent with the needs of the military. “Fitness for combat” is a standard subject to differing interpretation, and has been through the centuries, and will likely continue to evolve. Policies designed to limit the right of patriotic Americans to serve their country must respect that reality.

The other argument which permeates the rationale for this new policy is that integration of transgender individuals will be so offensive to the existing military force that it will be detrimental to military effectiveness. In support of this, the argument is that a military fighting unit is a “unique social organism” which requires “human bonding” to be effective, and that introducing transgender individuals into that social organism will destroy the effectiveness of that unit. Of course, as will be described below, such arguments have been made in support of policies which discriminated against integration of blacks, women, gays and lesbians. The continued effectiveness of the American fighting forces has been proven time and again for more than six decades, even with the integration of blacks, women, gays and lesbians, on battlefields from Korea to Vietnam to Afghanistan and to Iraq.

One other general point – despite the arguments raised in support of the policy, the new policy provides that service members who are already on active duty, and were diagnosed with gender dysphoria after June 30, 2016 but before the effective date of this new policy, may continue to serve in their preferred gender (as opposed to their biological gender). If the horrors suggested by the expert panel were real and tangible, continued service of transgender individuals would be impossible.

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I. Transgender individuals openly serving in the Armed Forces will have an insignificant impact on military readiness.

a. Transgender individuals openly serving in the Armed Forces will have only a marginal impact on an ability to deploy

One argument that is relied upon by those who oppose allowing transgender individuals to serve in the Armed Forces is that the medical needs of those members would affect Armed Forces’ readiness and deployment. It is axiomatic that the U.S. military requires its members to maintain a certain level of physical fitness and to have the ability to deploy as necessary. However, there is no empirical evidence that supports the argument that transgender people are physically unfit for service. 17

The new policy relies in part on accession standards which are facially neutral, i.e., they apply to all potential applicants, including standards that are associated with conditions identified in the DSM, as well as medical conditions related to medical treatment, including a history of chest surgery or genital surgery. To the extent that these policies are facially neutral, however, there is no reason they could not continue to be applied to individuals who fail to meet these standards, without reference to whether or not they are transgender or have gender dysphoria.

Since 2016, active U.S. military members who identify as transgender have been able to seek transition-related care. In that time, there has not been any significant disruption to military operations or deployment. In fact, it is estimated that less than 0.1% of the U.S Armed Forces will seek transition-related care, and with only a slight disruption to deployment. 18 Thus, it is clear that transgender individuals would have a minimal likely impact on the U.S. military’s force readiness, a measure that includes factors like unit cohesion and physical ability.

Nonetheless, the Armed Forces will need to implement certain policies and procedures to accommodate transgender members. For example, while undergoing transition-related medical treatments, it may become necessary to restrict deployment of transitioning individuals from environments where their health care needs cannot be met. Additionally, as expected, there is a post-operative recovery period for individuals who undergo gender re-assignment or related surgeries, and they are unable to work or deploy while recovering from surgery. However, after this short-term leave, a member could resume activity in an operational unit if otherwise qualified. To date, there is no evidence that


18 Schaefer, Agnes Gereben, et al. RAND Corporation. 2016, “Assessing the Implications of Allowing Transgender Personnel to Serve Openly” www.rand.org/pubs/research_reports/RR1550.html. “Our estimates based on private health insurance data ranged from 0.022 to 0.0396 annual claimants per 1,000 individuals. Applied to the AC [Active Component, rather than reserves] population, these estimates led to a lower-bound estimate of 29 AC service members and an upper-bound estimate of 129 AC service members annually utilizing transition-related health care, out of a total AC force of 1,326,275 in FY 2014.” Summary xi.
transition related medical care will have any long-term effect on a transgender individual's ability to serve in the Armed Forces.

b. Unit cohesion will not be affected by allowing transgender individuals to serve openly in the Armed Forces.

Unit cohesion, a military concept closely tied to morale, has been analyzed dating back to Sun Tzu, a Chinese military theorist who viewed cohesion as the unity of will of a unit through which all ranks could achieve victory. The importance of unit cohesion to the success of an army in battle has been emphasized by military theorists since. Karl von Clausewitz wrote that the loss of order and cohesion in a unit often makes even the resistance of individual units fatal for them. More recently, researchers studying military units during World War II, the Korean War, and the Vietnam War have concluded that unit cohesion enhanced fighting power, reducing combat inhibitors and promoting morale and teamwork.

As one Army officer recently wrote, unit cohesion is an important consideration in the best of times; in the worst of times unit cohesion may be the one attribute enabling a unit to survive.

The importance of unit cohesion to military success coupled with the difficulty in objectively measuring it, has provided ready ammunition for opponents of social change in the U.S. armed forces. Throughout much of the U.S. military's recent history, various groups have argued that a particular category of people—from African-Americans in the 1940s, to women in the 1970s, to gays and lesbians in the 1990s, and now, transgender individuals—would destroy the military from within by degrading unit cohesion. The underlying assumption is that if service members discover that a member of their unit is transgender (or Black, or a woman, or lesbian or gay), this discovery would inhibit bonding


20 Id. at 5.

21 See, e.g., Cox, supra note 19, at 7; Roger Kaplan, "Army Unit Cohesion in Vietnam: A Bum Rap," Parameters, U.S. Army War College at 59, http://www.dtic.mil/cgi-bin/GetTRDoc?AD=AADA515790&Location=U2&doc=GetTRDoc.pdf; NATIONAL DEFENSE RESEARCH INSTITUTE, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND'S 1993 STUDY (RAND Corp. 2010), https://www.rand.org/pubs/monographs/MG1056.html. Recent studies have concluded that task cohesion is the primary component of cohesiveness impacting performance and that social cohesion has no reliable effects on performance once task cohesion is statistically controlled. Id. at 142. For purposes of this report, we refer to "unit cohesion" in a monolithic sense.

22 Major Geoff Van Epps, U.S. Army, "Relooking Unit Cohesion: A Sensemaking Approach," Military Review 102 (Nov.-Dec., 2008), http://www.army.mil/MilitaryReview/Archives/English/MilitaryReview_20081231.arch15.pdf; NATIONAL DEFENSE RESEARCH INSTITUTE, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND'S 1993 STUDY (RAND Corp. 2010), https://www.rand.org/pubs/monographs/MG1056.html. Recent studies have concluded that task cohesion is the primary component of cohesiveness impacting performance and that social cohesion has no reliable effects on performance once task cohesion is statistically controlled. Id. at 142. For purposes of this report, we refer to "unit cohesion" in a monolithic sense.

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24 Major Geoff Van Epps, U.S. Army, "Relooking Unit Cohesion: A Sensemaking Approach," Military Review 102 (Nov.-Dec., 2008), http://www.army.mil/MilitaryReview/Archives/English/MilitaryReview_20081231.arch15.pdf; NATIONAL DEFENSE RESEARCH INSTITUTE, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND'S 1993 STUDY (RAND Corp. 2010), https://www.rand.org/pubs/monographs/MG1056.html. Recent studies have concluded that task cohesion is the primary component of cohesiveness impacting performance and that social cohesion has no reliable effects on performance once task cohesion is statistically controlled. Id. at 142. For purposes of this report, we refer to "unit cohesion" in a monolithic sense.
within the unit, reducing operational readiness. It is an argument that has repeatedly proven to be false.

During World War II, the U.S. military was segregated despite the growing number of African-Americans serving in the military during the war, putting increasing pressure on the U.S. administration to desegregate the Armed Forces. Military officials frequently argued that racial integration of the armed forces would have a negative impact on unit cohesion. In 1940, President Franklin D. Roosevelt, stated that he kept the armed forces segregated because he feared that “[a]t this time and this time only, we dare not confuse the issue of prompt preparedness with a new social experiment however important and desirable it may be.” A 1944 memorandum authored by the War Department (the predecessor of the Department of Defense) noted that “[t]he policy of the War Department is not to intermingle colored and white enlisted personnel in the same regimental organizations. This policy has proven satisfactory over a long period of years and to make changes would produce situations destructive to morale and detrimental to the preparation for national defense.”

However, after testing the proposition of integrated units under wartime conditions, the threat to unit cohesion was dispelled. A 1945 survey of soldiers who had served in integrated units conducted by Trumpet's Committee on Equality of Treatment and Opportunity in the Armed Services found that 64% percent of white service members had negative views of serving with African-Americans before they served in an integrated unit, but that 77% said they had more favorable views about serving in an integrated unit afterward. Similarly, evaluations of racial integration on supply ships during 1944 and 1945 revealed high performance and morale among the racially mixed crews.

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Currently, the U.S. Armed Forces are regarded as among the most integrated and diverse institutions in the United States; as exemplified by interracial marriage, which is significantly more prevalent in the U.S. military than in civilian society.31

Similar arguments were voiced during the debates that occurred over the integration of women into the military and the end to the prohibition on gays and lesbians serving in the United States military. With the enactment of the Armed Services Integration Act in 1948, women were limited to 2% of active duty personnel in each of the Services and it was not until the late-1970s, the number and the roles of women in the military increased.32 As with racial integration, many leaders expressed concerns about women having a negative impact on unit cohesion.33 U.S. Navy surveys of ships’ crews integrating women indicated concerns about unit cohesion.34 However, as with racial integration, the Department of Defense has found that “the expansion of women’s roles in the military have not brought a degradation in military readiness, military effectiveness, or unit cohesion.”35

Similarly, the concern about the effect that a gay or lesbian service member would have on unit cohesion dominated the debate over ending the prohibition on gay and lesbian people serving in the U.S. military.36 At the time, The Chairman of the Joint Chiefs of Staff and other senior military leaders believed that the presence of a known gay person in a unit would seriously undermine the cohesiveness of that unit.37 Congress codified the unit cohesion argument in the 1993 “Don’t Ask, Don’t Tell” legislation.38 In 2010, those who opposed repeal of the “Don’t Ask, Don’t Tell” policy continued to use the same argument.39 However, a Department of Defense study conducted in 2010 surveyed active duty service members and concluded that the risk of permitting open service by gays and lesbian people on overall military effectiveness was low.40 The surveys indicated that approximately 70% of service members predicted that repeal of the prohibition service by gay and lesbian people would have mixed, positive or no effects on unit cohesion.41

A recent study of the implications of allowing transgender individuals to serve in the U.S. Armed Forces examined the impact of such service on unit cohesion and found that existing data suggests a minimal impact on unit cohesion as a result of allowing

32 Id. at 86.
33 Id.
34 Id.
35 Id. at 78.
36 ROSTKER supra note 25 at xxii.
37 Id. at 1, 28.
38 10 U.S.C. § 654(k)(15) (2006) (“The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of Armed Forces capability.”).
39 NATIONAL DEFENSE RESEARCH INSTITUTE, supra note 19 at 5.
40 U.S. DEP’T OF DEF., supra note 31 at 129.
41 Id. at 119.
transgender individuals to serve. The study reviewed the experiences of foreign militaries that permit service by transgender individuals and found that there has been no significant effect on cohesion, operational effectiveness, or readiness.

As outlined above, the U.S. military, has historically wrestled with the integration of diverse populations: African-Americans, women, and gays and lesbians. We now know that a great body of research shows that this concern for the protection of unit cohesion has consistently proven to be unjustified. There is in fact, research that suggests that that concealment of sexual orientation appears to reduce, rather than increase unit cohesion. While sexual orientation disclosure positively impacted unit cohesion.

II. Costs associated with extending health coverage for transgender individuals is negligible.

The new policy rests in large part on the analysis that medical costs would be meaningful, and are increasing. However, prior research commissioned by the DoD does not bear this statement out.

Instead, the study found that a change in policy that permits transition-related care for transgender individuals was likely to have marginal impact on health care costs. The report stated that only a small population of service members would likely seek transition-related care each year (described as both surgical and hormone therapy) therefore the estimated costs were only expected to be a .013-percent increase. (A high-end estimate was estimated to be $8.4 million a year, out of health care expenditures for active component military members of $6.27 billion in 2014.) Conversely, the report revealed the potential cost of not providing necessary transition-related health care. One risk identified included having transgender personnel avoid other necessary health care, including preventative care and increased rates of substance abuse and even suicide. Other risks identified included individuals turning to alternative solutions such as injecting construction-grade silicone into their bodies to alter body shape. The report did note that the potential cost of mental health care services for individuals who did not receive care due to implementing the ban would cost $960 million—more than 100 times the cost of providing necessary healthcare services to transgender personnel.

42 SCHAEFER supra note 23 at xii.
43 Id. at 45. Policies regulating the service of transgender military personnel vary greatly by country; Joshua Polchar et al., LGBT Military Personnel: A Strategic Vision for Inclusion (The Hague, the Netherlands: The Hague Centre for Strategic Studies, 2014); seventeen countries currently allow transgender people to serve in their military: Australia, Austria, Belgium, Bolivia, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, Netherlands, New Zealand, Norway, Spain, Sweden, and the United Kingdom. Elders et al., “Medical Aspects of Transgender Military Service” Armed Forces & Society (2014) vol. 41 no. 2 pp 199-220.
45 AGNES GEREBEN SCHAEFER ET AL.,

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transgender individuals to serve. The study reviewed the experiences of foreign militaries that permit service by transgender individuals and found that there has been no significant effect on cohesion, operational effectiveness, or readiness.

As outlined above, the U.S. military, has historically wrestled with the integration of diverse populations: African-Americans, women, and gays and lesbians. We now know that a great body of research shows that this concern for the protection of unit cohesion has consistently proven to be unjustified. There is in fact, research that suggests that that concealment of sexual orientation appears to reduce, rather than increase unit cohesion. While sexual orientation disclosure positively impacted unit cohesion.

II. Costs associated with extending health coverage for transgender individuals is negligible.

The new policy rests in part on the analysis that medical costs would be meaningful, and are increasing. However, prior research commissioned by the DoD does not bear this statement out.

Instead, the study found that a change in policy that permits transition-related care for transgender individuals was likely to have marginal impact on health care costs. The report stated that only a small population of service members would likely seek transition-related care each year (described as both surgical and hormone therapy) therefore the estimated costs were only expected to be a .013-percent increase. (A high-end estimate was estimated to be $8.4 million a year, out of health care expenditures for active component military members of $6.27 billion in 2014.) Conversely, the report revealed the potential cost of not providing necessary transition-related health care. One risk identified included having transgender personnel avoid other necessary health care, including preventative care and increased rates of substance abuse and even suicide. Other risks identified included individuals turning to alternative solutions such as injecting construction-grade silicone into their bodies to alter body shape. The report did note that the potential cost of mental health care services for individuals who did not receive care due to implementing the ban would cost $960 million—more than 100 times the cost of providing necessary healthcare services to transgender personnel.

42 SCHAEFER supra note 23 at xii.
43 Id. at 45. Policies regulating the service of transgender military personnel vary greatly by country; Joshua Polchar et al., LGBT Military Personnel: A Strategic Vision for Inclusion (The Hague, the Netherlands: The Hague Centre for Strategic Studies, 2014); seventeen countries currently allow transgender people to serve in their military: Australia, Austria, Belgium, Bolivia, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, Netherlands, New Zealand, Norway, Spain, Sweden, and the United Kingdom. Elders et al., “Medical Aspects of Transgender Military Service” Armed Forces & Society (2014) vol. 41 no. 2 pp 199-220.
45 AGNES GEREBEN SCHAEFER ET AL.,
III. Transgender service ban would violate the constitutional guarantees of equal protection and due process.

a. A Transgender Service Member Ban Would Violate the Equal Protection Component of the Fifth Amendment to the United States Constitution

“The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.” United States v. Windsor, 133 S. Ct. 2675, 2695 (2013). This equal protection guarantee applies to men and women who serve in the Armed Forces. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973); Emory v. Sec’y of Navy, 819 F.2d 291 (D.C. Cir. 1987) (per curiam).

A government action that treats certain classes of people differently “is presumed to be valid and will be sustained if the classification drawn . . . is rationally related to a legitimate state interest.” City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). This general rule does not apply, however, where the government action draws distinctions between individuals based on certain suspect or quasi-suspect classification and, in those instances, courts apply a heightened degree of scrutiny. Id. at 440-441.

The transgender military service ban is subject to a heightened degree of scrutiny for two reasons. First, the targeting of men and women who are transgender involves a suspect classification because they have experienced a “history of purposeful unequal treatment” and been “subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.” See Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976); see also Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017) (holding that “[t]here is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity,” and that “[a]ccording to a report issued by the National Center for Transgender Equality, 78% of students who identify as transgender or as gender non-conformant, report being harassed while in grades K-12”). See also GG ex rel. Grimm v. Gloucester County School Bd., 822 F. 3d 709 (4th Cir. 2017) (Concurrence by Davis, J.) (Noting animus against transgender people and need to protect them from discrimination); Federal Register / Vol. 76, No. 15 / Monday, January 24, 2011 / Proposed Rules, Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity (proposing rule to curb pervasive discrimination against transgender people in housing).

Further, transgender individuals as a group have been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political powerlessness as to command extraordinary protection from the majoritarian

political process." Murgia, 427 U.S. at 313. Transgender individuals also "exhibit obvious, immutable, or distinguishing characteristics that define [the members of the class] as a discrete group," Bowen v. Gillard, 483 U.S. 620 (1987). The presence of these factors "is a signal that the particular classification is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," thus requiring heightened scrutiny." Golinski v. OPM, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012).

Second, the transgender military service is subject to heightened scrutiny because it is a form of discrimination on the basis of sex. Gender-based discrimination includes discrimination based on non-conformity with gender stereotypes. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339 (7th Cir. 2017); see also Fabian v. Hosp. of Cent. Conn., 172 F.Supp.3d 509, 527 (D. Conn. 2016) (noting that "[d]iscrimination against transgender people because they are transgender people, by that reading, is quite literally discrimination "because of sex").

Moreover, the transgender service member ban fails any level of scrutiny. Under rational basis review, the classification must have a "footing in the realities of the subject addressed," Heller v. Doe by Doe, 509 U.S. 312, 321 (1993), and the government 'may not rely on a classification whose relations to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.' Cleburne, 473 U.S. at 446. A "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Romer v. Evans, 517 U.S. 620, 634 (1996). The transgender military service ban is not rationally related to military effectiveness, particularly as service members who are transgender are held to the same standards as other service members. Moreover, the de minimis deployability constraints on undergoing transition-related surgery does not plausibly justify the sweeping ban on transgender service members. The transgender military service ban is also not rationally related to an interest in avoiding costs as medically necessary transition-related surgeries for men and women who are transgender are overwhelmingly small.

In determining whether a law is motivated by an improper animus or purpose, "[d]iscriminations of an unusual character especially require careful consideration." Windsor, 133 S. Ct. at 2693 (quoting Romer, 517 U.S. at 633). The discrimination demonstrated by the ban is just that; evidence of animus is borne out by the timeline of events that took place just prior to the ban going into effect.

As outlined above, after a lengthy review process by senior military personnel, the military had determined that permitting transgender individuals to serve would not have adverse effects on the military and had announced that such individuals were free to serve openly. Similarly, this policy results from a lengthy review process by senior military personnel, who reached a different conclusion. However, we cannot be unmindful of the President’s prior statements on banning transgender individuals from service without measured research and thought beforehand. See VIII. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (holding that "[t]he specific sequence of events leading up the challenged decision . . . may shed some light on the decisionmaker’s purposes")
and “[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role”).

b. The Transgender Service Member Ban Violates the Due Process Clause of the Fifth Amendment to the United States Constitution

The Due Process Clause of the Fifth Amendment provides that “No person shall be . . . deprived of life, liberty, or property, without due process of law,” U.S. Const. amend. V. This “substantive component” of due process prevents the government from engaging in conduct that “shocks the conscience,” Rochin v. California, 342 U.S. 165, 172 (1952), or interferes with rights “implicit in the concept of ordered liberty.” Palko v. Connecticut, 302 U.S. 319, 325-326 (1937).

The due process requirement that every government action must have a “reasonable justification in the service of a legitimate governmental objective” protects individuals against the arbitrary and oppressive exercise of governmental power. City of Sacramento v. Lewis, 523 U.S. 933, 845-46 (1998) (internal quotations omitted); Abbildatollah v. U.S. Dep't of Homeland Sec., 787 F.3d 524, 540 (D.C. Cir. 2015). As explained in detail above, the ban lacks any rational connection to a legitimate governmental objective, and for this reason violates due process as well as equal protection. See, e.g., George Washington Univ. v. Dist. of Columbia, 391 F. Supp. 2d 109, 114 (D.D.C. 2005) (noting that the rational basis tests under equal protection and due process “are almost indistinguishable”).

The ban impermissibly burdens transgender service members’ fundamental rights to autonomy. The right to live in accord with one’s gender identity is an inherent aspect of the right to personal autonomy. As the Supreme Court has repeatedly explained, the liberty protected by the Due Process Clause includes the right to make “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015); see also Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992); Lawrence v. Texas, 539 U.S. 558, 562, 578-79 (2003); Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984) (explaining that the Constitution protects these decisions from “unwarranted state interference” in order to “safeguard[ ] the ability independently to define one’s identity that is central to any concept of liberty”).

Under these well-established principles, the fundamental right to autonomy must include a person’s right to be transgender, just as it includes a person’s right to be lesbian, gay, bisexual, or heterosexual. Like a person’s sexual orientation or other central aspects of personhood, gender identity is “inherent to one’s very identity as a person.” Hernandez-Montiel v. INS, 225 F.3d 1084, 1093-94 (9th Cir. 2000) (internal citations and quotation marks omitted). The ban intrudes upon the right of transgender men and women to live as who they are, consistent with this core aspect of their identity. Thus it is subject to heightened review. See Witt v. Dep't of Air Force, 527 F.3d 806, 819 (9th Cir. 2008) (holding that heightened scrutiny applies “when the government attempts to intrude upon . . . the rights [of personal autonomy] identified in Lawrence”).

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Moreover, the ban is also subject to heightened due process review because it burdens this fundamental right selectively, only for transgender people. “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects.” *Lawrence*, 539 U.S. at 575. Subjecting one group of persons to adverse treatment based solely on a characteristic that is so central, immutable, and deep-seated violates that prohibition unless supported by a sufficient governmental interest. See id.

**Conclusion**

Transgender individuals have long served in the United States Armed Forces and have been able to serve their country openly since June 30, 2016. For all of the reasons stated above, the ABA should have a policy that supports the continued service by all Americans regardless of gender identity.

Respectfully submitted,

Mark Johnson Roberts, Chair
Commission on Sexual Orientation and Gender Identity
August 2018

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Respectfully submitted,

Mark Johnson Roberts, Chair
Commission on Sexual Orientation and Gender Identity
August 2018
1. **Summary of Resolution**

This Resolution addresses the current Transgender military ban policies and will enable the ABA to more specifically address any and all discriminatory actions perpetrated by the federal, state, local, territorial and tribunal courts to bar service in the United States Military based on one’s gender identity.

2. **Approval by Submitting Entity**

April 25th, 2018

3. **Has This or a Similar Recommendation Been Submitted to the House or Board Previously?**

Yes; it was submitted at the 2018 Midyear Meeting and subsequently withdrawn.

4. **What Existing Association Policies are Relevant to This Resolution and How Would They be Affected by its Adoption?**

This resolution is consistent with prior policy supporting laws that prohibit discrimination on the basis of sexual orientation and gender identity. See 06A122B and 89M8.

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**

N/A

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 any ABA amicus curiae brief in the U.S. Supreme Court or other appropriate judicial forum in any case presenting the issues that are addressed in the policy. The policy would also allow the ABA to directly advocate on behalf of transgender military personnel.
8. Cost to the Association (both direct and indirect costs).
Adoption of the recommendations will 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 resolution is being distributed to each of the Sections, Divisions, Standing Committees, and Commissions of the Association. Additionally, this is being distributed to the National LGBT Bar Association.

11. Contact Persons (prior to meeting)
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12. Contact Persons (who will present the report to the House)
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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution will establish policy to recognize that service in the United States Armed Forces should not be restricted and that members should not be discriminated based on one’s gender identity.

2. Summary of the Issue that the Resolution Addresses

The Resolution addresses a number of factors that were outlined by the current administration as reasons why the United States Government will reverse course and not accept or allow transgender individuals to serve in any capacity in the U.S. Armed Forces.

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

The Resolution clarifies and emphasizes the ABA’s position on discrimination by the United States Government on the basis of gender identity and more fully enables the Government Affairs Office, the ABA President, and the Standing Committee on Amicus Curiae Briefs to act.

4. Summary of Minority Views

None.
RESOLVED, That the American Bar Association adopts the black letter ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States, dated August 2018 to replace the original version of these Standards dated August 2004.
ABA Standard for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States (August 2018)

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I. Definitions

“Adult Family Member” — Any person who is 18 years of age or older and with whom the Unaccompanied Child has a familial bond through blood or a legal relationship, including, but not limited to, an Unaccompanied Child’s parent, step-parent, grandparent (of any degree), sibling, aunt, uncle, or cousin.

“Adjudicator” — An immigration judge, a member of the Board of Immigration Appeals, or officers with the United States Department of Homeland Security who make decisions related to immigration matters. Though these standards use feminine pronouns for “Adjudicator” for convenience in some places, they are intended to be gender-neutral.

“Attorney” — An individual licensed to practice law in any U.S. jurisdiction who represents an Unaccompanied Child in immigration matters. While most legal representatives of Unaccompanied Children are Attorneys, these Standards recognize such representation by non-attorneys.

“Best Interests” — A guiding principle in child protection matters that includes consideration of the following factors: the Child’s safety and well-being; expressed interests; health; family integrity; liberty; development; past experiences; Special Needs; age; gender, gender identity, and gender expression; sexual orientation; and religious and cultural background.

“CBP” — The U.S. Customs and Border Protection is an agency of DHS charged with enforcing immigration law at U.S. borders and ports of entry. CBP includes, among other departments, U.S. Border Patrol (BP) and the Office of Field Operations (OFO).

“Child(ren)” — See “Unaccompanied Child(ren)” below.

“Child Advocate” — An individual who is independent of any organization providing other services to the Unaccompanied Child and who is appointed pursuant to federal law to identify and advocate for the Child’s Best Interests on issues including the Child’s Custody, care, placement, legal relief, and repatriation. Though these Standards use feminine pronouns for “Child Advocate” for convenience in some places, they are intended to be gender-neutral.

“Unaccompanied Child(ren)” — Any person who is 18 years of age or older and with whom the Unaccompanied Child has a familial bond through blood or a legal relationship, including, but not limited to, an Unaccompanied Child’s parent, step-parent, grandparent (of any degree), sibling, aunt, uncle, or cousin.

“Unaccompanied Child(ren)” — An immigration judge, a member of the Board of Immigration Appeals, or officers with the United States Department of Homeland Security who make decisions related to immigration matters. Though these standards use feminine pronouns for “Adjudicator” for convenience in some places, they are intended to be gender-neutral.

While most legal representatives of Unaccompanied Children are Attorneys, these Standards recognize such representation by non-attorneys.

"Custodial Agency" — Any entity that has the Custody of an Unaccompanied Child or is responsible either in law or in fact for providing for the care or placement of an Unaccompanied Child, but not including an Immigration Enforcement Agency.

"Custody" — The holding of, care for, supervision of, or protection of an Unaccompanied Child, as authorized by law. This includes actual, constructive or legal custody, except as noted otherwise.

"Detention Facility" — A place, institution, building (or part thereof), set of buildings, or otherwise enclosed area that is used for the lawful Custody and/or treatment of an Unaccompanied Child. Types of Detention Facilities include, but are not limited to shelter, secure and staff-secure facilities; emergency reception centers; Temporary Placement Facilities; and other residential and therapeutic facilities and group homes. They do not, however, include Foster Care.

"Developmentally Appropriate" — Suitable to the Unaccompanied Child’s age, level of education, gender, gender identity, gender expression, cultural background, intellectual, social and emotional development, degree of language proficiency, Special Needs, and other individual circumstances in order to ensure the Unaccompanied Child’s comprehension and meaningful participation.

"DHS" — The U.S. Department of Homeland Security is the federal agency tasked with facilitating and enforcing the nation’s immigration laws as well as disaster response. DHS is made up of seven federal agencies including: U.S. Citizenship & Immigration Services (USCIS or CIS), U.S. Coast Guard, U.S. Customs & Border Protection (CBP), Federal Emergency Management Agency (FEMA), U.S. Immigration & Customs Enforcement (ICE), U.S. Secret Service, and Transportation Security Administration (TSA).

"EOIR" — The Executive Office for Immigration Review is an agency of the U.S. Department of Justice that adjudicates immigration cases through Removal Proceedings, appellate review, and administrative hearings.


"Foster Care" — A licensed or approved placement, which meets the Standards established by a state licensing or approval authority(ies) and which provides 24-hour substitute care for Children, including responsibility for the comfort, health, well-being, education, and upbringing of the Unaccompanied Child.

"Friend of the Court" — An individual whose primary purpose is to assist the Immigration Court and facilitate non-representational communication between an unrepresented Unaccompanied Child and the immigration judge.
• “Government Oversight Agency” — Any government agency responsible for the review, investigation, and/or monitoring of compliance with federal and/or state conditions for the Custody, treatment, and care of Unaccompanied Children.

• “HHS” — The U.S. Department of Health and Human Services, through its Office of Refugee Resettlement (ORR), has primary responsibility for the placement, Custody, care, and release of Unaccompanied Children.

• “Home Study” — An assessment that considers the sponsor’s ability to care for the Unaccompanied Child and provide for the Child’s needs, including interviews of the sponsor and exploration of that person’s living conditions.

• “ICE” — Immigration and Customs Enforcement is a branch of the DHS responsible for enforcement of the immigration laws in the interior of the United States.

• “Immigration Adjudication” — Any hearing or interview before a court or administrative agency concerning any aspect of a Child’s immigration status, most commonly through the EOIR (i.e., the immigration court or the Board of Immigration Appeals) and U.S. Citizenship and Immigration Services (part of DHS).

• “Immigration Enforcement Agency” — Any entity with authority to enforce the immigration laws of the United States.

• “Immigration Questioning” — Any non-privileged communication that is intended to, or does, obtain information that could affect the Unaccompanied Child’s immigration status.

• “Legal Services Provider” — Any Attorney or non-attorney staff members of an organization providing free or low-cost immigration legal services including accredited representatives, paralegals and other support personnel. Though these Standards use feminine pronouns for “Legal Services Provider” for convenience in some places, they are intended to be gender-neutral.

• “ORR” — Office of Refugee Resettlement, a part of HHS. ORR serves new populations to support their successful integration into American society. ORR is the branch of HHS that provides for the care and custody of Unaccompanied Children.

• “Removal Proceedings” — Administrative proceedings under EOIR to determine whether an individual will be expelled or allowed to remain lawfully in the United States pursuant to U.S. immigration law.

• “Special Needs” — Any condition or disability, such as an intellectual disability, hearing impairment, speech or language impairment, visual impairment, emotional disturbance, developmental disability, orthopedic impairment, autism, traumatic brain injury, specific learning disability, or other disabilities as further defined in the

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regulations implementing the Individuals with Disabilities Education Act (34 U.S.C. § 1400 et seq.) found at 34 C.F.R. § 300.7.

• “Sponsor” — Qualified parents, legal guardians, relatives, or other adults to whom Children are released from ORR Custody.

• “Staff” — any individual, including volunteers, who works at or for a Detention Facility.

• “Temporary Placement Facility” — A Detention Facility into which Unaccompanied Children are placed upon apprehension by the Immigration Enforcement Agency and pending transfer to the Custodial Agency.

• “TVPRA” — William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457) and as subsequently amended in 2013 (P.L. 113-4).

• “Unaccompanied Children(ren)” or “Child(ren)” — Individuals under the age of 18, who lack lawful immigration status in the United States and who, at the time of initial determination, do not have a parent or legal guardian living in the United States available and willing to provide care and physical Custody. (The definition of “Unaccompanied Child(ren)/Child(ren)” used herein is based on the definition of “Unaccompanied Alien Child” found in 6 U.S.C. §279(g)(2) and differs from the definition of “child” found in the Immigration and Nationality Act, at 8 U.S.C. § 1101(b)(1). Because it is no longer customary for people in the legal community to refer to “Unaccompanied Alien Children,” these updated Standards refer simply to “Unaccompanied Children.”) Though these Standards use masculine pronouns for “Unaccompanied Children” for convenience in some places, they are intended to be gender-neutral.

• “USCIS” — The U.S. Citizenship and Immigration Services is a branch of DHS responsible for adjudication of immigration applications and benefits.
II. Preamble

A. Preamble to the 2018 Edition

When these Standards were originally published in 2004, they provided critical assistance to practitioners and Adjudicators at a time when very little guidance of any sort existed. The Standards have influenced the practice of law as it relates to Unaccompanied Children, as well as informed numerous trainings, academic articles, and Immigration Adjudications. In so doing, they have protected countless Unaccompanied Children.

The past 14 years have seen many important developments in Children’s immigration law and policy. Collectively, these developments represent an unmistakable trend toward improved treatment of Unaccompanied Children, far closer to that which the original Standards envisioned. Since 2004, the Violence Against Women Act of 2005 (VAWA of 2005), the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA of 2008), the Trafficking Victims Protection Reauthorization Act of 2013 (TVPRA of 2013), and the Violence Against Women Act Reauthorization of 2013 (VAWA of 2013), as well as amendments to other U.S. immigration laws, have provided further protections for this uniquely vulnerable population. Administrative changes in policy over the last decade have also resulted in improved treatment for Unaccompanied Children.

Since the ABA published the original Standards, country conditions affecting the migration of Unaccompanied Children to the United States have changed significantly. Increasing drugs and gang-related violence in the Northern Triangle of Central America (El Salvador, Guatemala, and Honduras) has contributed to mass migration. Indeed, in 2012, San Pedro Sula, Honduras was named the murder capital of the world. That city ceded its title to San Salvador in 2014. In May and June of 2014, at the peak of what has been described as the “homicide capital of the world.”

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5 For example, VAWA of 2005 protects a Child applying for Special Immigrant Juvenile Status from being compelled to contact his abuser. The TVPRA of 2008 expanded several provisions regarding the care and custody of Unaccompanied Children, including asylum protections for Unaccompanied Children and eligibility for Special Immigrant Juvenile Status. The TVPRA of 2013 expanded protection for Unaccompanied Children, increased federal Foster Care for certain Unaccompanied Children, and ordered a study of border screenings.


been commonly referred to as the “surge,” U.S. immigration authorities apprehended more than 10,000 Unaccompanied Children at the southwest border each month. The year the ABA House of Delegates first adopted these rules, immigration authorities apprehended about 5,000 children. In FY2014, immigration authorities apprehended over 88,000 Unaccompanied Children. In times of unprecedented volume, the Standards provided a vital guide to the work of all those involved in the apprehension, detention, care, release, legal representation, and Immigration Adjudication of Unaccompanied Children. At the same time, the Standards reminded all involved that this influx was made up of individual Children, each with a unique history, vulnerability, and need.

Despite the U.S. government’s substantial efforts to stop the flow, what began as an unprecedented surge in 2014 has become the new normal at the southwest border. Adhering to our highest ideals by adequately caring for, advocating for, and adjudicating the immigration matters of Unaccompanied Children continues to provide unique challenges. In partnership with the American Bar Association and a national network of nonprofit organizations and pro bono providers, hundreds of attorneys throughout the country continue to provide quality representation to Children. In recognition of this dynamic field of law, the ABA, in collaboration with Kids in Need of Defense (KIND), organized a national conference in Houston, Texas, in December 2017. The conference highlighted the legal and social service needs of Unaccompanied Children and brought together advocates to share best-practices.

Despite increased collaborations, improvements in law and policy remain desperately needed. Children still lack the right to free, court-appointed counsel in their immigration adjudications, despite significant litigation and advocacy. Over the past few years, federal, state and city governments have invested significant resources to partially meet this critical need. Despite these admirable efforts, however, approximately 50% of Unaccompanied Children continue to lack legal representation in their Removal Proceedings. Government funding for the Child Advocate program constitutes another recent advancement, although the resources provided for this purpose remain insufficient.

Practitioners working with Unaccompanied Children—attorneys, advocates, judges, and DHS officers alike, must continue to improve their efforts to be child-friendly in a variety of areas. Indeed, existing policies protecting Children throughout the system are often ignored, and some are in jeopardy of being rescinded. Representatives of Unaccompanied Children can and should learn from practitioners in well-established practice areas in the juvenile justice and child welfare systems, especially on issues related to


That number fell in FY2016 to just under 60,000.


The conference, current through March 2018, there are currently 309,561 cases of juveniles pending in the immigration court system. Of those pending cases, 188,696 children are represented (51%) and 180,865 are unrepresented (49%).
to the many ethical concerns that arise in representing children. Finally, in addition to their legal needs, Unaccompanied Children require other services to better integrate them into their communities and address their social, educational, and medical needs. In short, much work remains to be accomplished.

This second edition to the Standards has been drafted to update specific provisions to address these needs as well as significant and wide-ranging changes in law and policy. Despite the passage of time, the core values of the Standards remain constant. At present, much of the progress over the past fourteen years appears to be in jeopardy. Regardless of changes in politics, we must remember that we are dealing with children. We must continue to afford them special consideration to ensure that our immigration enforcement and adjudication systems acknowledge their need for protection and our nation’s fundamental traditions.

B. Preamble to the 2004 Edition

Unaccompanied Alien Children who reach our shores have often come here fleeing violence, abuse and persecution in their native lands. Frequently, these Children, or those who have helped them flee, have chosen the United States as their destination in the belief that it promises and provides their last, best hope for compassion, fair treatment and refuge from all that they have left behind. These Standards seek nothing more – and nothing less than to fulfill that promise to them.

Despite all the obstacles that these Children have overcome simply to reach America, their treatment here confronts them with a new set of hurdles. Approximately 5000 Unaccompanied Alien Children, ranging from infants to teenagers, are held in Custody each year. Some are apprehended at our borders as they seek to enter the country. Others are detained in the interior, sometimes having lived in this country undetected for years. Many of these Children have been held unnecessarily in secure Detention Facilities and forced to commingle with adults and/or adjudicated delinquents. In such circumstances, they have also been cut off from the love and support of parents, legal guardians, or other adult family members in this country who are willing, able, and fit to care for them. Finally, the level of care and services, such as educational, medical and cultural, available to these Children while in detention have often been inadequate or interrupted due to unnecessary transfers from one Detention Facility to another.

Because a large percentage of these Children do not speak English and/or are of limited education, they require substantial assistance in understanding and asserting their rights. Indeed, the stakes are, in some instances, literally life and death. However, as many as half of these Children do not receive any legal representation at all. Alone, such Children must attempt to resolve their immigration status in adversarial proceedings against trained and experienced Department of Homeland Security (“DHS”) attorneys. Nor are these Children provided with guardians ad litem or Advocates for Child Protection (recommended below) to identify and promote their Best Interests. Finally, the interpreter to the many ethical concerns that arise in representing children. Finally, in addition to their legal needs, Unaccompanied Children require other services to better integrate them into their communities and address their social, educational, and medical needs. In short, much work remains to be accomplished.

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services provided these Children often are inadequate, leaving them unable to communicate their most basic needs to their custodians and service providers.10

In response to these circumstances, these Standards reject an approach that treats Children merely as “adults in miniature” in favor of one which recognizes the special needs of Children. The Standards promote an approach to the Custody, placement, care, legal representation and adjudication of Unaccompanied Alien Children which may best be characterized as holistic and child-centered. In particular, these Standards spring from certain fundamental principles that should guide the treatment of any Unaccompanied Alien Child in the United States in these respects. Each Standard in Sections III through VIII represents a particular application of these principles in a variety of contexts bearing upon the treatment of such Children. As such, the fundamental principles, outlined in brief immediately below and set forth in more detail in Section III, should inform and guide any interpretation of the Standards that follow them.

At all times, and in all regards, an Unaccompanied Alien Child should be treated with dignity, respect, and special concern for his particular vulnerability as a Child. All Unaccompanied Children possess the full rights of children. Where they are also refugees, Children also possess the full rights of refugees.

To the maximum extent possible, the best interests of the Child shall be a primary consideration of the Custodial Agency, Advocate for Child Protection, Adjudicator, and all other Immigration Enforcement Agency personnel responsible for the Child in the United States in all actions and decisions concerning the Child. A determination of the Child’s best interests should be made with a consideration of a variety of factors discussed in greater detail below.

Every Child is entitled to non-discrimination, i.e., the enjoyment of the rights and freedoms guaranteed by law irrespective of the Child’s race, ethnicity, color, gender, language, religion, political or other opinions, national and social origin, birth, disability, sexual orientation, or other status. In addition, all persons interacting with a Child should be sensitive to the impact of gender on the Child’s trust, confidence, candor and well-being due to the Child’s past experiences or cultural norms.

A Child should be permitted, to the extent possible given his intellectual, social and emotional development, to participate in all decision-making processes that affect his life. The custodian, Advocate for Child Protection, Adjudicator and Attorney for the Child should ensure for each Child the opportunity to express his views freely on all matters affecting him, and should give due weight to those views in accordance with the age, maturity, and intellectual, social and emotional development of the Child.

As necessary corollaries to participation, the Child must first be provided an Attorney, and should be timely informed of that right, to ensure his meaningful access to

justice. Fortunately, hundreds of attorneys throughout the country already provide quality pro bono representation to Children in partnership with the American Bar Association and a nationwide network of nonprofit organizations dedicated to providing such legal services. Given the critical importance of legal representation, these Standards require that an Attorney be provided to all Children. Unfortunately, there have been rare instances in the past where attorneys associated with criminal operations for the trafficking or smuggling of children have claimed to represent Children in their proceedings when in fact they have only sought to further a criminal enterprise. These Standards place a duty on all parties with responsibility for these Children to report any such criminal conduct should this deplorable practice appear again in the future.

As a second corollary to participation, the Child must be able to understand others and express himself to the extent to which he is capable. A Child deficient in English should therefore be provided the assistance necessary, including an interpreter and translations, to ensure that he is able to participate in the decision-making process and enjoy all other rights and services available to him. Third, an Advocate for Child Protection should be appointed for each Child to assist him to participate fully in his case and to ensure that his best interests are identified, expressed and advocated. The services provided by these three individuals—the Attorney, the interpreter, and the Advocate for Child Protection— are essential to the administration of justice and to the fair and accurate resolution of the Child’s case.

A Child must be afforded reasonable privacy with respect to phone calls, mail, communication with the press, and visits with guests. A Child also has the right to reasonable freedom of expression. This right should include freedom to seek, receive and impart information and ideas through any media.

A Child’s personal safety should be protected and he should be safeguarded from all forms of violence, injury, abuse, neglect, and exploitation.

Given the fundamental importance of the family to, and the potentially deleterious effects of placement in a Detention Facility on, Children, a Child is entitled to a presumption against detention and in favor of family reunification or release into the Custody of another appropriate individual or entity.

Anyone who has responsibilities pertaining to the Custody, placement, care, legal representation or adjudication of a Child should be required to uphold these Standards. Those individuals and entities working with a Child should cooperate and coordinate with each other to ensure that the welfare and rights of the Child are protected and enhanced. Notwithstanding different governmental jurisdictions, Unaccompanied Alien Children in all parts of the country should receive equal treatment.

It has been said that the quality of a society is best judged by how it treats its most vulnerable members. Few among us are more vulnerable than Unaccompanied Alien Children. With respect to their plight, the United States should not be found wanting. Given the fundamental importance of the family to, and the potentially deleterious effects of placement in a Detention Facility on, Children, a Child is entitled to a presumption against detention and in favor of family reunification or release into the Custody of another appropriate individual or entity.

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III. Rules of General Applicability

The following are rules of general applicability that should guide the treatment of any Unaccompanied Child in the United States in all respects and that inform the specific standards set forth below, even where not specifically referenced. These Standards are intended to apply to all those who are Unaccompanied Children in the United States, or who have ever been so designated. The Unaccompanied-Child designation should remain valid until the case is completed.

A. Applicability of These Standards

Rule: Any individual or entity who has Custody of an Unaccompanied Child, or otherwise has responsibilities pertaining to his placement, care, legal representation, or adjudication of his immigration case, should be required to uphold these Standards. These Standards should be applied broadly and equally throughout the Immigration Adjudication and removal process regardless of where the Child is located and regardless of whether the Child is or is not in Custody.

An Unaccompanied Child may be part of legal proceedings in state courts, such as actions that include requests for Special Immigrant Juvenile Status (INS JPM), predicate findings. While these Standards may be informative, individuals providing legal representation to Children in state proceedings should adhere to the standards of representation for that particular court and/or jurisdiction.

B. Treatment of Unaccompanied Children with Dignity and Respect

Rule: At all times, and in all respects, a Child shall be treated with dignity, respect, and special concern for his particular vulnerability as a child.

C. Full Rights of Unaccompanied Children

Rule: Unaccompanied Children shall be accorded the full rights of children. Unaccompanied Children who are refugees shall also be accorded the full rights of refugees.

Comments:

One who is designated an Unaccompanied Child may have parents or legal guardians in the United States, and may end up living with such parents or legal guardians. The Unaccompanied Child designation does and should continue even after a Child has reached the age of 18, because many Children require the additional protections that accompany such designation. These Standards may also provide useful guidance in cases involving other noncitizen children.

The United Nations Convention on the Rights of the Child (“CRC”) addresses almost every aspect of a Child’s life from health and education to social and political rights. The CRC establishes three rights, sometimes called the “triangle of rights,” which are considered to be fundamental: the “best interests” rule, non-discrimination, and the right to participate. CRC standards are considered universal and customary.

D. Best Interests of the Unaccompanied Child

Rule:

1. Except as otherwise required by law, the Best Interests of the Child shall be a primary consideration of the Custodial Agency, Child Advocate, Adjudicator, and all Immigration Enforcement Agency personnel responsible for the Child in the United States in all actions and decisions concerning the Child.

2. A determination of the Best Interests of the Child shall take into account, at a minimum, the following factors:

   a. the Child’s safety and well-being;

   b. the Child’s education and training;

   c. the Child’s social relationships;

   d. the Child’s health and medical needs;

   e. the Child’s religious needs;

   f. the Child’s emotional needs;

   g. the Child’s individual cultural and genetic heritage;

   h. the Child’s legal, political and social status.

Comments:

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b. the Child’s expressed wishes, in accordance with the Child’s age and maturity;

c. the integrity of the Child’s family, including the preservation of relationships with parents, siblings, and other family members;

d. the age, gender, gender identity, gender expression, sexual orientation, Special Needs, and religious and cultural background of the Child;

e. the health and development of the Child, including access to medical care and education;

f. the past experiences of the Child, including any resulting trauma, and any other unique strengths or vulnerabilities of the Child; and

g. the Child’s liberty, including placement in the least restrictive setting.

3. The importance of each of these factors will vary with each case, and not every factor will be relevant in every case. The factors may conflict with each other, but they should each be considered in the Best Interests determination. Furthermore, the factors should be reevaluated in light of the Child’s progress along the continuum of care, and from apprehension through the final determination of the Child’s legal claim.

14 Trafficking Victims Protection Reauthorization Act § 235(c)(2), 8 U.S.C. § 1232(c)(2)(A) (2008); Interagency Working Group on Unaccompanied and Separated Children Subcommittee on Best Interests, Framework for Considering the Best Interests of Unaccompanied Children at 3 (May 2016) (envisioning “consideration of the best interests of the child from the moment the child is identified by federal officials as unaccompanied until there is a durable solution, i.e., the child is granted the right to remain permanently in the United States or is safely repatriated to the child’s country of origin.”); Comm. on the Rights of

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Comments: This rule recognizes that current immigration laws and regulations do not require or provide for an evaluation of a Child’s Best Interests in the adjudication of immigration claims. However, in accordance with international standards, this rule provides that, wherever the Child’s Best Interests may control, they shall be a primary consideration.16

E. Right to Non-Discrimination

Rule: Every Child is entitled to non-discrimination on the basis of the Child’s race, ethnicity, color, gender, gender identity, gender expression, language, religion, Special Needs, political opinion, national and social origin, disability, sexual orientation, or status as a parent.17

Children, Gen. Comment No. 14, at ¶ 80-84; JENNIFER NAGDA & MARIA WOLTJEN, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 6 (2016). 16 CRC, Article 3 (in all actions concerning children, the best interests of the child shall be a primary consideration). Article 3 (the right of the child to preserve his identity, including nationality, name and family relations shall be respected). Article 12(1) (a child who is capable of forming his own views has the right to express those views freely in all matters affecting the child, with the views of the child being given due weight in accordance with the age and maturity of the child). Article 19 (States Parties directed to take appropriate measures to protect the child from violence, abuse, neglect and negligent treatment while in the care of parents, guardians or any other person), and Article 28(3) (due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background). Guidelines Issued by the Chairperson Pursuant to 65(3) of the Immigration Act, Guideline 3, Imjuke Claims: Procedure and Evidentiary Issues, Immigration and Refugee Board, Ottawa, Canada, Sept. 30, 1996 (“Canadian Child Refugee Guidelines”) at A.1. (“General Principle: In determining the procedures to be followed, when considering the refugee claim of a child, the CRDD should give primary consideration to the “best interests of the child”.”). The Hague Convention on the Civil Aspects of International Child Abduction adopted at The Hague Conference on Private International Law, 14th Sess., Convention No. 28 (1980) (“Hague Convention”), Art. 1, providing that “the interests of children are of paramount importance” and that an object of the Convention is to return children who are “wrongfully removed,” and defining “wrongful” removal as removal “in breach of rights of custody,” which include rights arising “by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of [the particular State].”). International Bureau for Children’s Rights, Focal Point on Separated Children in the Americas, “Best Practice Statement: Separated Children in Canada,” 2003) (“IBCR Statement”), A.1 (citing CRC 3(1)). 17 ABA House of Delegates Policy on Immigrant Children’s Rights, Adopted Feb. 1995 (“the American Bar Association urges federal, state, local, and territorial governments … to respect the rights of all children, including those rights articulated under the United States Constitution and the United Nations Convention on the Rights of the Child, and … not to discriminate against any child based on the child’s citizenship or immigration status or the immigration or citizenship status of the child’s parent(s).”). Plyler v. Doe, 457 U.S. 202 (1982) (holding that children of aliens whose presence in the United States is not lawful are nonetheless guaranteed equal protection of the law under the Fifth and Fourteenth Amendments of the Constitution and, as a result, cannot be denied education because of their immigration status). Zadvydas v. Davis, 533 U.S. 678 (2001) (holding that detention (for longer than a presumptively- appropriate six-month period) of resident aliens who had been ordered removed because of criminal offenses violated their due process rights where there was no realistic chance that they would be deported and, therefore, the detention would be indefinite). Lewis v. Thompson, 252 F.3d 567, 568 (2d Cir. 2001) (“citizen children of alien mothers are entitled to automatic eligibility for Medicaid benefits for a year after birth equivalent to the automatic eligibility extended to the citizen children of citizen mothers.”). Xiao v.
F. Right to Full Participation in Decision-Making

Rule: A Child has the right to understand all proceedings and to express his own views freely in all matters affecting him.

Comments: Children have the right to participate in all decision-making processes that affect their lives. Specifically, allowing a Child meaningfully to participate in decision-making means ensuring that this process must (i) provide the Child with sufficient and Developmentally Appropriate information to allow the Child to make an informed decision; (ii) account for the Child’s evolving ability to understand situations and respond to advice and guidance; and (iii) be free from pressure on and manipulation of the Child either to reach a certain decision or to make a decision at all.

In some circumstances due to characteristics such as age and capacity, a Child may not be able to comprehend the information presented. In such cases, the Child shall be appointed a Child Advocate.18

Reno, 81 F.3d 808 (9th Cir. 1996) ("[w]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term, and is therefore a ‘person’ guaranteed due process of law by the Fifth and Fourteenth Amendments” (quoting Plyer v. Doe)). CRC, Article 2 ("parties shall respect and ensure the rights of each child without discrimination of any kind, irrespective of the child’s or his parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."); United Nations Rules for the Protection of Juveniles Deprived of their Liberty. G.A. Res. 45/113, Annex, U.N. GAOR, Supp. No. 21, U.N. Doc. A/45/489 (1990) ("UN RPIDL."); IL.13 ("Juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty."); ECtHR Key Recommendations 5 A (a) ("a refugee child should have the same social, economic, cultural, civil and political rights as other children living in the host state."); Rights and Welfare of the Child, UNICEF (1985); African Charter on the Rights and Welfare of the Child, CAB/LEG/24/49, art. 21 (1990) ("States Parties shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth, and development of the child and in particular... (b) those customs and practices discriminatory to the child on the grounds of the child’s sex or other status."); American Correctional Association Standards for Adult Correctional Institutions (American Correctional Association 3d. ed. 1990) (“ACA Adult Standards”), 3-JDF-JD-03 ("all remedies must be construed liberally to free persons who are available to juveniles in case of discriminatory treatment"), 3-JDF-JD-04 ("There should be no discrimination in work assignments."); Statement, A(2) (Separated Children are entitled to the same treatment and rights as national or resident children. They must be treated as children first and foremost. Other considerations, including their immigration status, must be secondary."); 18 United States Department of Justice, Departmental Plan Implementing Executive Order 13166, 2.0 Background (1997) ("Executive Order 13166 requires federal agencies to have procedures in place to allow eligible persons seeking access to federally conducted programs and activities who, due to limited English proficiency, cannot freely and equally participate in or benefit from those programs and activities."); INS JPM 2.4.5 (positive suitability assessment of a prospective custodian prior to release may include consideration of the juvenile’s concerns). CRC, Article 12 ("States Parties shall ascribe to the child who is capable of forming his own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. … For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."); see also “Article 12, An Overview,” at http://www.unicef.org/crc/crc.htm ("Respecting children’s views means that such views should not be ignored; it does not mean that children’s opinions should be automatically endorsed,") and further discussing
G. Right to Interpreter and Translation

Rule: Children have the right to language access by means of an interpreter and translated documents throughout all stages of Custody and proceedings.

In any Immigration Adjudication or Immigration Questioning, interpretation should be full and simultaneous, and cover everything said during any proceeding or questioning by any party or other participant.

Comments: The right to an interpreter or translation services is necessary to ensure that the Child is able to enjoy all other rights and services. The entity providing the right or service in question, or otherwise engaged in the enforcement process, has the obligation to provide a trained, independent interpreter or translator. When choosing an interpreter or translator, it is important to choose one who speaks not only the Child’s language, but his specific dialect, as dialects can differ substantially. The Child’s Attorney should insist on the Child’s right in court to have an interpreter in his preferred/best language. All written materials relating to the Child’s Custody, placement, care, right to legal representation, charges against him, and adjudication shall be translated into the Child’s best language, provided to him, and explained to him in a Developmentally Appropriate manner. Where the Child cannot read, the materials shall also be read to him.19

the salient elements of a Child’s right to self-determination). Separated Children in Europe Programme, Executive Summary, at 5 (study of separated children in Europe, finding that “[i]n practice, attempts are made to incorporate the principle of the right to participate into the refugee or asylum determination process. Children normally do have the right to have their views represented during interviews, and most states have an age limit above which the child either should be or must be consulted (usually 12).”)

19 Augustin v. Sava, 735 F. 2d 32, 37 (2d Cir. 1984) (an asylum applicant “must be furnished with an accurate and complete translation of official proceedings … translation services must be sufficient to enable the applicant to place his claim before the judge.”); INS JPM 2.1.1 (“The arresting officer must be sure to explain the documents in the juvenile’s native tongue in terms the juvenile can understand.”); CRC Article 40(b)(vi) (“Every child alleged as or accused of having infringed the penal law has at least the following guarantees to have the free assistance of an interpreter if the child cannot understand or speak the language used”); UN RPIDL, L.6 (“Juveniles who are not fluent in the language spoken by the personnel of the detention facility should have the right to the services of an interpreter free of charge wherever necessary.”); Sandy Ruxton, Separated Children Seeking Asylum in Europe: A Programme for Action (Save the Children and United Nations High Commissioner for Refugees 2000) (“Separated Children in Europe Programme”) (Executive Summary, at 5 (among factors that facilitate child participation are “the availability of skilled interpreters”)). A/CA Juvenile Standards, 3-JDF-5A-15 (“New juveniles receive written orientation materials and/or translations in their own language if they do not understand English. When a literacy problem exists, a staff member assists the juvenile in understanding the material.”). Determined and Deprived of Rights: Natives in the Custody of the U.S. Immigration and Naturalization Service, Human Rights Watch Vol. 10, No. 4 (G) (Dec. 1998). (“Detained and Deprived of Rights”) (noting that “a problem identified repeatedly in our interviews was the unavailability of translation” and recommending that the INS “ensure that all written rights advisory forms are translated into the language spoken by each child and provided to each child” and that the INS “provide a sufficient number of trained interpreters at facilities housing unaccompanied children.”).
Interpreters and translators should use standard industry techniques to communicate accurately, effectively, and with impartiality. Privileged or confidential information acquired during an interpretation or translation must remain confidential unless the interpreter or translator is authorized to disclose.

H. Right to Attorney

Rule: The Child has the right to have an Attorney represent him in any formal proceedings or other matter in which a decision will be made that will affect his Custody, placement, or immigration status. When otherwise unrepresented, an Attorney shall be appointed for the Child, at public expense. Where a child lacks representation, Immigration Courts should refrain from conducting any hearings involving the taking of pleadings, admissions, or the presentation of evidence before an Unaccompanied Child has had a meaningful opportunity to consult with counsel about the Child’s specific legal options. Following apprehension and while in Custody, the Child shall receive a timely legal rights presentation that includes an opportunity for individual consultation with an Attorney.

Comments: Every Child shall have access to an Attorney throughout his Immigration Adjudication and any other administrative or court proceedings related to his immigration status. The participation of an Attorney on behalf of a Child subject to such proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of such proceedings.

Unfortunately, pursuant to federal law, Children from contiguous countries often are not permitted even to speak with an Attorney. Rather, unless they meet certain screening criteria, they are immediately repatriated to their country without ever being provided access to an Attorney. Consistent with the foregoing, these Children should also have the right to a meaningful consultation with an Attorney.

While most legal representatives of Unaccompanied Children are Attorneys, these Standards recognize that Children may be represented by others, including accredited representatives, law students, law graduates, or other reputable individuals as defined in 8 C.F.R. § 1292. These Standards should also guide such representation by non-attorneys.

21 While most legal representatives of Unaccompanied Children are Attorneys, these Standards recognize that Children may be represented by others, including accredited representatives, law students, law graduates, or other reputable individuals as defined in 8 C.F.R. § 1292. These Standards should also guide such representation by non-attorneys.
Lawyers Who Represent Children in Abuse and Neglect Cases (Feb. 1996) (“ABA Standards of Practice”), Preface to Part I (“All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court’s jurisdiction continues.”), H.-I., Comment (“These Standards take the position that courts must assure the appointment of a lawyer for a child as soon as practical (ideally, on the day the court first has jurisdiction over the case, and hopefully, no later than the next business day).”).

ABA JIS, Standards Relating to the Juvenile Intake Function 2.13 (a juvenile should have an unavoidable right to the assistance of counsel in connection with any questioning by intake personnel or in connection with any discussions or negotiations regarding a nondispositional, including discussions and negotiations). Homeland Security Act of 2002, P.L. 107-296 (H.R. 5005), Title IV, Subtitle E, § 462 (b)(1)(A) (directing Office of Refugee Resettlement to develop a plan “to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each [unaccompanied] child, consistent with the law regarding appointment of counsel that is in effect on the date of enactment of this Act.”); Unaccompanied Alien Child Protection Act, S.2444, 107th Cong. (2002) (“S.2444”) § 332(a) (all unaccompanied alien children in custody shall have competent counsel in representation in custody shall have competent counsel to represent them in Immigration

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Rule: In order to ensure that the Child’s Best Interests are identified, advocated, and considered at all times, a Child shall be referred to a provider of Child Advocate services not later than 72 hours after an agency identifies the Child as a trafficking victim or an otherwise vulnerable Unaccompanied Child. Cases that should be identified as a priority for Child Advocate assignment may include cases in which the Child (i) is of tender age (12 years old or younger); (ii) lacks independent decision-making capacity; (iii) has physical or mental health issues affecting daily functioning; (iv) is suspected to be a trafficking victim; (v) is suspected to have an unresolved or untreated history of trauma and/or abuse; (vi) has one or more identity traits that separates him from most other Children in Custody or in the community, such as indigenous language, sexual orientation, or a sibling identity; (vii) is at risk of permanent separation from a parent/legal guardian against the will of the Child and/or the parent/legal guardian; (viii) has requested voluntary departure despite safety concerns; or (ix) is expected to be in Custody for more than 90 days.

Comments: The Child Advocate is distinct from the Attorney, and her role is to ensure that the Child’s Best Interests are identified, advocated, and considered throughout the entire immigration process. The Child Advocate should have the qualifications, duties, and obligations described in Rule VI.B. infra. 22

J. Right to Friend-of-the-Court Assistance

Rule: A Child who is unrepresented before the Immigration Court should have the right to obtain assistance from a Friend of the Court whose primary purpose is to assist the court and facilitate communication between the Child and the immigration judge. The Friend of the Court should serve in a limited, non-representational role and may be an attorney or a non-attorney.

When an attorney provides Friend-of-the-Court services, she must make her limited role abundantly clear to the Child and obtain the Child’s consent prior to serving in this capacity before the court. The appearance

22 Homeland Security Act of 2002, P.L. 107-296 (H.R. 5005), title IV, Subtitle E, § 462(b)(1)(x) (directing Office of Refugee Resettlement to compile a list of entities available to provide guardian services to Children); Vienna Convention on Consular Relations and Optional Protocols U.N.T.S. Nos. 8638-8640, vol. 596 (1963), Articles 5, 37 (imposing a duty on the United States “to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor.”). S.2444 § 331(a) (the Director shall appoint a Child Protection Advocate for each unaccompanied child in the custody not later than 72 hours after the Office assumes physical or constructive custody of such child); Canadian Child Refugee Guidelines, A.II (Section 69(4) of the Immigration Act requires appointment of a designated representative for any child in Immigration Adjudications); IBCR Statement, B(6) (As soon as a separated child is identified, the competent child welfare authority should be notified to take jurisdiction and take measures to protect and safeguard the child’s best interests. The CWA should assume guardianship of the child.).
of a Friend of the Court is not a substitute for legal counsel and a Child who has Friend-of-the-Court assistance will still be unable to fully exercise all his legal rights before the court unless and until he secures legal counsel.

Comments: Since 2014, the Immigration Court system has been confronted with large numbers of Unaccompanied Children appearing at both detained and non-detained dockets. Substantial numbers of these Children have been unable to obtain counsel, especially early in the proceedings. For this reason, many courts have welcomed the assistance of individuals serving in the role of Friend of the Court.

A Friend of the Court should be able to gather and provide accurate information about the Child that will assist the court in deciding how to conduct the Removal Proceedings. Such information includes, but is not limited to, the Child’s reunification status, change of address, efforts to secure legal representation, and need for a continuance.

The Friend of the Court should recognize her role as an independent advisor to the court and clearly communicate this limited role to the Child while encouraging the Child to continue to seek representation where possible. It may be particularly confusing to a Child where an attorney represents some children as Friend of Court and others as his Attorney during the same docket. This difference in roles can be demonstrated by physically sitting in a different seat or standing behind the bar as Friend of Court. In the unfortunate situation where the immigration court is instructing an unrepresented Child to move forward in his legal case pro se, the Friend of Court should not provide the Court information regarding the Child’s legal claim, sit next to the Child, or in any way give the Court or the Child the impression the Child’s right to counsel is being fulfilled by the role of Friend of Court.23

K. Presumption Against Detention and in Favor of Family Reunification

23 4 Am.Jur. 2d, Amicus Curiae, §1, at 109. More information is provided in the EOIR memorandum titled “Friend of the Court Guidance,” dated September 10, 2014 available http://www.americanbar.org/content/dam/aba/administrative/immigration/UACFriendCtOct2014.auth.pdf; State Bar of Texas Professional Ethics Committee, Opinion No. 628, at 3 (May, 2013) (“If the lawyer appointed as a “friend of the court” for a minor does not intend to create a client-lawyer relationship with the minor, the lawyer must clearly define to the minor the role the lawyer intends to perform and such role cannot involve participating in the proceeding in any manner that would reasonably lead the minor to believe that the lawyer was representing the minor.”).
Rule: A Child is entitled to a presumption against detention and in favor of family reunification or release to another appropriate individual or entity.

Comments: This Rule is prompted by the fundamental importance of the family in the life of a Child, and the potentially deleterious effects of Custody on Children. See Rule VII.A infra.

L. Right to Privacy and Freedom of Expression

Rule:

1. A Child is entitled to a reasonable right of privacy. This right should include the ability to talk privately on the phone without automatic monitoring; to receive and send uncensored mail; and to meet privately with Attorneys and other visitors. It should also include the nondisclosure of sensitive personal information to other residents or nonessential staff.

Comments: Sensitive personal information includes, but is not limited to, gender identity, gender expression, sexual orientation, and religious beliefs. Sensitive personal information includes, but is not limited to, gender identity, gender expression, sexual orientation, and religious beliefs. A Child’s freedom of expression should not be abridged even when a Child is in a Detention Facility, to the extent consistent with the safety of the Child and others.24

This Rule is prompted by the fundamental importance of the family in the life of a Child, and the potentially deleterious effects of Custody on Children. See Rule VII.A infra.

M. Right to Personal Safety and Protection

Rule:

1. The Custodial Agency and the Immigration Enforcement Agency shall take all appropriate preventative measures to protect a Child from all forms of physical, sexual, or mental violence, injury, or other interference with his privacy; ACA Juvenile Standards, 3JDF-5G-01 through 5G-15 (providing that juveniles should be permitted to engage in correspondence, use telephones, and receive guests with minimum supervision; inspection, and/or censura; CRC Art. 13 (the right to freedom of expression is subject to certain restrictions, but only as necessary to respect the rights and reputations of others and for the protection of national security or public order); UN RPJD, Part I, § 59 (juvenile shall have the right to communicate with family, friends, media).

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24 IJA-ABA JUVENILE JUSTICE STANDARDS, ANNOTATED (Robert E. Shepherd, Jr. ed., American Bar Association 1996) ("ABA JJS"), Standards Relating To Interim Status 16.7 (a right to individual privacy should be honored in each institution); CRC, Article 16 (No child shall be subjected to arbitrary or unlawful interference with his privacy); ACA Juvenile Standards, 3JDF-5G-01 through 5G-15 (providing that juveniles shall be permitted to communicate with family, friends, media).
abuse, as well as neglect, abandonment, maltreatment, and exploitation while that Child is in their care.

2. The Custodial Agency shall have expertise in child welfare principles and shall not be the same agency charged with enforcing the immigration laws.

3. A Child shall never be released into an environment likely to lead to abuse or trafficking.

Comments: Historically, the Custody and care of Unaccompanied Children arriving in the United States was the responsibility of the former Immigration and Naturalization Service (“INS”). The INS was an enforcement agency rather than an agency with child welfare expertise. As both custodian and prosecutor, the INS faced an inherent conflict of interest, and often placed Children in inappropriate settings and otherwise failed to consider Children’s Best Interests. Beginning in 2003, Congress delegated to HHS the care of, and Custody over, Unaccompanied Children.25

N. Right to Preservation of Culture and Identity

Rule: The Custodial Agency shall take all appropriate measures to preserve a Child’s essential identity, including such aspects of that identity as the Child’s culture, religion, name, family relations, gender identity, gender expression, sexual orientation, or status as a parent, and to protect the Child’s development.

O. Cooperation

Rule: The Custodial Agency, the Immigration Enforcement Agency, and individuals working with the Child shall cooperate and coordinate with each other to ensure that the welfare and rights of the Child are protected, especially with respect to transfers of the Child.

Comments: When a Child is transferred or released, it is essential that the Custodial Agency and Staff maintain intact all records necessary to the Child’s welfare, including medical and educational records, and transfer them with the Child. To the extent possible, the Custodial Agency shall inform the Child’s family, any Attorney or Legal Services Provider who has had contact with the Child, and any Child Advocate of the transfer or release.

P. Consistent Treatment

Rule: Unaccompanied Children shall receive equal treatment and services regardless of where in the United States they are held in Custody.

IV. Training for Attorneys and Others

A. Initial and Ongoing Training

Rule: Special training should include Attorneys, Adjudicators, government trial attorneys, Custodial Agency personnel, Immigration Enforcement Agency personnel and/or contractors, and Child Advocates working with Children subject to Immigration Adjudications and appellate proceedings.

This training should take place both prior to beginning that work and on an ongoing basis.

B. Substance of Training

Rule: Training for these Attorneys, Adjudicators, government trial attorneys, Custodial Agency personnel, Immigration Enforcement Agency personnel and/or contractors, and Child Advocates should include:

| 1. information about immigration law and policies, including those forms of relief specific to Children, the consequences to the Child for failure to appear at any scheduled proceeding, relevant federal statutes, federal and agency regulations, court decisions, and court rules; | 1. information about immigration law and policies, including those forms of relief specific to Children, the consequences to the Child for failure to appear at any scheduled proceeding, relevant federal statutes, federal and agency regulations, court decisions, and court rules; |
| 2. information about the evidentiary rules as they relate to Children in immigration proceedings; 26 | 2. information about the evidentiary rules as they relate to Children in immigration proceedings; 26 |

26 8 C.F.R. §240.7(a) (“Any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing or trial.”) 8 C.F.R. §240.10(c) (“An Immigration Judge should not accept admissions of deportability from an unrepresented minor under the age of 18 who is not accompanied by a guardian, friend or relative.”). FRE Rule 403 (providing that evidence may be excluded where “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). Sandoval-Rubio v. INS, 246 R.3d 676 (9th Cir. 2000) (unpublished) (text available at 2001 WL 1523064) (successful suppression of alienage warranting termination of removal proceedings in illegal, race-based stop); United States v. Lopez-Valdez, 178 F.3d 282 (5th Cir. 1999); United States v. Jimenez-Medina, 173 F.3d 752 (9th Cir. 1999); Davila-Bardales v. INS, 27 F. 3d 1 (1st Cir. 1994) (explaining that the rationale for 8 C.F.R. § 242.16(b), which prohibits the special inquiry officer from accepting “an admission of deportability from an unrepresented respondent who is incompetent or under age 16 and is not accompanied by a guardian, relative, or friend” is that “… an unaccompanied minor under 16 lacks sufficient maturity to appreciate the significance of an interrogation by a Service official and lacks the capacity to evaluate the foreseeable consequences of any responses provided …”). Matter of Perez, 22 I&N Dec. 784 (BIA 1999).
3. an overview of the court process and key personnel in Immigration Adjudications and appellate proceedings involving Children;

4. a description of applicable guidelines and standards for representation, and of the roles of Attorneys and Child Advocates in Immigration Adjudications;

5. information on Child development and a Child’s needs and abilities;

6. information on the multidisciplinary input required in immigration cases involving Children, including information on local experts who can provide consultation and testimony on the reasonableness and appropriateness of efforts to repatriate such Children;

7. information concerning family dynamics, dysfunctional behaviors, and trauma that might impact a Child;

8. information on the circumstances under which Children arrive alone in the United States, including victimization by trafficking and smuggling operations, and political, social and economic conditions in their countries of origin;

9. information on accessible Child welfare, family preservation, medical, educational, and mental health resources; Child evaluation, diagnostic, and treatment services; and the provisions and constraints related to any available payment for services;

prohibitive and whether its use is fundamentally fair so as not to deprive the alien of due process.”); Matter of S-M-J-J., 21 I&N Dec. 722, 727-29 (BIA 1997) (encouraging the Immigration Judge to consider his own understanding of background information regarding the applicant’s claim in rendering a decision), 729 (“While the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.” (citing Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva, 1992)); In re Hernandez-Jimenez, No. A29-998-097 (BIA Nov. 8, 1991) [unpublished decision] (holding that any admissions or confessions allegedly made by an unaccompanied minor during custodial interrogation will be treated as “inherently suspect.”); Matter of Wadud, 19 I&N Dec. 182 (BIA 1984) (the Federal Rules of Evidence are relaxed in an immigration hearing); The Basics of Immigration Law. The Hearing ¶ 2 (suggesting the benefits to the child of a relaxed interpretation of the Federal Rules of Evidence); Johnson, The Case Against Race Profiling in Immigration Enforcement, 78 Wash. U.L.Q. 675 (2000); Terry Coonan, Tolerating No Margin for Error: The Admissibility of Statements by Alien Minors in Deportation Proceedings, 29 Texas Tech L. Rev. 75 (1998) (Asserting that while Immigration Judges may not accept an admission to a charge of deportability of unrepresented alien minors under the age of 16 (8 C.F.R. §242.16(b)), the practice of admitting the same, but out-of-court, statement made to an INS official is inconsistent with the rule and results in disparate treatment.); Christopher Nugent & Steven Schueman, Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children, 78 Interpreter Releases 1569,1588 (2001) (A motion to suppress evidence of alienage derived from an unconstitutional stop in violation of the Fourth Amendment resulted in termination of proceedings, thereby requiring the release of the Child from custody).
10. information about factors relevant to considering the Best Interests of the Child; and

11. information about maintaining the confidentiality of information, including information protected by federal and state law.

C. Additional Training in Child-Sensitive and Culturally Appropriate Interviewing Techniques

Rule: Attorneys, Adjudicators, government trial attorneys, Custodial Agency personnel, Immigration Enforcement Agency personnel and/or contractors, and Child Advocates should receive training in child-sensitive interviewing techniques to assist them in communicating with Children in order to create a nonjudgmental, supportive, and sympathetic environment that puts the Children at ease to the extent possible and that also facilitates self-expression by Children. Interviewers should be trained to take a friendly, relaxed approach when interviewing Children, use Developmentally Appropriate language, utilize trauma-informed interviewing techniques, avoid legal terms and abstract concepts to the extent possible, and favor open-ended questions over leading ones; be mindful that Children who have had distressing experiences may find it very difficult to trust unfamiliar adults and be prepared to be patient in tolerating expressions of distress or aggression from them; interpret Children’s answers in light of their age and stage of development; be patient if Children are initially reluctant to talk and avoid pressuring Children to talk before they are ready; and be attentive to Children’s potentially limited attention spans and need for snack or bathroom breaks. Interviewers should also be trained to avoid giving Children false assurances, as such assurances may damage their trust towards them and adults in general, but instead to present Children with a realistic picture of their circumstances in an atmosphere of trust and support.

The Interviewer should be trained to expect and address a variety of reactions that a Child may have to her. For example, the Child may find it
extremely difficult to talk about what he has experienced. The Child may be afraid of being overwhelmed by emotions if he expresses them to someone else. He may also use particular behaviors to test whether the Interviewer will react critically or sympathetically. Because the Child may feel guilty or ashamed about past experiences, such as participation in criminal activity or domestic and sexual abuse, conveying respect for the Child and not judging his behavior is important. In particular, if the Child has suffered sexual abuse in the past, the Child may have a preference to talk about sexual abuse in the presence of an adult trusted by the Child in the interview. See also Appendix.

27 S. 2444 § 342(a) (Requires the Attorney General to provide training for State and county officials, including juvenile court personnel and other persons in child protective services, to educate them on the special needs pertaining to unaccompanied alien children, with pending immigration status and the available relief); Separated Children in Europe Programme, p.43 (In order to carry out their role effectively, advisers or Guardians Ad Litem must have relevant childcare expertise and an understanding of the special and cultural needs of separated children. They should receive adequate training and professional support); ABA Standards of Practice, Rule D-8 ("The child's attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner."); United Nations High Commissioner for Refugees, Action for the Rights of Children (ARC): A Rights-Based Training and Capacity Building Initiative (2001), Topic 2: Key Skills (Recommending an interviewing approach which includes: introductions, confidentiality, simple language, a friendly, informal and relaxed approach, adequate time, a non-judgmental attitude, and follow-up support after the interview). See also ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES (West Group 1993) (discussing several factors that are relevant in the process of eliciting testimony from children, including the witness's developmental stage, suggestibility, and suggesting special accommodations for children, including taking the testimony in the judge's chambers, which are less imposing that the courtroom, preparing a child-friendly environment for the child's testimony ("with child-size furniture, bright colors on the walls ...") and suggesting special interview techniques that reflect the witness's language and cognitive development); Ellen Matthews & Karen Saywitz, Child Victim Witness Manual, 12/1 C.J.E.R. J. 40 (1992); ECRE, Rule 27 (Those who interview children and assess their claims should: train and assess the interviewer's knowledge of child development, the Convention on the Rights of the Child, and relevant cultural factors. Oral interviews with children should never be used for the primary purpose of finding discrepancies. If possible, provision should be made for an expert assessment of the child's ability to express a well-founded fear of persecution."); John C. Yullie, Robin Hunter, Risha Joffe, and Judy Zaparniuk, Interviewing Children in Sexual Abuse Cases, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY (Gail S. Goodman & Bette L. Bottoms, eds., Guilford Press, 1993) ("Interview problems can arise if the interviewer is unaware of developmental changes in language ability and cognition. An untrained interviewer may misinterpret a child's word or may use age-inappropriate language that will confuse the child. Further, an untrained interviewer may not understand that children often conceptualize events in a different manner from adults. This can lead to a misunderstanding or misinterpretation of the child's narration of the events. In addition, interviews may unwittingly use suggestive or leading questions ..."), 102 ("There must also be an appreciation for the varying narrative forms children use at different ages. Preschool children typically provide an idiosyncratic organization when describing a specific episode ... In contrast, primary school children have usually acquired narrative organization necessary to tell an event from beginning to end."); Latham & Watkins Memorandum from Nicole Thorpe to Steve Sudelman (Sept. 6, 2001) (on Suggested Accommodations for Children in Immigration Proceedings) (Recommending tactics such as physical alteration of the court room to make room less intimidating, the presence of a familiar support person for the child, giving the child breaks while he testifies, and creating questions tailored to the assessed language and comprehension abilities of the child.); United Nations High Commissioner for Refugees, Action for the Rights of Children (ARC): A Rights-Based Training and Capacity Building Initiative (2001), Topic 4: Psycho-social Intervention and Cultural Considerations ("People in different
V. Representation of Unaccompanied Children

A. The Attorney’s Role

1. The Attorney’s Duty to the Child

Rule:

- a. The Attorney for the Child is a lawyer who provides legal services for the Child and who owes the Child the same duties, including undivided loyalty, confidentiality, and competent representation as would be owed to an adult client. 28

b. The Attorney shall ensure that the Child participates in the Immigration Adjudication to the greatest extent possible, taking into account the Child’s age, development, maturity, level of education, ability to communicate, and personal circumstances.

c. The Attorney’s duty of confidentiality is to the Child, regardless of who engaged, paid, or appointed the Attorney. The Attorney is not permitted to disclose confidential information to a parent, legal guardian, family member, or other individual without the Child’s consent.

d. The Attorney shall provide the Child with legal advice and zealously advocate the Child’s legal interests, as directed by the Child’s expressed wishes. The Attorney’s obligation is cultural contexts perceive, understand and make sense of events and experiences in different ways. Traditional beliefs and practices, religious beliefs and political ideology may confer a sense of meaning on events and thereby contribute to healing and recovery.”); United Nations High Commissioner for Refugees, Action for the Rights of Children (ARC): A Rights-Based Training and Capacity Building Initiative (2001), 5 (“[C]hildren’s psycho-social well-being is inextricably bound up with that of their parents or other carers. Separated children may be disproportionately affected by their experiences: not only have they experienced violence, loss of their family and the experience of being suddenly uprooted: they are having to cope with all of this without the presence and support of familiar adults. It is for this reason that identifying these children, documenting them and tracing their families is an urgent priority.”); Canadian Child Refugee Guidelines (“In determining what evidence the child is able to provide and the best way to elicit this evidence, the panel should consider, in addition to any other relevant factors, the following: the age and mental development of the child both at the time of the hearing and at the time of the events about which they might have information; the capacity of the child to recall past events and the time that has elapsed since the events; and the capacity of the child to communicate his experiences.”) “The child may, due to age, gender, cultural background or other circumstances, be unable to present evidence concerning every fact in support of the claim. In these situations, the panel should consider whether it is able to infer the details of the claim from the evidence presented.”) 28 ABA STANDARDS FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (Feb. 1996) Rule A-1; ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT AND DEPENDENCY HEARINGS (Aug. 2011) Rule 1; see also ABA FAMILY LAW SECTION STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES (2003), Rule 2(B)(1).
to represent the Child’s expressed wishes, even if they conflict with those of the parent or other adult, and regardless of who engaged the Attorney to represent the Child.

e. This obligation as well as the duty of confidentiality to the Child should be clearly communicated at the outset to the party engaging the Attorney pursuant to Rule 1.6 of the ABA Model Rules of Professional Conduct.

f. If the Child does not express the objectives of representation, or is found incompetent pursuant to the procedure set forth in Rule X.C. infra, the Child’s Attorney shall advocate his legal interests, preserving to the greatest extent possible any immigration remedies available to the Child. In some instances, it may be appropriate for the Attorney to consider the opinions of a Child’s Adult Family Member.

g. The Attorney, at her first meeting with the Child and throughout her representation, shall determine and monitor whether these Standards are being complied with, and, if not, seek compliance on behalf of the Child.

h. The Attorney shall not reveal otherwise confidential communications of the Child to the Child Advocate without first obtaining the informed consent of the Child, even when doing so would better inform the Child Advocate’s Best Interests assessment.

i. The Attorney shall take reasonable steps to communicate with her client in a language and manner the client understands and to ensure that any interpreter or translator used in her communications with the Child understands the Attorney’s and her own confidentiality obligations. See Rule V.C.3.d. infra.

j. The Attorney shall respond promptly to all questions and requests for documents and information from the Child.

k. The Attorney shall investigate and communicate all forms of relief and return available and the impact of each on the Child.

l. The Attorney should advise the Child of the consequences for failure to appear at any scheduled proceeding.

m. The Attorney should advise the Child of the consequences for failure to appear at any scheduled proceeding.
The Attorney’s Role. The Attorney’s role initially is to advise the Child of all his legal options and their potential consequences in a Developmentally Appropriate manner, even where some options may not be in the Child’s best or legal interests. Ultimately, the Attorney must advocate for the Child’s expressed wishes, or for his legal interests where the Child expresses no wish or has been found to lack competence pursuant to the procedure set forth in Rule X.C. infra. The Attorney must take care to advise the Child of his legal options and the likely consequences of those options, without imposing the Attorney’s own views as to what the Child should do.

The Attorney shall zealously advocate for the Child’s wishes, placing that goal above all other concerns. Even where a Child may possess a legitimate claim for relief from removal from the United States, an Attorney may not pursue that claim if the Child’s expressed wishes are to the contrary. For example, a Child with an excellent case for asylum may learn that his father is dying in the country that he has fled. That Child’s expressed wish may be to forego his asylum claim in order to return with his father. While his Attorney has an obligation to present to him the strength of his asylum case and the ramifications of his leaving the United States, if the Child’s expressed wish is to return to his father, the Attorney must assist him in doing so. (However, as will be discussed further below in this Comment, if the Child expresses no wish or the Adjudicator determines that he lacks the competence to do so, the Attorney can and must pursue his legal interest, i.e., to seek asylum despite his father’s condition.)

The Attorney shall have access to all available information about the Child’s situation and . . . themselves must determine whether a child has diminished capacity.”

A Lawyer for Every Child: Client-Directed Representation in Dependency Cases, 47 Fam. Ct. Rev. 605, 618 (2009) (“Attorneys who advocate for the child’s best interests substitute their personal judgment, which can be colored by personal bias, when the child’s stated goal is deemed contrary to that interest.”); Lauren Girard Adams, Lourdes M. Rosado & Angela C. Vigil, What Difference Can a Quality Lawyer Make for a Child?, Litigation, 38.1 (2011) (“Children’s lawyers must have access to all available information about their child clients and . . . themselves must determine whether a child has diminished capacity.”); CRC (“States Parties shall assure to
Where a Child states an objective of representation, the Attorney must also remain aware of the power dynamics inherent in adult/child relationships. Before accepting the Child’s statement at face value, the Attorney should explore whether the statement reflects the Child’s own wishes or is an attempt to please various adults in his life, including those with whom he may have come into contact during the immigration process. 66

Attorney’s Duty to Communicate Effectively. Attorneys have an ethical obligation to take reasonable steps to communicate with their clients in a language they understand or be subject to

the child who is capable of forming his own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” Emily Buss, Confronting Developmental Barriers to the Empowerment of Child Clients, 64 Fordham L.R. 895 (1999), (advocating “child empowerment,” as children represent have “an important, influential role to play in a decision-making process that could greatly affect the course of their lives” and “enabling clients to exercise direct influence over the litigation process and indirect influence over litigation outcomes”); Frank P. Cervone & Linda M. Mauro, Ethics, Cultures and Professions in the Representation of Children, 64 Fordham L.R. 1351 (1996) (The lawyer should make use of other experts as well as family in assessing the child’s circumstances.).
disciplinary action. Disciplinary action can include disbarment, suspension, public or private censure, or other appropriate disciplinary sanctions. ¹

To the extent that the Child may be having problems expressing a preference because of linguistic difficulties, the Attorney should ensure that the interpreter recognizes the importance of understanding the Child’s wishes, conveying them in an accurate manner, setting aside prejudices and misconceptions about the Child, and refraining from attempting to influence the Child in any way. The accepted standard for legal interpretation is to ensure “direct speech,” using the same grammatical person as the speaker. This method allows the Attorney and the client to build a trusting relationship despite an inability to communicate directly. This requires the interpreter to avoid unnecessary interference and to say exactly what the speaker is saying, for example, “[P]lease state your name,” instead of “she wants you to state your name.”

Capacity and Competence. The normal client-lawyer relationship assumes that the client, when properly advised and assisted, can make decisions about important matters in the legal proceeding. When representing a client with diminished capacity, a lawyer is expected to maintain a normal client-lawyer relationship to the greatest extent possible. Although capacity may be diminished by a client’s age, or for some other reason, the Rule does not presume that Children below a certain age lack capacity to determine their wishes in litigation. Capacity refers to a client’s ability to understand information relevant to his case and the ability to appreciate the consequences of decisions. Capacity exists in various degrees. In other words, it is contextual and incremental, and may also be intermittent. ²

The Child’s ability to contribute to a determination of his position is functional, depending upon the particular position and the circumstances prevailing at the time that the position must be determined. Therefore, a Child may be able to determine some positions in the case but not others. Similarly, a Child may be able to direct the Attorney with respect to a particular issue at one time but not at another. Simply because an Attorney disagrees with a Child’s decision, or believes what the Child wants is not best for him, does not mean that the Child lacks capacity to make decisions.

¹ C.F.R. § 1003.102(c); 8 C.F.R. § 1003.101(a).
² AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, ANNOTATED, Rule 1.14(a) (American Bar Association Center for Professional Responsibility, 2016 ed.).
Although an Attorney may be tempted to use the substance of a decision as a test of a Child’s capacity, she must strive to separate the evaluation of the Child’s ability to make a decision from the Attorney’s evaluation of the decision itself.

ABA Model Rule of Professional Conduct Rule 1.14 discusses circumstances when it may be permissible for an Attorney to act beyond the scope of the Child’s express wishes. The rule provides that, “[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action.” That protective action might include “consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.” In the case of an Unaccompanied Child, protective action might include the involvement of a Child Advocate or a trusted family member or professional. (The role of a Child Advocate is discussed in detail in Rule VII.B infra.)

Capacity can be distinguished from competence, the latter of which is regularly referred to as a legal standard and denotes a specific level of skill. The most critical distinction between the two concepts is that competence is a characteristic that one either possesses or does not, an all or nothing principle. Competence in the

33 ABA Standards of Practice B-3; ABA Model Act Commentary to Section 7(e); AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, ANNOTATED, Rule 1.14(a) & cmt (American Bar Association Center for Professional Responsibility, 2016 ed.); J. Renne, Legal Ethics in Child Welfare Cases, 2016 ed. (ABA Center on Children and the Law 2004); CRC Article 12(1) (states Parties must ensure that a child “who is capable of forming his own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”), Article 12(2) (a child shall have “the opportunity to be heard in any judicial or administrative proceeding affecting a child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”), Article 32 (a child shall have “the opportunity to be heard in any judicial or administrative proceeding affecting a child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”), Section 26 (all procedures and determinations affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”), Article 32(2) (a child shall have “the opportunity to be heard in any judicial or administrative proceeding affecting a child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”). (African Charter on the Rights and Welfare of the Child, OAU Doc, CAB/L/E.24/24/94 (1990), Article 4(2) (“In all judicial or administrative proceeding affecting a child who is capable of communicating his/her own views, and [sic] opportunity shall be provided for the view of the child to be heard either directly or through an impartial representative. . . and those views shall be taken into consideration by the relevant authority.”), ECER (November 1986) Section 25 (every child “who is capable of forming his own views has the right to express these views freely in all matters affecting the child . . . particularly the refugee determination procedure. These views should be taken into account and given due weight, in accordance with age and maturity.”), Section 26 (all procedures and determinations affecting the child should be done in a child-appropriate way (for example, with breaks, non-threatening surroundings and the presence of the guardian/ad litem, legal or trusted family member); Christopher Nugent & Steven Schulman, Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children, 78 Interpreter Releases 1569 (2001) (“Giving Voice to the Vulnerable”) (a lawyer representing a detained child must be loyal to the child’s expressed interests over other considerations.).
adjudication of Unaccompanied Children’s claims is further discussed in Rule X.C. infra. 34

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34 AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, ANNOTATED, Rule 1.14(b) (American Bar Association Center for Professional Responsibility, 2016 ed.); J. Renne, Legal Ethics in Child Welfare Cases, 39 n.3 (ABA Center on Children and the Law 2004); UNHCR GPC, at page 6 (“States shall assure to the child who is capable of forming his views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”); Wendy Ayotte, Statement of Good Practice, Separated Children in Europe Programme, International Save the Children Alliance and UNHCR (Oct. 2000), p.4 (“The views and wishes of separated children must be sought and taken into account whenever decisions affecting them are being made. Measures must be put in place to facilitate their participation in line with their age and maturity.”); Elizabeth Amon, The Snakehead Lawyers, The National Law Journal (July 17, 2002) (Citing Robert Hirshon, president of the American Bar Association, who stated that “[j]udges who involve themselves in the legal representation and understanding of a representation and its scope, since the child is the client with the ultimate right to hire and fire counsel at will.”); Emily Buss, Confronting Developmental Barriers to the Empowerment of Child Clients, 84 Conn. L.R. 895 (1999), gadocating “child representation” has an “important, influential role to play in a decision-making process that could greatly affect the course of their lives” and “soliciting clients to exercise direct influence over the litigation process and indirect influence over litigation outcomes”). Frank P. Cervone & Linda M. Mauro, Ethics, Cultures and Professions in the Representation of Children, 64 Fordham L.R. 1975 (1996), (“[T]he child’s attorney must advocate the child’s choice of direction.”); Donald N. Duquette, New Perspectives on Child Protection: Legal Representation for Children in Protection Proceedings: Two Distinct Roles Are Required, 34 Family L.Q. 441 (2000) (Arguing that we should resolve the ambivalence not by adopting a client-directed or a best interests approach, but by having two sets of standards—one for the client-directed attorney role and one for a best interests Child Protection Advocate (GAL), that both roles should be clearly established, aggressive, active, and the court should appoint either one or the other, or both, under certain circumstances as set out in law.); Jessica Matthews Eames, Seen But Not Heard: Advocating for the Legal Representation of a Child’s Experienced Wish in Protection Proceedings and Recommendations for New Standards in Georgia, 48 Emory L.R. 1451 (1999) (“[l]awyers for children can and must individualize every representation, in a way that allows maximum possible participation of the client, so that the representation reflects the child-in-context and her unique view of the world.”); Citing Jean Koh Peters, Representing Children in Child Protection Proceedings: Ethical and Practical Dimensions (1997); Karen A. Halstenby, Interviewing and Counseling the Child Client, 64 AL Bar J. 488 (1999) (“The rule does not permit the attorney to substitute his judgment for that of his impaired client; rather, only when the lawyer reasonably believes the client cannot act in his own best interest may the lawyer seek the court’s permission to substitute his own judgment or that of the child’s guardian or other legal representative or take such other protective action as may appear appropriate under the circumstances.”). Rule 1.4 of the Rules of Professional Conduct requires the attorney to give his client sufficient information to participate intelligently in decisions to the extent the client is willing and able to do so.” Fordham Conference on Ethical Issues in the Legal Representation of Children, Working Group on Interviewing and Counseling, Report of the Working Group: Interviewing and Counseling, 64 Fordham L.R. 1531 (1996) (The vast majority of the Working Group favored an ‘empowerment’ or attorney model of representation in which the attorney advocates the position or interest of the client after full consultation with the client and independent investigation. In so doing, attorneys assess the capacity to make a “considered judgment” about her case. If the child demonstrates decision-making capacity, the attorney affords the child’s wishes great weight, and treats that child client in a manner similar to an adult client.”); Katherine H. Frederle, The Ethics of Empowerment: Rethinking the Role of Lawyers Interviewing and Counseling the Child Client, 64 Fordham L.R. 1655 (1996) (proposing a new lawyering model that stems from an empowerment perspective on the rights of children); Separated Children in Europe (1995), p.7 (“Although lacking in the EU Resolution on Unaccompanied Minors, any national and EU level legislation on asylum procedures should include the principle of consulting children and taking their views into account whenever decisions affecting them are being made.”). Steve Zwerin & Miriam Berkman, Being a Lawyer for a Child Too Young to be a Client: A Clinical Study, 68 AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, ANNOTATED, Rule 1.14(b) (American Bar Association Center for Professional Responsibility, 2016 ed.); J. 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Attorney’s Duty to Pursue Legal Interests. Where the Child cannot or will not express objectives regarding a particular issue or issues, the Child’s Attorney shall determine the Child’s legal interests and pursue them. The Child’s “legal interests” are distinct from his “Best Interests” and from his “objectives.” Legal interests are those interests that are specifically recognized in law and that can be protected through the courts or other government agencies, for example, seeking a release from Custody pending determination of his case or filing an application for asylum. Nebraska L.R. 330 (1989) (The lawyer’s role in representing a child should include determining the child's preference.).

Child’s Failure to State Wishes. The Attorney should also be mindful that the Child’s failure to express a position is different both from an inability to do so and from directing the lawyer not to take a position on a certain issue. The Child may have no opinion with respect to a particular issue. If the Attorney believes that the Child is unable to state his wishes, the Attorney should refer the Child for the appointment of a Child Advocate to identify and advocate for the Child’s Best Interests. The Child may also wish to delegate the decision-making authority because of loyalty conflicts or the desire not to hurt a parent or other Adult Family Member. In that case, the Attorney is free to pursue the objective that appears to be in the Child’s legal interests based on information that the Attorney has and positions that the Child has already expressed. A position chosen by the Attorney should not contradict or undermine other issues about which the Child has expressed a viewpoint. However, before reaching that point, the Attorney should clarify with the Child whether the Child wants the Attorney to take a position, or to remain silent with respect to that issue. The Attorney is then bound by the Child’s directive.

Legal Interests. In establishing an attorney-client relationship with the Child, the Attorney must define the scope of legal interests that she will represent. Attorneys may limit representation to Immigration Adjudications. However, many Children correctly understand that their legal interests include their placement in and release from Custody. If the Attorney will not represent these legal interests, she should affirmatively disclose this limitation of representation to the Child, consistent with the Standard for Attorney’s Scope of Representation. See Rule V.A.2 infra.

Investigation of Available Relief. The Attorney must carefully investigate and consider the Child’s immigration alternatives. She must consider what impact each form of relief might have on his ability to receive public benefits, qualify for a green card, work, and position. Nebraska L.R. 330 (1989) (The lawyer’s role in representing a child should include determining the child's preference.).
travel outside the U.S., and obtain relief for family members. She must also consider the impact of any arrest and court involvement. The Attorney must then advise the Child accordingly. While the statutory framework may well change over time, the principle will remain that the Attorney should consider the ramifications of all the Child’s legal options in advising him. 35

2. Attorney’s Scope of Representation

Rule:

a. The Attorney’s scope of representation should be explained to the Child at the outset of the representation.

b. The explanation of the Attorney’s scope of representation should be put in terms that the Child will understand given the Child’s age, development, education, maturity, and language abilities.

Comments: It is important for both the Attorney and the Child to establish the scope of their relationship at the outset of the representation. As a matter of best practices, the Attorney’s explanation about her scope of representation should contain at a minimum the following information: The Attorney providing the representation; the duration of the representation including representation on appeal; the matter(s) for which the Attorney will provide representation, including any appeal; the names of and contact information for the Attorney who will be working on the Child’s case; the fees and charges for all services (and if the representation is on a pro bono basis, the explanation should explicitly so state); the Child’s rights regarding the possession of the Child’s files compiled by the Attorney; the Attorney’s professional responsibilities to the Child, including the duty of confidentiality; and the Child’s right to terminate the Attorney’s representation at any time.

While the explanation need not be written, a writing provides a record of the scope of representation. The explanation, where translated, should also be read to the Child to ensure comprehension, and the Child’s understanding should be verified. For example, the Attorney could stop at regular intervals and ask

35 See, e.g., https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/
Responsibilities to the Child Client Following a Decision

a. When the Child is granted relief, the Attorney should explain orally and in writing the benefits and limitations of the Child’s newly acquired status.

b. A Child shall have the right to appeal a final decision in any Immigration Adjudication to an independent judicial authority.

c. The Attorney shall promptly inform the Child of his appellate rights and take all steps necessary to protect those rights, including making appropriate referrals, at least until an appellate Attorney is substituted or a decision is made not to appeal. Nothing herein requires an Attorney to represent the Child on appeal.

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36 American Bar Association Model Rules of Professional Conduct, Annotated, Rule 1.5(a) (American Bar Association Center for Professional Responsibility, 2016 ed.) (a lawyer’s fee must be reasonable; factors determining the reasonableness of the fee include, among other things, the time and labor required, the difficulty of the matter, the skill requisite for the matter and whether the fee is fixed or contingent.). Rule 1.5(b) (when a lawyer has not represented that client on a regular basis, then “the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.”). Rule 1.5(c) (any contingent fee agreement “be in writing.”). Rule 1.2 (“[a] lawyer shall abide by a client’s decisions concerning the objectives of representation, ... and shall consult with the client as to the means by which they are to be pursued.”) TheABA’s comments to Rule 1.2 state that the rule “requires a lawyer to pursue the specific objectives, as defined by the client, for which the lawyer was retained.” Rule 1.3 (requires that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” TheABA’s comments to Rule 1.3 state that a lawyer should “pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer,” should see the client’s matter to its conclusion (unless terminated) and shall not unreasonably procrastinate.).

HAZARD & WILLIAM HODES, THE LAW OF LAWYERING (Aspen Law and Business 2001), § 5.1 (2003 Supplement) (Cites the ABA’s Rule 1.2, which is discussed above); Elizabeth Amon, The Snakehead Lawyers, The National Law Journal (July 17, 2002) (In order to reduce the prevalence of “snakehead” lawyers – lawyers who ostensibly represent illegal aliens when really they are hired by the aliens’ smugglers and thus have a conflict of interest – “[i]mmigration judges should inquire as to the [alien] child’s free consent to and understanding of [the snakehead lawyer’s] representation and its scope, since the child is the client with the ultimate right to hire and fire counsel at will.”) RONALD E. MALLEN & JEFFREY L. SMITH, LEGAL MALPRACTICE (West Publishing Company, College and School Division 4th ed. 2000) (the purpose of a written retainer agreement is to ensure that the lawyer and client understand the scope of the representation, the staffing of the of the representation among lawyers, the compensation and any actual or potential ethical issues, and the written retainer agreement should be included in a retainer agreement: scope of the representation, the delegation of responsibilities among lawyers, compensation and method of payment, file retention, confirmation and execution by the client.).
d. The Attorney shall advise the Child of the date, nature, issues, and potential consequences of any pending post-decision hearing or proceeding. The Attorney should urge, and if necessary seek to facilitate, the attendance at any such hearing of the Child and of any material witnesses who may be called.

e. The Attorney’s responsibility to the Child does not necessarily end if the Attorney is no longer retained for an appeal. The Attorney shall timely forward all documents to appellate counsel. When appropriate, the Attorney should continue to counsel the Child and assist in securing legal services for the Child in matters arising from the original proceeding.

Comments: Once the Child’s case has concluded, the Attorney should discuss with the Child the end of the representation and determine what contacts, if any, she and the Child will continue to have.37

B. General Standards of Professional Conduct

1. Standards of Professional Conduct

Rule: An Attorney representing a Child in Immigration Adjudication or appellate proceedings is required to know, and is subject to, the standards of professional conduct set forth in statutes, rules, decisions of courts, and codes of professional conduct. An Attorney has no duty to execute any directive of the Child that is inconsistent with the law or these Standards.38

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37 AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, ANNOTATED, RULE 1.3 & cmt.

38 AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, ANNOTATED, RULE 1.16
2. Privacy and Publicity

**Rule:**

**a.** The Attorney shall inform the Child of his right to privacy. At all times, the Attorney shall respect the Child’s right to privacy. That privacy should be protected not only by conforming to the duty of confidentiality, but also by actively ensuring that the Child is protected from unwanted publicity and outside influence and is afforded personal privacy.

**b.** The Attorney, in consultation with the Child Advocate, social worker, and, as appropriate and available, his parent or legal guardian, and mindful of the Child’s age and development, should discuss with the Child his right to communicate with the media individually or through a representative and to otherwise seek publicity about his case. The Attorney should then follow the Child’s expressed wishes as set forth in Rule V.A.1.d and f.supp.

**c.** The Attorney, in consultation with the Child Advocate, social worker, and, as appropriate and available, his parent or legal guardian, and mindful of the Child’s age and development, should discuss with the Child the advisability of speaking to the media. Consequently, the decision whether and how to seek media attention where such attention might help the Child’s legal position should be finalized only after careful analysis. As set forth in Rule V.A.1.d. and f.supp., the expressed wishes of a competent Child should be followed. In every case, the Attorney should be mindful of any applicable limitations on using the media to prejudice a judicial proceeding.\(^9\)

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\(^9\) 39 ABA JJS, Standards Relating to Counsel for Private Parties 3.1 (the determination of the client’s interest in the proceedings ... is ultimately the responsibility of the client after full consultation with the attorney.); INS DOM, 4.L. (providing that detainees may communicate with members of the news media, and that members of the news media may initiate correspondence with a detainee), 16.A. (requiring that the Detention Facility establish procedures whereby legal representatives and members of the news media may visit detainees); Beijing Rules, rule 15.2 and Commentary (“The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. ... The competent authority's search for an adequate disposition of the case may profit, in precaution to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.”).
C. Establishing the Client Relationship

1. Interviewing the Child

Rule: The Attorney shall meet with the Child as soon as possible after agreeing to undertake representation and maintain frequent contact with him thereafter. Whenever possible, the Attorney shall communicate with the Child in person, as opposed to telephonically or virtually.

Comments: Irrespective of the Child’s age, the Attorney should meet frequently with him. Communication with the parent or legal guardian is not an appropriate substitute. It is strongly recommended that the Attorney meet with the Child promptly after agreeing to undertake the representation and regularly throughout the case. This is helpful in establishing and maintaining a trusting relationship, which in turn is the foundation of representation. In-person communication is therefore usually necessary to satisfy the Attorney’s ethical obligations to provide competent representation to the Child, negotiate the scope of representation with the Child, particular, from the cooperation of the legal representatives of the juvenile (or, for that matter, some other person constant who the juvenile can and does really trust.”); UN RPDLF, (“Every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family and the defense counsel... Every juvenile should have the right to communicate in writing or by telephone at least twice a week with the person of his choice, ... should be assisted as necessary in order effectively to enjoy this right ... [and] should have the right to receive correspondence.”); AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, Annotated, Rule 3.6 (American Bar Association Center for Professional Responsibility, 2016 ed.) (Trial Publicity – discussing limitations on publicity that a “lawyer knows or reasonably should know ... will have a substantial likelihood of materially prejudicing an adjudicative proceeding”); 8 C.F.R. § 208.6 (2000) (“(a) Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General; (b) The confidentiality of other records kept by the Service and the Executive Office for Immigration Review that indicate that a specific alien has applied for asylum, received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure. The Service will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.”); CRC, Article 16 (1) (“No child shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”) (The child has the right to the protection of the law against such interference or attacks.”); Beijing Rules, (Juveniles’ privacy should be respected and they should be protected from public exposure). Journalistic ethical standards concerning the interviewing of children provide helpful perspective on some of these issues. E.g., R. Teichroeb, Covering Children & Trauma: A guide for journalism professionals (Dart Center for Journalism & Trauma) http://dartcenter.org/sites/default/files/covering_children_and_trauma_0.pdf; A. Chin, Interviewing Children: Guidelines for Journalists (Dart Center for Journalism & Trauma) http://dartcenter.org/content/interviewing-children-guide-for-journalists; The Radio Television Digital News Foundation, Guidelines of Good Practice: Interviewing Juveniles http://www.rtnfd.org/content/interviewing/azu_juveniles
and generally ensure effective communication with the Child. The Attorney should use the first meeting to begin to gain the trust of the Child. This process is a deliberate one that should continue throughout the representation. The following approaches should be considered:

- **Establishing and maintaining representation.** This should begin with a deliberate process of building the trust of the child. The Attorney should explain the purpose, role and confidentiality obligations of the interpreter. As noted earlier, building trust may be aided when an interpreter is present, the Attorney should explain to the Child the purpose, role and confidentiality obligations of the interpreter. As noted earlier, building trust may be aided when the appointment is present, the Attorney should explain to the Child the purpose, role and confidentiality obligations of the interpreter. As noted earlier, building trust may be aided when

- **Explaining the child's role, the purpose of your interview, your relationship with the client and the nature of any Immigration Adjudication.** If an interpreter is present, the Attorney should explain to the Child the purpose, role and confidentiality obligations of the interpreter. As noted earlier, building trust may be aided when an interpreter is present, the Attorney should explain to the Child the purpose, role and confidentiality obligations of the interpreter. As noted earlier, building trust may be aided when

- **An explanation that the judge, and not the lawyer, is the ultimate decision maker.** The GAL should explain that the GAL will advocate what she thinks is best for the child, even if it conflicts with the child's wishes. The child needs to understand that the lawyer's role is not to make the ultimate decision.

- **Explain why she is doing so.** The Attorney should explain why she is doing so.

40 ABA Standards of Practice Rule C-1 ("Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with child prior to court hearings and when approved of emergencies or significant events impacting on the child."); Giving Voice to the Vulnerable ("Ideally, the first interview should be viewed as a 'get-acquainted' session rather than a fact-finding mission. Even when introduced by a trusted person, the first interview should as much as possible focus on building this trust rather than exploring the child's legal claims in depth, even when logistical challenges might put time at a premium for a trusting relationship with the client preferably after the first interview, the attorney may turn to discussing the legal proceedings and questions related to surfacing the child's claims to ultimate relief from removal."); Working With Refugee and Immigrant Children: Issues of Law, Development, Lutheran Immigration and Refugee Service (1998), 34 ("Developing trust with a child requires both time and testing. For this reason, legal practitioners who work with minors suggest meeting several times for short periods before really delving into a minor's asylum case."); 45 ("Explain the child's role, the purpose of your interview, your expectations and what the next steps will be. Just as you want to know about the child, he has the right to understand your role and the process at hand."); Fordham Conference on Ethical Issues in the Legal Representation of Children, Working Group on Interviewing and Counseling, Report of the Working Group: Interviewing and Counseling, 64 Fordham L.R. 1531 (1996) ("The lawyer should explain her role, including an explanation that the judge, and not the lawyer, is the ultimate decision maker. The GAL should explain that the GAL will advocate what she thinks is best for the child, even if it conflicts with the child's wishes. The child needs to understand that the lawyer's role is not to make the ultimate decision."); ABA JS, Standards for Representative Counsel for Private Parties, § 4.2(a) ("The lawyer should confer with a client without delay and as often as necessary to ascertain all relevant facts and matters of defense known to the client."); ABA Standards of Practice, Rule C-1 ("Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with child prior to court hearings and when approved of emergencies or significant events impacting on the child."); ABA Standards of Practice, Rule C-1 ("Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with child prior to court hearings and when approved of emergencies or significant events impacting on the child."); ABA Standards of Practice, Rule C-1 ("Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with child prior to court hearings and when approved of emergencies or significant events impacting on the child."); ABA Standards of Practice, Rule C-1 ("Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with child prior to court hearings and when approved of emergencies or significant events impacting on the child."); Bazu v. INS, 296 F.3d 116, 322 (4th Cir. 2002) ("Therefore, regardless of how rapidly technological improvements, such as video conferencing, may advance, the Government remains obliged to ensure that asylum petitioners are accorded a meaningful opportunity to be heard before their cases are determined. In
The Attorney should also explain why the Child may be questioned repeatedly about the same matter by different individuals and that third parties who may interview him do not necessarily represent or seek to advance the Child’s Best Interests or wishes, and that, indeed, the interests of such third parties might be contrary to those of the Child. Before any third-party interview, the Attorney should ensure that the Child understands the purpose of the interview, how the information he provides will be used, whether he can request an attorney, and whether he is obliged to answer the questions.

Before making substantive representations on the record, the Attorney shall obtain a full understanding of the Child’s background and the circumstances of his arrival in the United States.

2. Child-Appropriate Setting

Rule: The Attorney should interview the Child in a private, quiet, non-distracting, Developmentally Appropriate setting in which the Child feels comfortable.

Comments: Choice of interview location can have a great impact on the effectiveness of the interview. While options are often limited in a detention setting, whenever practicable, the Attorney should consider the following: the setting and environment of the interview space, the age and development of the Child, the cultural norms of the Child, the presence of other qualified professionals or a trusted adult for the Child, the provision of child-appropriate activities or

this regard, the procedures utilized in Rusu's hearing could have resulted in the denial of a full and fair hearing on his claim. The utilization of video conferencing, although enhancing the efficient conduct of the judicial and administrative processes, also has the potential of creating ethical problems in adjudicatory proceedings ("Proceedings of the Group on Interviewing and Counseling, at a premium."); Fordham Conference on Ethical Issues in the Legal Representation of Children, Working Group on Interviewing and Counseling, Report of the Working Group: Interviewing and Counseling, 64 Fordham L.R. 1351 (1996) (Recommending “statutory/court rules to require the judiciary to provide the opportunity to adequately interview and counsel the child in a setting conducive to the establishment of an attorney-client relationship.”): Separated Children in Europe Programme, p.9 (“Representation of specialist lawyers should be available to every child throughout the determination procedure; lawyers should be present at asylum interviews, and they should be skilled in supporting children; regular and open contact should be established between the lawyer and the child; free legal aid should be provided; and training should be available to legal representatives.”).
tools to facilitate the Child’s ease and communication, aides the Attorney can employ to engage the Child (e.g., toys, snacks), and the Attorney’s dress. For a full list of suggested activities, see Appendix. For most Children, a quiet, non-distracting space with a comfortable and culturally appropriate seating arrangement provides the best setting. The Attorney should be aware that different cultures have different norms about the appropriate distance and level in seating arrangements, but in general, sitting on the same level without barriers such as desks is appropriate. For other Children, engaging in alternative activities such as drawing or playing with a toy while discussing their cases may facilitate communications. Privacy is another factor to consider when choosing the setting for the interview—some Children, a private setting may be best, while others may prefer to have a trusted friend or adult with them. See Rule X.B.4. Comments infra.62

3. Interpreter/Translator

a. When the Attorney does not fluently speak the Child’s best language and dialect, whenever practical, a trained, independent interpreter or translator should be used to facilitate oral and written communication. If the Child is in Custody, the Attorney shall request the Custodial Agency to facilitate the use of an interpreter/translator.

b. The Attorney should ascertain the interpreter/translator’s background to ensure impartiality.

c. The Attorney shall ensure, to the extent she is able, the following: that the interpreter/translator is fluent in both English and the Child’s best language and dialect; and that she62 understands any legal or other specialized terminology. In the case of an interpreter (i.e., one who translates oral communications as opposed to one who translates documents), the Attorney shall also ensure, to the extent she

41 UNCHR Action for the Rights of Children, 2001 – Working with Children, Revision Version 2000 ("Selecting an appropriate location for interviewing children, or having an informal conversation, can have an important bearing on the effectiveness of the communication. For most young people, a quiet space with comfortable and culturally appropriate seating may be the ideal choice, though for others going for a walk, or playing or working together may provide the best opportunity for communication."); AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, ANNOTATED, Rule 1.6 (American Bar Association Center for Professional Responsibility, 2016 ed.) (governing when a lawyer may reveal a client’s confidential information).

62 Though these standards use feminine pronouns for “interpreters” for convenience in some places, they are intended to be gender-neutral.
is able, that the interpreter employs words appropriate to the Child’s age and abilities; that the interpreter is, and appears to the Child to be, impartial; that the interpreter communicates well with Children in general, and, where applicable, with traumatized Children; and that the interpreter employs direct speech.43

d. As noted, upon determination that an interpreter/translator is necessary, the Attorney should explain to the Child the purpose and role of the interpreter/translator. The Attorney should also ensure that the interpreter/translator and the Child understand the ethical duty of both the Attorney and the interpreter/translator to maintain confidentiality of the information. If possible, the interpreter/translator should sign a confidentiality agreement in the presence of the Child.

See Rules V.A.1.i. and V.C.1. Comments supra.

43 Direct Speech is a form of interpretation using the speaker’s exact words, employing the speaker’s exact pronouns and tenses. See NATIONAL ASSOCIATION OF JUDICIARY INTERPRETERS & TRANSLATORS, NAJIT POSITION PAPER: DIRECT SPEECH IN LEGAL SETTINGS (2004).

44 UNHCR GPC, Chapter 8: Legal Status (“Trained independent interpreters should be used when the interpreter does not share the child’s language, even if the child appears to speak the interpreter’s language adequately.”); United Nations High Commissioner for Refugees, Action for the Rights of Children (ARC): A Rights-Based Training and Capacity Building Initiative (2001), Topic 1: The Importance of Skills in Communicating with Children (“When the use of an interpreter is unavoidable, it is vital that the interpreter is fluent in both languages, understands any specialist terminology and is able to use words which the child can understand. He or she needs to be acceptable within the community and be seen as impartial. It is vital that the interpreter has good skills at communicating with children, can cope with any emotions being expressed and does not influence the conversation by mistranslating, summarizing or omitting selected sections of what was said.”); Giving Voice to the Vulnerable (“When using an interpreter, the attorney should explain to the child the purpose and role of the interpreter. Even before retaining an interpreter, the attorney should take care to evaluate the interpreter’s expertise and background, any U.S. or foreign
D. Coordination with the Child Advocate (If Appointed)

Rule:

1. Where a Child Advocate has been appointed, the Attorney should keep the Child Advocate informed as to the Child’s progress throughout the immigration process and the possible consequences of different legal strategies, provided that such communication is consistent with the protection of the Child’s legal interests and does not violate the Attorney’s ethical duties toward the Child. The Attorney should also provide the Child Advocate with timely notice of all proceedings.

2. When a Child Advocate is appointed, the Attorney may choose to utilize the Child Advocate’s expertise in ascertaining those facts relevant to the Child’s Best Interests in the United States. Such information may include facts pertaining to the Child’s life in his home country and/or last habitual residence, the Child’s departure from such country, his journey to the United States, and his time in the United States, if any, prior to apprehension. The Attorney shall not share any information with the Child Advocate without first obtaining the Child’s consent. The Attorney should consider any Best Interests recommendation made by the Child Advocate. See Rule VI.B.1. and 6.d. infra.

3. In certain circumstances, an Attorney may seek the appointment of a Child Advocate. These circumstances may include a Child who is unable to express a legal interest, or a Child who is unable to assist the Attorney in pursuing a legal interest.

4. The Attorney should also seek the Child Advocate’s recommendation on whether it is in the Child’s Best Interests to voluntarily depart from the United States or to apply for relief from removal, and whether the Child’s Custody, placement, or release continues to be in his Best Interests. See Rule VI.B.1. infra.

However, the Attorney is not bound to agree with or act in accordance with such recommendations, because the Attorney’s primary role is to give effect to the client’s expressed wishes and promote the client’s legal interests both in the short term and long term. See Rule V.A.1.d. supra.45

45 ABA JJS, Standards Relating to Pretrial Court Proceedings, 6.5, 6.7 (providing, with respect to adjudication of juveniles who are delinquency respondents, that “the function of a Child Protection Advocate is to act toward the juvenile in the proceedings as would a concerned parent” that “[a] Child Protection governmental affiliation, and capacity to interpret in the dialect of the child. The Attorney must also ensure that the interpreter understands the ethical duty to maintain confidentiality of the information. The child client should be informed of his right to consent to or refuse the interpreter.”).
VI. Child Advocates and the Best Interests of the Unaccompanied Child

A. Consideration of the Best Interests of the Unaccompanied Child

Rule: Each government actor shall consider a Child’s Best Interests as part of each decision along the continuum of a Child’s care—from apprehension, to Custody, to release, to a decision on the Child’s legal claim, including the possibility of repatriation. The decision-maker shall consider the Best Interests of the Child in a manner consistent with existing immigration law.64

B. The Role of the Child Advocate

1. Appointment

Rule: The Child Advocate shall be appointed by HHS, or other appropriate agency that is-disinterested in the outcome of the Child’s Immigration Adjudications, for child trafficking victims and other vulnerable Unaccompanied Children to provide support and other services, including the following:

- Services relating to the child’s legal claim, including the possibility of repatriation. The child’s legal claim, including the possibility of repatriation shall be considered in the best interests of the child, as part of each decision along the continuum of a Child’s care. The decision-maker shall consider the Best Interests of the Child in a manner consistent with existing immigration law.66

Advocate should have all the procedural rights accorded to parents,” and that “parents should be encouraged to take an active interest in the juvenile’s case. Their proper functions include consultation with the juvenile and the juvenile’s counsel at all stages of the proceedings concerning decisions made by the juvenile or by counsel on the juvenile’s behalf. ...”). ABA Standards of Practice (Comments that because the child has a right to confidentiality and advocacy of his position, the child’s attorney can never abandon this role, while the Child Protection Advocate-client relationship may not be confidential, B-2 [p.4]; §2.444 (Section 351 Subchapter A provides that the duties of the Child Protection Advocate include: interviewing the child, investigating the facts and circumstances relevant to the child’s presence in the United States, working with counsel and developing recommendations of issues relating to the child’s custody and immigration status, among other things.)); UNHCR GPC (Chapter 10: An unaccompanied child should have a legal guardian with respect to involvement in any legal proceedings and may need a legal guardian to advocate for the child’s interests or to make decision on behalf of the child in other situations.); Wendy Ayotte, Statement of Good Practice, Separated Children in Europe Programme, International Save the Children Alliance and UNHCR (Oct. 2000), § B.8 (Organizations, government departments and professionals involved in providing services to separated children must cooperate to ensure that the welfare and rights of separated children are enhanced and protected.); Jessica Matthews Eames, Seen But Not Heard: Advocating for the Legal Representation of a Child’s Expressed Wish in Protection Proceedings and Recommendations for New Standards in Georgia, 48 Emory L. R. 1431 (1999) (Summarizes the ABA’s Standards of Practice stating that the attorney should keep the child’s safety as a paramount concern, but maintain confidentiality while requesting the appointment of a Child Protection Advocate to advise the child of his best interests.); 48 Emory L. R. 1431 (1999) (Summarizes the ABA’s Standards of Practice stating that the attorney should keep the child’s safety as a paramount concern, but maintain confidentiality while requesting the appointment of a Child Protection Advocate to advise the child of his best interests.); 48 Emory L. R. 1431 (1999) (Summarizes the ABA’s Standards of Practice stating that the attorney should keep the child’s safety as a paramount concern, but maintain confidentiality while requesting the appointment of a Child Protection Advocate to advise the child of his best interests.)

64 Interagency Working Group on Unaccompanied and Separated Children Subcommittee on Best Interests, Framework for Considering the Best Interests of Unaccompanied Children 2, 4 (May 2016).

recommendations about the Child’s Best Interests with respect to Custody, care, placement, release, permanency and repatriation. 

2. Powers

Rule: The Child Advocate shall have:

a. reasonable private access to the Child at all times, including while the Child is being held in a Detention Facility or in the care of a foster family;

b. the right to review all records and information necessary to effectively advocate for the Best Interests of the Child that are not deemed privileged or classified;  

c. the right to obtain independent evaluations of the Child, including, without limitation, psychological and medical evaluations;

d. the right to be present at all hearings and interviews involving the Child; and

e. the right to submit Best Interests recommendations for consideration by any individual including, but not limited to, immigration judges, DHS and ORR officials, Attorneys, and state court judges.

3. Qualifications

Rule: A Child Advocate should be:

a. a child welfare professional, including but not limited to lawyers and graduate-degree level social workers; and

b. specially trained in the circumstances and conditions that Unaccompanied Children face, as well as in the various immigration benefits for which a Child might be eligible.

If a Child Advocate is not an attorney, the Child Advocate’s work must be supervised by an attorney with experience in immigration law or child welfare law while Children are in, or face the prospect of being placed in, adversarial court proceedings.

47 TVPRA 235. (replace with statutory citation)
48 TVPRA 235. (replace with statutory citation)
4. Training

Rule: For all persons serving as Child Advocates, the appointing Custodial Agency should provide, or cause to be provided, professional training as set forth in Rule IV supra.

4. Independence

Rule: The Child Advocate must be independent, in that the agency overseeing the Child Advocate does not provide any other service or offer any benefit to Unaccompanied Children, including but not limited to legal services, care provider (shelter/facility) services, post-release services, home studies, etc., so as to avoid a conflict of interest. Appointment of the Child Advocate is not a substitute for the representation of an Attorney for the Child, nor vice versa.

5. Confidentiality

Rule: The Child Advocate shall keep communications with the Child confidential except where the Child Advocate determines that the sharing of information is required to ensure the Child’s safety or to otherwise serve the Child’s Best Interests. The Child Advocate shall not be compelled to testify or otherwise provide evidence in any proceedings concerning information received from the Child in the course of serving as the Child Advocate.

6. Duties

Rule: The Child Advocate shall, as appropriate:

a. meet and speak with the Child on a regular basis;

b. explain her role to the Child in a developmentally appropriate manner and explain the difference between a Child Advocate and a Child’s Attorney;

c. investigate the facts relevant to the Child’s presence in the United States, including, but not limited to: the facts pertaining to the country of the Child’s origin and/or last habitual residence; the facts concerning the Child’s departure from such country, his journey to the United States, and his time in the United States, if any, prior to apprehension; and any other factors relevant to the Child’s Best Interests per Rule III.D. supra;
d. identify the Child’s Best Interests as needed at all stages of the continuum of the Child’s care from apprehension, to Custody, to release, to a decision on the Child’s legal claim, including the possibility of repatriation;

e. advocate for the Child’s Best Interests by submitting a Best Interests recommendation to the relevant decision-maker, including but not limited to the Custodial Agency, the Attorney, the Immigration Court, and/or immigration officials;

f. ensure that the Child understands information provided by others, including the placement where he lives; access to legal representation; his rights and responsibilities; the processes and procedures of Immigration Questioning and Immigration Adjudication, and any determinations made therein; and to whom the Child can formally voice complaints;

g. where necessary, inform the Child’s Attorney of any violations of the Child’s rights at his placement; and

h. if she has reason to believe that the Child’s Attorney is involved in unethical or criminal conduct that affects the Child, report the same to appropriate licensing or prosecutorial authorities.

7. Termination of Appointment

Rule: The Child Advocate shall carry out the duties described above until and unless one of the following occurs:

a. the duties are completed, ensuring the child is safe and stable;

b. the Child departs the United States;

c. the Child is granted permanent resident status in the United States;

d. the Child attains the age of 18;

e. the Child is placed in the Custody of a parent or legal guardian; or

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g. where necessary, inform the Child’s Attorney of any violations of the Child’s rights at his placement; and

h. if she has reason to believe that the Child’s Attorney is involved in unethical or criminal conduct that affects the Child, report the same to appropriate licensing or prosecutorial authorities.

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e. the Child is placed in the Custody of a parent or legal guardian; or

51 Though these standards use feminine pronouns for “Child Advocates” for convenience in some places, they are intended to be gender-neutral.
f. the Child Advocate is relieved of her duties by the Custodial Agency which appointed her.

Comments: The Child Advocate plays a vital role in ensuring that the Best Interests of the Child are a primary consideration in decisions affecting the Child. Particularly for Children without families in the United States, a Child Advocate is the only individual exclusively interested in that Child's physical and mental well-being. The disinterested agency should provide professional training for all persons serving as Child Advocates as to the Child's special circumstances and conditions and as to any benefits or entitlements for which the Child may qualify. (For other recommended training for Child Advocates, see Rule IV supra.) The disinterested agency, which appoints the Child Advocate, may make the appointment itself or may delegate or contract its authority to another entity, provided that such entity is itself also disinterested. To avoid any real or perceived conflicts of interest, the Child Advocate must not be an employee of the Custodial Agency or of any third party with whom the Custodial Agency contracts to care for Unaccompanied Children. Nor should the Child Advocate also be the Child's Attorney. The Child Advocate is not a substitute for an Attorney for the Child, nor vice versa, because the purpose of appointing a Child Advocate is to ensure that the Best Interests of the Child are identified and communicated, while the role of Attorney is to serve the expressed wishes and legal interests of the Child.

VII. Standards for the Custody, Placement and Care of Unaccompanied Children

A. General Policy Favoring Release and Family Reunification

Rule:

1. There is a presumption that release from Custody and family reunification are in the Best Interests of the Child and that a Child should be so reunified and/or so released.

2. The Custodial Agency shall work expeditiously toward the release of the Child to an individual or entity as set forth at Rule VII.D. infra.

3. The Custodial Agency shall continue efforts to effect family reunification and/or release for as long as the Child is in Custody.

Comments: Except in unusual circumstances, neither separation from family nor detention is in the Best Interests of a Child who is in Removal Proceedings, particularly if he has committed no criminal offense and is not...
a danger to others. Periodic review of any decision not to release a Child should be undertaken by the Custodial Agency. The following reasons are not an adequate basis for the continued detention of the Child: (1) to punish, treat, or rehabilitate the Child; (2) to encourage the Child’s acceptance of a crime she should never have been detained for reasons related to her immigration status not as a measure of protection because of a suspicion that the child has been trafficked.

52 Flores ¶ 14 (general policy favoring release), ¶ 18 (INS shall make continuing efforts at family reunification); INS JPM 2.4 (“Family reunification efforts must continue while a juvenile is in INS custody, and must be documented by the District Juvenile Coordinator.”); CRC Art. 5 (“States Parties shall respect the responsibilities, rights and duties of the parents or, where applicable, the members of the extended family community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the education of the child by the child of the rights recognized in the present Convention.”); United Nations High Commissioner for Refugees Agenda for Protection (2002), Part II, Goal 1(2) (“States should introduce or enhance gender and age-specific safeguards in asylum procedures, with due weight being given to the principle of family unity.”); IBCR Statement, H(5) (“[s]econdmenting a child’s acceptance of a crime she should never have been detained for reasons related to her immigration status not as a measure of protection because of a suspicion that the child has been trafficked.”)

53 ABA JRS, Standards Relating to Inter Status 5.3(B) (all reasonable effort shall be made to notify a child’s parent or other Adult Family Member, or legal guardian shall not be a bar to the Custodial Agency releasing the Child to that individual.

54 52 AVA JRS, Standards Relating to Adjudication 1.3 (all reasonable effort shall be made to notify a child’s parent or other Adult Family Member, or legal guardian shall not be a bar to the Custodial Agency releasing the Child to that individual.)

55 ABA JRS, Standards Relating to Inter Status 5.3(B) (all reasonable effort shall be made to notify a parent of the juvenile, 6.5(A) (the intake official should inform the juvenile of his rights, inform the juvenile that his parent will be contacted immediately to aid in effecting release and explain the basis for detention), Standards Relating to Adjudication 1.4 (parents should be entitled to be present at an adjudication proceeding); INS JPM, 2.3.1 (“All post-arrest facilities, including temporary holding areas, will provide access to: contact with family members who were arrested with the juvenile.”); Beijing Rules ¶ 10 (upon the apprehension of a juvenile, his parents or guardian shall be immediately notified of such apprehension); UN RPJDL §§ 56-57 (the family or guardian of a juvenile and any other person designated by the juvenile have the right to be informed of the state of health of the juvenile); ACA Juvenile Standards, 3-JDF-5A-02

56 ABA JRS, Standards Relating to Inter Status 5.3(B) (all reasonable effort shall be made to notify a parent of the juvenile, 6.5(A) (the intake official should inform the juvenile of his rights, inform the juvenile that his parent will be contacted immediately to aid in effecting release and explain the basis for detention), Standards Relating to Adjudication 1.4 (parents should be entitled to be present at an adjudication proceeding); INS JPM, 2.3.1 (“All post-arrest facilities, including temporary holding areas, will provide access to: contact with family members who were arrested with the juvenile.”); Beijing Rules ¶ 10 (upon the apprehension of a juvenile, his parents or guardian shall be immediately notified of such apprehension); UN RPJDL §§ 56-57 (the family or guardian of a juvenile and any other person designated by the juvenile have the right to be informed of the state of health of the juvenile); ACA Juvenile Standards, 3-JDF-5A-02
B. Appropriate Placement and Custody

Rule:

When release is not possible, for any period during which the Child must remain in Custody, placement decisions should be made in the Best Interests of the Child and in accordance with the following rules:

1. The Child should be placed in the least restrictive setting appropriate to his age, gender, gender identity, gender expression, and Special Needs.

2. A Child seeking release to a parent should be placed in the least restrictive setting closest to that parent. When a Child has been apprehended after living in the United States, the Child should be placed in the least restrictive setting closest to his former community. To the extent possible, a Child should be placed in a setting closest to the location where he is most likely to be released.

3. No Child shall be housed with adults in a short-term Temporary Placement Facility, with the exception of an Adult Family member whose relationship has been confirmed and where such is in the Best Interests of the Child.

4. No Child shall be housed in a secure facility or criminal detention center except as set forth at Rule VII.G.2. infra.

5. No Child shall be placed in an adult jail, secure facility, criminal detention center, or any other setting in which they are held with adults.

6. No Child shall be placed in a jail, secure facility, or criminal detention center for children who have been charged or adjudicated delinquent.

7. To the extent possible, Children shall be placed in small, non-secure, community-based programs. In extremely limited circumstances, defined for the purposes of this Rule as a natural disaster, Detention Facility fire, or civil or medical emergency, Children may be placed with adults for a short period of time; however, under no circumstances shall a Child ever be placed with an adult with a history of violent, sexually abusive, or criminal behavior.

Comments: Unaccompanied Children are uniquely vulnerable given their often traumatic displacement from their home countries. It is therefore vital (assistance to juveniles in notifying their families); Beijing Rules § 10.1 (upon the apprehension of a juvenile, his parents or guardian shall be immediately notified).
that they be placed in a safe, home-like environment. At a minimum, the
Detention Facility selected must be the least restrictive alternative
appropriate to the needs of the Child. The Custodial Agency bears the
burden of proving with clear and convincing evidence that restraints on an
accused Child’s liberty are necessary and that no less intrusive alternative
is viable. Alternative measures are always preferable and they include,
without limitation, placement with a family, placement in an educational
setting or home, close supervision, or intensive care.

Consistent with developments and best practices in state child welfare
programs, Unaccompanied Children should not be placed in large,
institutional settings. These programs have been overwhelmingly
eliminated within the child welfare system in favor of small group or foster
care placements based in the community where children have much greater
liberty and are integrated into the local community, including schools.

Consistent with both the Best Interests of the Child and the need to minimize
the number of transfers of the Child, the following factors should be
considered in selecting a Child’s placement: (1) proximity to family and
community; (2) reasonable proximity to the availability of a Child
Advocate; (3) reasonable proximity to concentrations of immigration
lawyers to facilitate attorney-client meetings; (4) reasonable proximity to
Immigration Courts; (5) accessibility of mass transit systems to facilitate
visits by family; (6) reasonable access to, and consistency of, appropriate
educational, recreational, medical, psychiatric, and/or other services;
(7) reasonable access to other community resources; (8) reasonable access
to interpreters in the Child’s best language; and (9) reasonable proximity
to communities of the Child’s language and cultural background. The
placement should be made in the Best Interests of the Child to promote the
full and fair resolution of his immigration case. All placement
determinations should be individualized rather than based on broad
policies affecting classes of Children. For example, if a Child is
transgender, considerations as to care and custody should be aligned with
recommendations of reputable medical associations like the American
Pediatric Association.  

The vast majority of these Children pose no threat to the safety of the community; rather, they are merely in Custody awaiting the resolution of
their immigration status. Placements should not be made on any ground
(such as convenience of the Custodial Agency) other than the Best Interests
of the Child. The Custodial Agency shall not uproot and transfer the Child
to a remote area under the guise of safety concerns about smugglers.

For a more exhaustive list of factors to consider, see The Young Center for Immigrant Rights, Framework for Considering the Best Interests of Unaccompanied Children, Checklist 95 at 30-31 (May 2016). For standards on care and custody of transgender youth, see, e.g., https://assets2.hrc.org/files/documents/SupportingCaringforTransChildren.pdf.

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of the Child. The Custodial Agency shall not uproot and transfer the Child
to a remote area under the guise of safety concerns about smugglers.
traffickers, or others who might seek to victimize or otherwise engage the Child in criminal, harmful, or exploitive activity, nor shall a Child be placed in a secure facility to protect him against such potential threats. Rather, where the Child’s safety is threatened, enhanced security measures should be put in place to ensure the Child's safety, including segregation from unrelated adults whenever possible. If not immediately possible, an unaccompanied juvenile will not

For their safety, Children shall not be housed in Detention Facilities which also house adults. Studies demonstrate that children so housed are more likely to commit suicide and to be physically or sexually assaulted. One exception to the foregoing occurs where a Child has been apprehended with a non-parent relative with whom they have a strong relationship and where it is in the Child’s Best Interests to be housed with that relative.) Similarly, Children should not be housed in Detention Facilities which also house juveniles accused of being or adjudicated delinquent. Given this heightened risk of serious harm, mere inconvenience will not suffice as a justification for failing to separate a Child from adults and such juveniles. This Rule modifies the Flores standard, which has been interpreted to allow temporary confinements of Children with adults, children who have been charged with or convicted of crimes, and juveniles who have been adjudicated delinquent.

55 Homeland Security Act of 2002 (H.R. 5005), Title IV, Subtitle E, § 462 (b)(1)(A) (requiring that the Director of the Office of Refugee Resettlement “consult with appropriate juvenile justice professionals” to ensure that unaccompanied alien children are “placed in a setting in which they are not likely to pose a danger to themselves or others.”); Title IV, Subtitle E, § 462 (b)(1)(B) (requiring that the Director of the Office of Refugee Resettlement ensure that “the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child.”); Flores ¶ 11 (INS shall place detained minors in the last restrictive setting appropriate to their age and special needs); see also 20 C.F.R. §§300, 550-556 (Regulations implementing Individuals with Disabilities Education Act, describing the requirement that children with disabilities be placed in the least restrictive environment suitable for disability); INS JPM, Introduction (acknowledging that the Flores Agreement requires that Children be placed “in the least restrictive setting appropriate to their age and special needs, provided that the setting is consistent with being able to ensure the juvenile’s timely appearance in court to protect his well-being and that of others”); United Nations High Commissioner for Refugees Agenda for Protection (2002), Part III, Goal 1(9) (States should explore appropriate alternatives to the detention of asylum-seekers and refugees, and abstain in principle, from detaining children); IBCR Statement, B(9) (“Separated children who have not been arrested or charged with a crime should never be detained for reasons related to their immigration status nor as a measure of protection because of a suspicion that the child has been trafficked.”) ABA JJS, Standards Relating to Corrections 7.8 (restraints should not be necessary in facility).
C. Initial Apprehension and Expeditious Processing

1. Notice of Rights

Rule: Upon apprehension, the Immigration Enforcement Agency shall immediately inform the Child, both orally and in writing, in the Child’s best language and, where applicable, dialect, that he has the right to contact his parents and his consulate. Under the TVPRA,

be detained with an unrelated adult for more than 24 hours.

C. Initial Apprehension and Expeditious Processing

1. Notice of Rights

Rule: Upon apprehension, the Immigration Enforcement Agency shall immediately inform the Child, both orally and in writing, in the Child’s best language and, where applicable, dialect, that he has the right to contact his parents and his consulate. Under the TVPRA,
the Immigration Enforcement Agency must screen a Child from a contiguous country (i.e., Mexico and Canada) within 48 hours. The Immigration Enforcement Agency may return the Child to his country of origin upon finding that (1) the Child has no fear of return to his country of nationality or last habitual residence based on a fear of persecution; 2) the Child has not been a victim of trafficking and runs no risk of being trafficked if returned; and 3) the Child is able to make an independent decision to withdraw his application for admission. 39 If this determination cannot be made within 48 hours, the Child must be transferred to ORR Custody. Once a Child is processed for Removal Proceedings, he has the right, without limitation, to the following: (a) an Attorney; (b) immediate contact with a parent, or any relative, friend, or social service organization within or without the United States; (c) judicial review of his immigration and detention status, including his right to seek asylum and other legal relief; (d) consular notification and access, as required by the U.S. Department of State; (e) to remain silent and notification that any statements he does make can be used against him; (f) information concerning the basis for his initial apprehension and his temporary detention; (g) if applicable, reunification information on his rights while in detention and before transfer, including the basic necessities described in Rule VII.C.3. supra. If a Child expresses the desire not to talk, any interview shall cease.

Comments: Upon apprehension, many Children, especially young Children and Children who come from countries without rights similar to those to which they are entitled in the United States, do not understand what is happening to them or what rights they possess. The apprehending or initial processing officer should therefore determine whether the particular Child in question comprehends the scope, content and exercise of his rights. The apprehending or initial processing officer should facilitate the exercise of these rights, for example by providing free phone service to the Child to contact a lawyer or parent. The right to an Attorney shall be explained so that, even if the Child is unfamiliar with the U.S. legal system in general and/or the immigration system in particular, he can appreciate the importance of legal representation. Whenever feasible, the Child should be allowed to remain with siblings and Adult Family Members consistent with the Child’s Best Interests and federal law. 39

60 ABA JJS, Standards Relating to Interim Status 5.3(A) (juvenile shall be informed of the right to silence, the making of statements and the right to presence of an attorney, including providing this information in the juvenile’s native language), 6.5(A) (the intake official should inform the juvenile of his rights, inform the
2. Expeditious Processing

Rule: The Custody of any Child due to his immigration status should be limited to the shortest period of time necessary.

Immediately upon any claim or suspicion that a newly apprehended individual is a Child and that further Custody is necessary, the Immigration Enforcement Agency shall notify the Custodial Agency. The Immigration Enforcement Agency shall either release the Child or transfer him out of the Temporary Placement Facility and into the Custody of the Custodial Agency within 72 hours, except in the event of an emergency, defined for the purposes of this Rule as a natural disaster, Detention Facility fire, or civil or medical emergency.

Comments: The procedures to be used, and the conditions to be provided, during transfer are set forth at Rule VII.H.A. infra.

juvenile that his parent will be contacted immediately to aid in effecting release, and explain the basis for detention); S.2444 § 32(a)(4)(B) (children shall be notified orally and in writing of the standards for conditions of detention including educational services, medical care, mental health care, access to telephones, legal services and interpreters); Flores v. INS (INS shall provide the minor with a notice of rights whenever it takes the child into custody); INS JPM 4.2.4 ("Juveniles placed in a medium-security or secure detention facility must be provided written notice of the reasons why"); 7.4.3 ("The Arresting Officer must provide all juveniles with specific information regarding the availability of free legal assistance and advise each juvenile of the right to be represented by counsel at no expense to the government and of the right to a hearing before an Immigration Judge. This process is to be repeated by the Local or District Juvenile Coordinator upon the juvenile’s placement in the facility."); UNITED STATES DEPARTMENT OF STATE CONSULAR NOTIFICATION AND ACCESS (1998) (when foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified); Vienna Convention on Consular Relations and Optional Protocol Relating to the Status of Refugees, U.N.T.S. Nos. 868-8640, vol. 596 (1993), Article 36(1)(b) (a person arrested, in prison, custody or detention may request that the consular post be informed of his situation); UN RPJDL § 24 (all juveniles shall be given a copy of the rules governing the Detention Facility and a written description of their rights and obligations in a language they can understand); United Nations High Commissioner for Refugees, Guidelines on Detention of Asylum Seekers (1999), Guideline 4 (asylum seekers should be entitled to the right to be informed of the reasons for their detention in a language they understand, the right to challenge the lawfulness of the deprivation of liberty and the right to contact the local UNHCR office, available national refugee or other agencies and a lawyer); United Nations High Commissioner for Refugees, Executive Committee of the High Commissioner’s Programme, Standing Committee, Decision of 12 November 1998 (U.N. Doc. A/Conf.118/C.2/SC.2/1 (1999)) (as amended by specific cases and allowed by district policy, an INS Officer may deem it necessary to require a positive suitability assessment of a prospective custodian prior to releasing a juvenile to an individual or program, including investigating living conditions, standard of care, background check
3. Right to Basic Necessities

Rule: Commencing with his initial apprehension, a Child has the right to basic necessities such as food, water, bedding, sanitation facilities, and necessary medical attention, as well as to treatment with dignity and respect.

Comments: This Rule is necessitated by frequent reports of apprehended Children being denied such basic necessities, e.g., forced to sleep on floors and/or to endure extreme temperatures; denied adequate privacy, access to restrooms and/or essential hygiene products; and provided only one meal a day. These circumstances have frequently occurred between the time of their initial apprehension by the Immigration Enforcement Agency and transfer to Custodial Agencies. This inadequate care is generally due to the poor training of officials and/or inadequate facilities.

4. Age of Child

Rule:

a. If an individual claims or is suspected to be under 18 years of age, he shall be treated as a Child for all purposes, including the appointment of an Attorney as provided by Rule III.H. supra. If the Custodial Agency has a reasonable belief that the individual is 18 years of age or older, it may conduct an age determination inquiry within one week of apprehension by the Immigration Enforcement Agency, except in extraordinary circumstances or where the individual requests additional time to present evidence. Suspicion that a Child is over 18 should be individualized, specific to the Child, and not based on the Child’s country of origin, ethnicity, religion, or membership in any other group.

b. Any age determination inquiry should be independent and objective, taking into account all forms of evidence, including testimony of the Child, testimony of family members, psychological and developmental assessments, and all available documentary evidence, including local birth certificates, baptismal records and other such records, to on supporter, interviews at household, home visits, and a consideration of the juvenile’s concerns). Beijing Rules § 17.1 (restriction on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum), and § 19.1 (the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period). ACA Juvenile Standards 3-JDF-2B-03 (“if the facility is on the grounds of another type of corrections facility, such as an adult detention facility, it should be administered as a separate program.”).
The material provided is a page of text in English, discussing the determination of a child's age and the implications for custodial arrangements, rights to an attorney, and the need for a child to be released from immigration enforcement or custodial agencies. The text highlights the importance of accurate age determination, noting that dental and wrist bone x-rays have considerable margins of error. It references the Supreme Court decision in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 469, 113 S.Ct. 2786 (1993), and comments on the necessity of expert testimony and informal assessments in determining age. The document also addresses the role of trained advocates and the importance of ensuring that no child is deprived of rights due to age determination.
to several years), conclusive weight shall never be given to their results, and the weight each receives shall be significantly lessened in instances in which the child's alleged age is within the applicable margin of error. Indeed, such test results should not even be considered unless the procedures and methodology yielding them satisfy the principles of Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 469, 113 S.Ct. 2786 (1993).

A document found to be false, which indicates that the individual is not a child, should not be used or considered for any purpose in the age determination process, or in the underlying removal proceedings (e.g., to establish that the individual is 18 or over, or that he is not credible). It is generally recognized that individuals are often compelled by great danger or abuse to flee to the United States, that children often do not control what documents are in their possession, and that refugees often have to travel with false documents in order to flee their countries of origin.62

An individual claiming to be a child shall have the right to an appeal of any adverse age determination to an independent reviewer. The Custodial Agency should bear the burden of proof with regard to determining the person's status.

A document found to be false, which indicates that the individual is not a child, should not be used or considered for any purpose in the age determination process, or in the underlying removal proceedings (e.g., to establish that the individual is 18 or over, or that he is not credible). It is generally recognized that individuals are often compelled by great danger or abuse to flee to the United States, that children often do not control what documents are in their possession, and that refugees often have to travel with false documents in order to flee their countries of origin.62

62 IBCR Statement, B(8) (Suggesting that age assessments be carried out by an independent pediatrician, that such assessments should take into account the “genetic environmental and cultural diversity” of children, that such examinations should be gender appropriate, where the child’s age is in doubt, there should be a presumption in favor of the child’s claim of minority, and that age assessment is not an exact science); see United Nations Convention Relating to the Status of Refugees (requiring the Government Agency and/or Non-Governmental Organization to bear the burden of establishing that the person is not a child by objective manifestations; IJA-ABA JUVENILE JUSTICE STANDARDS, ANNOTATED (“ABA JJS”) (providing that the Government Agency and/or Non-Governmental Organization should bear the burden of proof with regard to determining the person’s status).
contact a parent or legal guardian of the Child solely for the purpose of notifying the parents of the Child’s apprehension, unless the Child requests that no such notice be given.

b. If no contact can be made with a Child’s parent or legal guardian, the Immigration Enforcement Agency should make a good faith effort to contact an Adult Family Member residing in the United States solely for the purpose of notifying him of the Child’s apprehension, unless the Child requests that no such notice be given.

c. As soon as practicable, the Custodial Agency should immediately inform the parties provided notice under Rule VII.C.6. a. and b. supra of the results of the individualized age determination; the determination of appropriate detention, if applicable; and the Child’s rights set forth in Rule VII.C.1. supra. If the Custodial Agency is unable to make contact with one of the above-listed individuals, other Agency personnel should continue to make every effort to establish contact with and provide the requisite notice to these individuals for the duration of the Child’s detention.

d. If the Child’s physical or mental health declines in any way while in Custodial Agency Custody, the parent, legal guardian, or Adult Family Member should be informed immediately, and in any event within 24 hours, unless the Child withholds consent. In the case of death, a serious illness threatening death, an illness or condition requiring the transfer of the Child to an outside medical facility, or an illness or condition requiring clinical care for more than 48 hours, the Custodial Agency must contact the parent or legal guardian and the consular officer immediately.

e. Any use of psychotropic medication must be consistent with state and federal law.

Comments: As noted, often a Child who is apprehended and/or taken into Custody has parents, legal guardians, or Adult Family Members residing in the United States who are willing to take care of the Child. While a real risk exists that an individual claiming relationship to a Child presents a threat to the Child’s health or welfare (e.g., if he is a smuggler), providing him with notice of the Child’s apprehension and rights would not be likely to assist him in harming the Child. On the other hand, an adult who is legitimately concerned for the Child could be greatly assisted in helping the Child navigate the legal process if made aware of the rights to which the Child is entitled.
the Child is entitled. Thus, if the parent of the Child attests in writing to the fact that an individual residing in the United States is an Adult Family Member of the Child, notice should be given to that individual.63

7. Monitoring and Reporting

Rule: The apprehending Immigration Enforcement Agency shall complete and maintain documentation with respect to each Child, his apprehension, temporary placement, processing, and all instances of transfers to a Custodial Agency responsible for care and Custody. Such documentation should be available to the Child, his Attorney, his Child Advocate, the entity or individual with whom the Child is placed, and the Custodial Agency. The documentation should also be available to the public, but only in the form of systemic reports redacted so as not to reveal Children’s identities.

Comments: In any Detention Facility or Foster Care setting where a Child is placed, a complete and secure record must be maintained which details relevant information about the Child’s care. The Custodial Agency shall maintain up-to-date records on all Children. Statistical information on such Children should be collected on a weekly basis from all Custodial Agency offices and from border patrol stations. The required documentation should include at least biographical information consisting of each Child’s name, date of birth and country of birth; any family members with whom the Child was traveling when apprehended; the date the Child was placed in Custody; the date of each placement at a new Detention Facility or Foster Care setting, removal from a Detention Facility or Foster Care setting or release from Custody; the name of the person or persons with whom the Child was placed, and the names of the Detention Facilities or Foster Care settings where the Child was placed and from which the Child was transferred, removed or released, if applicable; the Child’s immigration status; and any hearing dates for the Child. It should also include the number of overdue placements, the number of days by which placement in an

63 ABA JJS, Standards Relating to Interim Status 5.5(M) (all reasonable effort shall be made to notify a parent of the juvenile); 6.5(A) (the intake official should inform the juvenile of his rights, inform the juvenile that his parent will be contacted immediately to aid in effecting release and explain the basis for detention), Standards Relating to Adjudication 1.4 (parents should be entitled to be present at an adjudication proceeding); INS JMP, 2.3.1 (“All post-arrest facilities, including temporary holding areas, will provide access to... contact with family members who were arrested with the juvenile.”); Beijing Rules §10.1 (upon the apprehension of a juvenile, his parents or guardian shall be immediately notified of such apprehension); UN RPCD, §§ 56-57 (the family or guardian of a juvenile and any other person designated by the juvenile have the right to be informed of the state of health of the juvenile); ACA Juvenile Standards, 3-JDF-5A–02 (assistance to juveniles in notifying their families); Beijing Rules § 10.1 (upon the apprehension of a juvenile, his parents or guardian shall be immediately notified).
appropriate Detention Facility or Foster Care was delayed, and justifications for overdue placements. The apprehending Immigration Enforcement Agency should also monitor and document in each Child’s file the location and type of his temporary placement, the length of time he remained there and, if transfer was overdue in violation of Rule VII.C.2 supra, or if the exception in Rule VII.C.2. was invoked, the justification for the delay of transfer.

When a Child is transferred from one placement to another, the Child’s records should be released to any of the Custodial Agency with enforcement authority or to an Immigration Enforcement Agency.

The monitoring and reporting procedures addressed in this rule in particular provide accountability for the safety and well-being of Children during processing and to take remedial action as necessary.

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When a Child is transferred from one placement to another, the Child’s records should be released to any of the Custodial Agency with enforcement authority or to an Immigration Enforcement Agency.

The monitoring and reporting procedures addressed in this rule in particular provide accountability for the safety and well-being of Children during processing and to take remedial action as necessary.
D. Parents' and Others' Rights to Custody of the Unaccompanied Child

1. In accordance with the presumption in favor of family reunification set forth at Rule VII.A. supra, the Custodial Agency shall release a Child from Custody and place him with one of the following individuals in the United States, listed in order of preference, provided that none of the circumstances listed in Rule VII.D.2. infra exist:

a. a parent;

b. a legal guardian; and

c. another Adult Family Member.

2. The Custodial Agency may deny release of the Child only if the presumption in favor of a parent, legal guardian, or other Adult Family Member, is overcome because the Custodial Agency possesses a reasonable basis to believe one or more of the following circumstances exist: the purported parent/legal guardian/Adult Family Member is not in fact the Child’s parent/legal guardian/Adult Family Member, the parent/legal guardian/Adult Family Member is not willing to take care of the Child; or the parent/legal guardian/Adult Family Member is not fit.

3. If a Child is not released to a parent/legal guardian/Adult Family Member, the Custodial Agency shall then determine whether detention is necessary for one of three reasons: the Child is (i) a flight risk; (ii) at risk from smugglers, traffickers, or others who might seek to victimize or otherwise engage him in criminal, harmful, or exploitive activity; and/or (iii) a danger to himself or to others. Where none of these factors apply, the Custodial Agency should release the Child from Custody and place the Child with one of the following, in order of preference:

Juvenile Coordinator can maintain an up-to-date record of all juveniles in INS custody;”). 4.4 (details extensive record-keeping responsibilities of National Juvenile Coordinator); OIG Report, Chapter 2, Placement Requirements, Recommendation 8 (The INS should implement procedures that require the monitoring and regular reporting of instances of non-compliance with the 3-5 day placement requirement), Documentation of Transportation & Detention, Recommendation 4 (The INS should implement procedures that require juvenile transportation and detention custodial records that provide sufficient accountability), and Chapter 3, Meaning of Influx, Recommendations 18-20 (The INS should implement procedures that require: reporting of instances of non-delinquent juveniles placed in secure detention; the regional juvenile coordinator to monitor, document and report juvenile housing facility inspections; and procedures to track, analyze and report on significant incident reports involving juveniles).
a. a fit and willing adult individual or entity in the United States who is not disqualified by Rule VII.D.2, supra, is designated by the parent or legal guardian in writing as appropriate to care for the Child, and with whom the Child consents to live; or
b. another adult individual or entity in the United States who is not disqualified by Rule VI.D.2, supra, and with whom the Child consents to live.

Where some of these factors apply, the Custodial Agency should make an individualized determination whether release is nevertheless appropriate.

4. The Custodial Agency shall require that any application for release of a Child to the parent/legal guardian/Adult Family Member or others shall contain sufficient information to permit the Custodial Agency to determine the applicant’s identity and whether release to the applicant is in the Child’s Best Interests. Such information may include, for example:

a. information concerning the identity of the applicant;
b. information concerning the identity and birth date of the Child;
c. where available, a copy of a document that establishes a blood or legal relationship between the applicant and the Child;
d. the grounds on which the applicant’s claim for release of the Child to him or her are based;
e. all available information relating to where the Child will reside upon release;
f. an agreement to ensure the Child’s presence at all future proceedings before the Immigration Court; and
g. any other relevant documents.

5. The Custodial Agency should reach and issue a written decision regarding the release of a Child as quickly as possible and in any event no more than six weeks after receipt of the parent’s/legal guardian’s/Adult Family Member’s application. If the Custodial Agency has not issued a written decision within those six weeks, the Custodial Agency must supply a written statement of the reason(s)
6. The parent/legal guardian/Adult Family Member shall have the right to an independent review of a decision denying release of a Child to him or her. This review shall satisfy due process requirements. If the parent/legal guardian/Adult Family Member exercises this right to review, the Custodial Agency bears the burden of persuasion that release to the parent/legal guardian/Adult Family Member was not suitable and that the Custodial Agency complied with Rule VII.D. supra in making this determination.

7. If the parent/legal guardian /Adult Family Member is dissatisfied with the outcome of the independent review, de novo review may be sought in federal court.

8. Where the Child is released to a parent/legal guardian/Adult Family Member, the Immigration Enforcement Agency shall be apprised of the Child’s release, but shall not be given any information on the identity of the individual accepting Custody. The Immigration Enforcement Agency shall not have access to any information generated by the Safe Release process. See Rule VII.E.1. infra.

Comments:

Release to parent, legal guardian, another Adult Family Member, or others.

This rule is meant to encourage the reunification of families, where possible, and to minimize the number of Children detained in Custodial Agency Detention Facilities or Foster Care. A preference for family unity and safety and stability of the Child shall be the primary criterion for determining placement of the Child. A reasonable basis to believe that 1) an applicant is not in fact the Child’s parent/legal guardian /Adult Family Member, 2) is not truly willing to care for the Child, or 3) is unfit to take the Child should be the only basis for denying release of the Child to the parent/legal guardian/Adult Family Member. Because the parent’s/legal guardian’s/Adult Family Member’s financial condition or immigration status is not determinative of the integrity of the family unit or the safety of the Child, it shall not be a criterion by which to determine with whom the Child is placed.

The Child’s desire not to be placed with a parent/legal guardian/Adult Family Member alone is not a sufficient basis on which to deny release to the parent/legal guardian/Adult Family Member. If a Child asserts that the parent/legal guardian/Adult Family Member is unfit, that person’s fitness should be determined by the Custodial Agency in a manner consistent with the authority to investigate and require a decision from the Custodial Agency.

Release to parent, legal guardian, another Adult Family Member, or others.

This rule is meant to encourage the reunification of families, where possible, and to minimize the number of Children detained in Custodial Agency Detention Facilities or Foster Care. A preference for family unity and safety and stability of the Child shall be the primary criterion for determining placement of the Child. A reasonable basis to believe that 1) an applicant is not in fact the Child’s parent/legal guardian /Adult Family Member, 2) is not truly willing to care for the Child, or 3) is unfit to take the Child should be the only basis for denying release of the Child to the parent/legal guardian/Adult Family Member. Because the parent’s/legal guardian’s/Adult Family Member’s financial condition or immigration status is not determinative of the integrity of the family unit or the safety of the Child, it shall not be a criterion by which to determine with whom the Child is placed.

The Child’s desire not to be placed with a parent/legal guardian/Adult Family Member alone is not a sufficient basis on which to deny release to the parent/legal guardian/Adult Family Member. If a Child asserts that the parent/legal guardian/Adult Family Member is unfit, that person’s fitness should be determined by the Custodial Agency in a manner consistent with the authority to investigate and require a decision from the Custodial Agency.
Indeed, a Home Study with respect to a potential release should be, and should only be, conducted where there is compelling evidence that 1) living with the parent/legal guardian/Adult Family Member would put the Child at risk from smugglers, traffickers, or others who might seek to victimize or otherwise engage the Child in criminal, harmful or exploitive activity; or 2) the parent/legal guardian/Adult Family Member is unfit, or as otherwise provided in Rule VII.E.2. infra.

Because assurance that a Child will appear at relevant court proceedings is irrelevant to the integrity of the family unit and the Best Interests of the Child, but simultaneously considering the Immigration Enforcement Agency’s duty to enforce relevant immigration law, the Custodial Agency shall give consideration to this criterion only with respect to a requested release to individuals and entities other than the parent/legal guardian/Adult Family Member. Similarly, the Custodial Agency may consider factors such as whether the Child has a documented history of escape or whether the Child is associated with smugglers, traffickers, or others who might seek to victimize or otherwise engage him in criminal, harmful, or exploitive activity only with respect to a requested release to someone other than a parent/legal guardian/Adult Family Member. Even in these cases, while these factors may be considered, no single factor should be employed as a per se reason to place a Child in a Detention Facility or Foster Care.

This rule recognizes that a parent’s citizenship or legal immigration status is irrelevant to the integrity of the family unit and to the Best Interests of the Child. Children should never be used as “bait” to apprehend family members or other individuals when they seek placement of or contact with the Child for the purpose of initiating deportation proceedings against such family members or others.

The rule has also been crafted specifically to avoid the placement of other unreasonable requirements such as the production of a bond on individuals or entities seeking placement of the Child with them.

Timely determination whether to release. Because of the severe implications of a prolonged placement determination or a denial of release, the parent/legal guardian/Adult Family Member must be provided a streamlined form of redress when release is denied. Flores did not delineate a time within which decisions regarding release must be made and the process has sometimes been unreasonably prolonged. Consistent with The Hague Convention on the International Aspects of Child Abduction to which the U.S. is a signatory, determinations should be made within six weeks.
Review of denial of release. This Rule governs the right of the parent/legal guardian/Adult Family Member to the review of a decision denying release of a Child to him or her. The Child’s right to appeal a denial of release is addressed at Rule VII.F. infra. Judicial review under this Rule has historically been a cumbersome process. While it should be preserved, it should also be supplemented by administrative review. Flores itself sets forth two alternatives to judicial review: administrative review by the Custodial Agency and administrative review by a third party. However, the success of the former depends on a superior’s ability to be objective with regard to his subordinate’s work, and institutional pressures may therefore impair objectivity. Thus, an independent administrative review of a denial of release performed by a party outside the Custodial Agency should be supplemented by administrative review.

This party should also be charged with evaluating a parent/legal guardian’s/Adult Family Member’s claim regarding the expeditious placement determinations and with enforcing penalties. Nothing in this rule is intended to eliminate judicial review of these matters under Flores.

65 The integrity of the family unit is protected by the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Ninth Amendment of the U.S. Constitution. In international law, the integrity of the family unit is protected by the Universal Declaration of Human Rights and the Convention on the Rights of the Child. The principle of the best interests of the child is also embodied in the Convention on the Rights of the Child. INS JPM Standard 2.4 (Family reunification efforts must continue while child is in INS custody.), 2.4.4 (INS may terminate custody arrangements when custodian fails to comply with the custody agreement); CRC, Article 5 (“States Parties shall respect the responsibilities, rights and duties of parents … to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance ….”). Article 7.1 (“The child shall … have … the right to know and be cared for by his parents.”). Article 9.1 (“States Parties shall ensure that the child shall not be separated from his parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”). Article 9.1 (“States Parties shall respect the responsibilities, rights and duties of parents … to provide, in a manner consistent with the evolving capacities of the child.”). Article 7.1 (“The child shall … have … the right to know and be cared for by his parents.”). Article 9.1 (“States Parties shall ensure that the child shall not be separated from his parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”). Article 9.1 (“States Parties shall respect the responsibilities, rights and duties of parents … to provide, in a manner consistent with the evolving capacities of the child.”). Article 7.1 (“The child shall … have … the right to know and be cared for by his parents.”). Article 9.1 (“States Parties shall ensure that the child shall not be separated from his parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”). Article 9.1 (“States Parties shall respect the responsibilities, rights and duties of parents … to provide, in a manner consistent with the evolving capacities of the child.”). Article 7.1 (“The child shall … have … the right to know and be cared for by his parents.”). Article 9.1 (“States Parties shall ensure that the child shall not be separated from his parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”). Article 9.1 (“States Parties shall respect the responsibilities, rights and duties of parents … to provide, in a manner consistent with the evolving capacities of the child.”)
for assistance in securing the return of the child. The application must contain: a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child; b) the date on which the child was born; c) the grounds on which the applicant’s claim for return of the child is based; d) all information available relating to the whereabouts of the child and the identity of the person with whom the child is believed to be with; e) a copy of any relevant decision or agreement; f) a certificate or an affidavit emanating from a Central Authority, in other competent authority of the State of the child’s habitual residence, or from a qualified person, concerning the relevant law of that State; g) any other relevant document.

Article 11 ("The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.") Article 15 ("[I]f the judicial or administrative authority of the requested State cannot order the return of the child if the person, institution or other body which opposes its return establishes that … there is a grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.") Article 23 ("No legalization or similar formality may be required in the context of this Convention").

Flores v. I.N.S. (1994) holds that a juvenile who is not released is provided with an explanation of the right of judicial review; ORR Guide: Children Entering the United States Unaccompanied, Rule 2.77, 2.78.

A Home Study should only be conducted 1) where there is background checks and adherence to best practices in child welfare.

1. Background Checks. Background checks should be conducted promptly and, whenever feasible, upon all Sponsors. Such checks should never be shared with the Immigration Enforcement Agency.

2. Home Study. A Home Study with respect to a potential release should be needs-based and adhere to best practices in child welfare.

A Home Study should only be conducted 1) where there is background checks and adherence to best practices in child welfare.
compelling evidence that living with the potential Sponsor would put the Child at risk from smugglers, traffickers, or others who might seek to victimize or otherwise engage the Child in criminal, harmful, or exploitive activity; 2) where there is compelling evidence that the potential Sponsor is unfit; 3) at the request of a clinician or case manager; or 4) at the request of the Child, the Child Advocate, or the Child’s Attorney. Such Home Studies should be conducted swiftly and thoroughly by caseworkers, who have expertise in child welfare and cultural awareness and who exercise independent judgment. Follow-up Home Study visits should be permitted when a change in circumstances or additional relevant information is provided to the Home Study provider. Such Home Studies should never be shared with the Immigration Enforcement Agency. Except in the event of an emergency, defined for this Rule as a natural disaster (e.g., an earthquake or hurricane), the Home Study should begin within the 72-hour placement period and should conclude within six weeks of initial apprehension.

3. Post-Release Case Management Services. Post-release case management should be offered to every Child and Sponsor. Post-release case management services should be individualized and community-based services, which are trauma-informed, permitting a more flexible and tiered approach based on the Child’s and family’s needs. Such services should focus on family preservation, ensure the Child’s safety, facilitate the location of legal representation, educate the Child and Sponsor on their legal obligations, make referrals to culturally and linguistically appropriate medical and mental health providers, and facilitate enrollment in school.

4. Notice of Rights and Responsibilities. Upon the release of the Child, the Custodial Agency should inform him, both orally and in writing in his best language and dialect, of his rights (e.g., the right to obtain an education at a public school) and responsibilities (e.g., to appear at the Immigration Adjudication), as well as the roles of a Child Advocate and an Attorney.

Comments: Background checks are necessary to avoid the release of Children to smugglers, traffickers, or abusive Sponsors, and should be performed to comply with safety and suitability requirements in federal law. The type of background check employed should vary depending on the Sponsor’s verified relationship to the Child and initial indications of potential Sponsorship.

46 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-457, § 202(d) (An Unaccompanied Child “may not be placed with a person or entity unless the Secretary of health and Human Services makes a determination that the proposed custodian is capable of providing for the Child’s physical and mental well-being.”).
suitability. A Sponsor who has been confirmed to be the Child’s parent should be presumed to be a fit parent who will act in the Best Interests of the Child in accordance with U.S. Supreme Court jurisprudence, and should be subject to a limited background check. Non-parent Sponsors or others for whom concerns arise about their suitability as the Child’s caregiver will likely require additional background checks.

Home Studies should always be conducted on a non-parent or legal guardian. Best practices among Home Study providers use a functional family model that looks to support the entire family by assessing the Sponsor’s needs, determining whether the Sponsor understands his or her obligations under the conditions of release, and by assisting the Sponsor with safety plans for the Child. Home Studies should be conducted by outside providers (not shelter Staff).

Post-release case management services support the Child and Sponsor and ease the transition to family life. Such services should be consistently provided for a significant time period, for example six months, to 1) ensure appropriate safety monitoring and intervention during the most critical period in the family reunification process, 2) minimize the risk of placement breakdown, and 3) support efforts to achieve positive long-term post-release outcomes. Such services should also be individualized based on the needs of the Child and Sponsor.

The Rule recognizes the potential benefits of Home Study programs in ensuring adequate living conditions and an adequate standard of care for the Child with his new custodian and in protecting the Child from those who might seek to victimize or otherwise engage him in criminal, harmful or exploitive activity. These interests must be balanced against the parents’ constitutional rights and the Best Interests of the Child. 69

F. Unaccompanied Child’s Right of Appeal of Placement

Rule:

1. The Custodial Agency shall make ongoing efforts at family reunification. Once the Custodial Agency has made a decision that a Child will not be released to a particular individual, the Child has the right to seek reconsideration of the decision. The Custodial

68 S.2444 §§ 322(a)(1)-(3) (no child shall be placed with a person or entity unless a valid home study is conducted by an agency of the state of the child’s proposed residence; parents shall have the right to seek reconsideration of the decision; a suitability assessment may be required prior to release to an individual or program; it may include an investigation of the living conditions, interviews of members of the household and a home visit).

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Agency must provide to the Child, the Child’s Attorney, and the Child’s Advocate the records regarding the process for making the determination, the articulated cogent, specific reasons for the determination, and any evidence supporting the determination. The Custodial Agency must then also provide the Child, the Child’s Attorney, and the Child’s Advocate with the opportunity to seek, and present evidence supporting, an alternative placement.

2. The Custodial Agency’s duty to make ongoing efforts to achieve family reunification continues throughout a Child’s placement. The Custodial Agency shall review secure placements at a minimum on a monthly basis to ensure that the placements remain warranted. If the Child’s request for release and/or an alternative placement is denied, the Child shall have the right to an independent review of the Custodial Agency’s decision(s) that the Child not be released from Custody and/or should be placed or transferred into a particular Detention Facility or Foster Care setting. The review shall satisfy due process requirements. The Custodial Agency shall also have the right to request a bond hearing before an immigration judge. If a Child exercises his right to this review, the Custodial Agency bears the burden of persuasion that neither release nor a less restrictive alternative was suitable and that the Custodial Agency complied with Rules VII.D., VII.E., and VII.H. in making the determination that the placement or transfer was appropriate.

3. If the Child is dissatisfied with the outcome of the independent review, he may seek a bond hearing or de novo review in federal court.

Comments: Due process requires that the Child must receive notice of the determination and a right to be heard. Further, he should be accorded the rights to receive a statement of reasons for the determination, to see the record, and to call and examine witnesses. The TVPRA mandates that the placement of a Child in a secure facility shall be reviewed at least on a monthly basis. The need for an independent review, discussed in the Comments to Rule V.I.D. supra, in the context of the parent’s/legal guardian’s/Adult Family Member’s right to appeal a denial of a release of the Child to him, applies here as well. This Rule preserves a Child’s right to have his placement reviewed by a federal court, as set forth in Flores. A federal court has also held that a Child has a procedural right to a bond hearing before an immigration judge. In keeping with the general presumption advocated herein in favor of the Child in such proceedings, the Custodial Agency should bear the burden of demonstrating the legitimacy of the determination, as suggested by the IJA-ABA Juvenile Justice Standards.

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TVPRA, § 235(c)(2). (Replace with statutory citation).
For the Child’s right to appeal concerning the conditions of his Custody, see Rule VIII.A.3. infra. 70

G. Custodial Agency Custody Beyond Initial Apprehension and Before Release Is Accomplished

1. Detention with a Parent or Adult Family Member

Rule: If the Immigration Enforcement Agency apprehends a Child with a parent, legal guardian, or other Adult Family Member, or already holds a Child’s parent, legal guardian, or other Adult Family Member in its Custody, the Immigration Enforcement Agency should keep the Child and the parent/legal guardian/Adult Family Member together as a unit. The Immigration Enforcement Agency should make an individualized determination about, and apply a presumption against, detention. When detained, the Child and parent/legal guardian/Adult Family Member should be placed in the least restrictive setting appropriate to families and held for the shortest duration possible. In a Temporary Placement Facility that is also used to detain adults, the Child and the parent/legal guardian/Adult Family Member should remain together, provided that the Child is detained solely with the parent/legal guardian/Adult Family Member, unless such concurrent detention is operationally impossible or puts the security of the Child at risk. In that case, the parent/legal guardian/Adult Family Member should be released from Custody rather than separated. The Immigration Enforcement Agency should not render children unaccompanied by separating them from parents/legal guardians/Adult Family Members unless such concurrent detention is operationally impossible or puts the security of the Child at risk. In that case, the parent/legal guardian/Adult Family Member should be placed in the least restrictive setting appropriate to families and held for the shortest duration possible. In a Temporary Placement Facility that is also used to detain adults, the Child and the parent/legal guardian/Adult Family Member should remain together, provided that the Child is detained solely with the parent/legal guardian/Adult Family Member, unless such concurrent detention is operationally impossible or puts the security of the Child at risk. In that case, the parent/legal guardian/Adult Family Member should be released from Custody rather than separated. The Immigration Enforcement Agency should not render children unaccompanied by separating them from parents/legal guardians/Adult Family Members unless such concurrent detention is operationally impossible or puts the security of the Child at risk. In that case, the parent/legal guardian/Adult Family Member should be released from Custody rather than separated. The Immigration Enforcement Agency should not render children unaccompanied by separating them from parents/legal guardians/Adult Family Members unless such concurrent detention is operationally impossible or puts the security of the Child at risk. In that case, the parent/legal guardian/Adult Family Member should be released from Custody rather than separated. The Immigration Enforcement Agency should not render children unaccompanied by separating them from parents/legal guardians/Adult Family Members unless such concurrent detention is operationally impossible or puts the security of the Child at risk. In that case, the parent/legal guardian/Adult Family Member should be released from Custody rather than separated. The Immigration Enforcement Agency should not render children unaccompanied by separating them from parents/legal guardians/Adult Family Members unless such concurrent detention is operationally impossible or puts the security of the Child at risk. In that case, the parent/legal guardian/Adult Family Member should be released from Custody rather than separated. The Immigration Enforcement Agency should not render children unaccompanied by separating them from parents/legal guardians/Adult Family Members unless such concurrent detention is operationally impossible or puts the security of the Child at risk. In that case, the parent/legal guardian/Adult Family Member should be released from Custody rather than separated. The Immigration Enforcement Agency should not render children unaccompanied by separating them from parents/legal guardians/Adult Family

70 Flores v. Lynch, 828 F.3d 898 (9th Cir. 2016). ABA JFS, Standards Relating to Corrections Administration 4.5 (basic concepts of due process should apply to a juvenile under correctional supervision). Standards Relating to Interim Status, 4.2 (the state shall bear the burden of proof at all levels that restraints on the juvenile’s liberty are necessary and that no less intrusive alternative will suffice), 4.5 (all Detention Facility classification systems shall include procedures by which new arrivals can appeal their classification levels); https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-immigration-and-admission-section-323-4 (policy of ORR as of July 2017 reflecting the decision in Flores v. Reno, No. 15-55208, 2017 U.S. App. LEXIS 11949 (9th Cir. July 5, 2017) (enforcing paragraph 24A [relating to bonds] of the Stipulated Settlement Agreement, Flores v. Reno, Case No. CV-83-4544-RJK [C.D. Cal. 1996]; Saravia v. Sessions, 2017 WL 5569958, at *1 (N.D. Cal. Nov. 20, 2017)) (“The minors and their sponors have the right to participate in a prompt hearing before an immigration judge in which the government’s evidence of changed circumstances is put to the test. By shipping the minors across the country for indefinite detention in a high-security facility before providing that hearing, the government has violated their due process rights.”).
2062 Members due to lack of family detention space or for any other reason.

2064 Comments: When Children are detained with adults, the Children
2065 are subjected to an increased risk of violence, criminal behavior,
2066 abuse, and coercion. Children shall only be placed in adult
2067 Detention Facilities with their parents or legal guardians where
2068 their safety is not compromised. In situations where concurrent
2069 detention would be operationally impossible or create a security
2070 risk for the Child, the Child and the parent/legal guardian/Adult
2071 Family Member shall be released. If the parent/legal
2072 guardian/Adult Family Member is not eligible for release, Custody
2073 of the Child should be transferred to the Custodial Agency. This
2074 rule shall in no way limit the general policy favoring the release of
2075 a Child into the Custody of a fit adult as set forth in Rule VII.D.
2076 supra.

2077 The federal courts have held that the protections afforded by
2078 Flores apply not only Unaccompanied Children, but to
2079 accompanied children as well.71

2080 2. Selection of Appropriate Placement for Unaccompanied
2081 Children

2082 Rule:

2083 a. Once a child is deemed an Unaccompanied Child, the
2084 Custodial Agency shall place the Child in the least restrictive
2085 setting in accordance with the Child’s Best Interests.

2086 i. Such placements shall include, but not be limited to:

2087 A. Foster Care;

71 U.S. Customs and Border Protection, National Standards on Transport, Escort, Detention, and Search §§ 1.9, 4.3 (Oct. 2015). ABA JJS, Standards Relating to Interim Status 10.2 (use of adult jails prohibited); Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5633(a)(13) (juveniles alleged to be or found to be delinquent and youths shall not be detained or confined in any institution in which they have contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges); S.2444 § 323(a)(1) (an unaccompanied alien child shall not be placed in an adult Detention Facility or a Detention Facility housing delinquent children); INS JPM 2.3.1 (“All post-arrest facilities, including temporary holding areas, will provide access to: … contact with family members who were arrested with the child.”); United Nations International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) Article 10(2)(b) (“[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible to adjudication”); ACA Juvenile Standards 3-JDF-2B-03, Comment (“If the facility is located on property shared with another corrections facility, such as an adult detention facility, it should be administered as a separate program.”); ACA Adult Standards § 3-4203 (adjudicated delinquent offenders and youths charged with offenses that would not be crimes if committed by adults do not reside in adult institutions).
A Child shall not be placed in a secure Detention Facility unless a determination has been made that a Child poses a risk to self or others if less restrictive alternatives (including therapeutic placements) are available, and that placement must be reviewed every 30 days. The Child shall have the right to an independent review of the Custodial Agency’s decision(s) that the Child be placed in a secure Detention Facility. The review shall satisfy due process requirements.

b. A Child shall not be placed in a secure Detention Facility unless a determination has been made that a Child poses a risk to self or others if less restrictive alternatives (including therapeutic placements) are available, and that placement must be reviewed every 30 days. The Child shall have the right to an independent review of the Custodial Agency’s decision(s) that the Child be placed in a secure Detention Facility. The review shall satisfy due process requirements.

c. Where the Child exhibits violent or criminal behavior that poses a danger to others or where the Child is at demonstrated risk of harm from smugglers, traffickers, or others who might seek to victimize or otherwise engage him in criminal, harmful, or exploitive activity, the Child shall be placed in the least restrictive Developmentally Appropriate placement consistent with his safety and the safety of others. Comments: Secure Detention Facilities are only to be used in extreme circumstances, for example, where the Child has previously exhibited violent or criminal behavior that poses a danger to others. The Rule intentionally modifies the Flores Agreement, which allows the secure detention of (1) Children who have proven to be "unacceptably disruptive of the normal functioning of the licensed program,..." (2) Children who are an "escape-risk," and (3) Children whose safety is in issue, according to INS officers. (Flores, ¶ 21). Such general language has, in the past, (1) allowed INS officers to place a Child in secure Detention Facilities for minor matters such as shouting, smoking a cigarette, or pushing another detainee; (2) allowed INS officers to classify a Child as an escape-risk based only on previous instances in which the Child did not exhibit reliable behavior; and (3) provided an overly elastic catch-all category given that the safety of the Child is highly subjective and non-reviewable. Thus, the Flores standards have been interpreted to grant too much discretion to DHS. The TVPRA has also incorporated the concept of least restrictive setting and ensuring the Best Interests of the Child in all placement decisions. The Custodial Agency shall not place a Child in a secure Detention Facility if less restrictive alternatives are available, such as a less restrictive Detention Facility equipped with counseling services and intensive Staff supervision. All placements of Children in Detention Facilities should be intensely reviewed and approved by a Custodial
Agency official responsible for coordinating placement of Children at Detention Facilities in that region, and shall be subject to the procedures concerning review and appeal set forth in Rule VII.F. supra. This rule precludes the Custodial Agency from using lack of available space as a justification for placing a Child in a more secure Detention Facility. 72

3. Procedure When a Child Turns 18 While in Custodial Agency Custody

Rule: When a Child turns 18 while in Custody, the Immigration Enforcement Agency should release him on his own recognizance. If the Immigration Enforcement Agency does not authorize release, it must consider alternatives to detention or placement in the least restrictive setting.

Comments: Children who turn 18 years old while in Custody, although legally adults, are still considered from a child welfare perspective to be children transitioning to adulthood. Many of these Children have been subjected to harrowing experiences, such as flight from great danger, separation from primary caregivers, traveling to and through foreign countries alone, introduction to a novel environment and, finally, Custody. The emotional effect of these circumstances alone militates in favor of continuing to treat them as Children even after they turn 18. As such, they should continue to possess certain residual rights even upon release from Custody.

72 See TVPRA § 235(c)(2)(A) (replace with statutory citation). ABA JIS, Standards Relating to Interim Status 3.1 (policy favoring release). Standards Relating to Interim Status 10.2 (use of adult jails prohibited), and 10.3 (policy favoring non-secure alternatives); Flores 11 (INS shall place detained minors in the least restrictive setting appropriate to the minor’s age and special needs); § 14 (general policy favoring release), and § 23 (the INS shall not place a minor in a secure Detention Facility if there are less restrictive alternatives available); INS JPM 4.1.2 (“When placing a juvenile in a facility, the Placing Official must strictly adhere to the guidelines contained in the Flores v. Reno decision.”); 4.1.3 (“A juvenile who remains in INS custody must be placed in an appropriate Non-Secure juvenile facility (licensed program) within 3 days (72 hours) from when INS assumes custody if he or she was apprehended in an INS district with a licensed program that has space. In all cases, juveniles must be placed within 5 days, with certain exceptions: Juvenile is an escape risk, criminal, or delinquent.”); United Nations International Covenant on Civil and Political Rights Article 10(2)(a) (accused persons shall be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons); Beijing Rules §17.1(b) (restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum), and § 19.1 (the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period), UN RPDJL § 2 (deprivation of the liberty of a juvenile minor shall be a disposition of last resort and should be limited to the minimum necessary period and should be limited to exceptional cases), and § 28 (the placement for the juvenile should take account of his particular needs, status and special requirements according to his age, personality, gender, the type of offence, and the juvenile’s mental and physical health, and the placement should ensure him protection against harmful influences and risk situations); ACA Juvenile Standards 3-JDF-5A-08 (factors for determination for juveniles for whom petition has been filed regarding secure or Non-Secure placement), 3-JDF-5A-09 (conditional release provision).
Custody. Often, when Children in ORR custody turn 18, ICE automatically transfers them to an ICE adult detention center. This is generally not an appropriate setting for a young person and violates federal law that requires the ICE Officer to “consider placement in the least restrictive setting.” A lack of such consideration has been held to violate federal law. 73

H. Transfers of Unaccompanied Children

1. Prohibition on Arbitrary Transfers; Presumption Against Transfer

a. The Custodial Agency shall minimize the number of times it transfers each Child. A Child should be transferred from one placement to another only when such transfer is voluntary and/or would be in the Best Interests of the Child. The factors to be considered in determining whether a transfer is in the Child’s Best Interests are the same as those set forth in the Rule VII.B. supra.

b. Transfer of a Child in Custody to a more restrictive placement should only occur under the following circumstances:

i. since his current placement, the Child has been convicted of a crime involving violence against a person or the use or carrying of a weapon;

ii. the Child has committed a violent act (whether directed at himself or others) while in Custodial Agency Custody or while in the presence of Custodial Agency personnel;

iii. the Child has engaged in a pattern of extremely disruptive behavior that has prevented the normal functioning of the facility in which he has been placed and a) the Custodial Agency has determined that removal is necessary to ensure the welfare of the Child or others, or b) a mental health specialist has

concluded that therapy at the current facility would not remedy the behavioral problems; or

iv. the Custodial Agency has determined that the Child is an escape risk, based on prior attempts to flee or escape from the Custodial Agency or prior failure to appear at an Immigration Court hearing where the failure was not otherwise explained.

Comments: Transfers of Children should not be made arbitrarily, nor on the basis of an unsubstantiated perception of danger to or by the Child. Nor should the threat of transfer or a more restrictive placement be used to intimidate or coerce Children. This Rule is designed to prevent such uses of transfer, as well as to prevent Children, whenever possible, from being arbitrarily transferred to more restrictive detention environments. Transfers should be minimized because they can substantially disrupt the lives of Children in Custody, thereby harming their ability to form close relationships and impeding the consistency of the legal assistance and other services that they are able to obtain. However, circumstances sometimes exist under which a transfer may be in the Best Interests of the Unaccompanied Child, for example, a transfer to long-term Foster Care.

2. Notice Requirements

Rule:

a. Prior to transfer, the Child and his Attorney shall be advised both orally and in writing, in the Child’s best language and, where applicable, dialect, of the following:

i. the reason he is being transferred;

Comments: Transfers of Children should not be made arbitrarily, nor on the basis of an unsubstantiated perception of danger to or by the Child. Nor should the threat of transfer or a more restrictive placement be used to intimidate or coerce Children. This Rule is designed to prevent such uses of transfer, as well as to prevent Children, whenever possible, from being arbitrarily transferred to more restrictive detention environments. Transfers should be minimized because they can substantially disrupt the lives of Children in Custody, thereby harming their ability to form close relationships and impeding the consistency of the legal assistance and other services that they are able to obtain. However, circumstances sometimes exist under which a transfer may be in the Best Interests of the Unaccompanied Child, for example, a transfer to long-term Foster Care.

a. Prior to transfer, the Child and his Attorney shall be advised both orally and in writing, in the Child’s best language and, where applicable, dialect, of the following:

i. the reason he is being transferred;

74 ABA JDS, Standards Relating to Corrections Administration 7.7 (unless the transfer involves an emergency relating to the health and safety of the juvenile or others, the department should provide notice at least seven days in advance to the juvenile and the juvenile’s parents or guardian). Flores v. 21 (a minor may be held in or transferred to a juvenile Detention Facility or a secure INS Detention Facility under certain circumstances), and ¶ 23 (INS will not place a minor in a secure Detention Facility if there are less restrictive alternatives available and appropriate in the circumstances). INS JPM 4.4.5 (“To the extent practical, the INS will attempt to locate emergency placements where culturally and linguistically appropriate community services are located.”). UN RPJDL § 26 (juveniles should not be transferred from one Detention Facility to another arbitrarily); https://www.federalregister.gov/documents/2014/12/24/2014-29984/standards-to-prevent-detect-and-respond-to-sexual-abuse-and-sexual-harassment-involving (The Interim Final Rule implementing the HHS Prison Rape Elimination Act (“PREA”) at § 411.68 provides for and prohibits transfer in certain circumstances as it relates to sexual abuse allegations and on-going investigations).
ii. his right to appeal the determination of appropriate transfer; and

iii. the procedures for such an appeal.

b. Prior to transfer, the Custodial Agency shall also provide actual and written notice to the Child’s Attorney and Child Advocate including the date of transfer and the location, address, and phone number of the new Detention Facility.

c. The Custodial Agency should provide such notice to the Child’s Attorney and Child Advocate in all cases prior to the transfer, and in no case less than 24 hours prior to such transfer, unless compelling and unusual circumstances arise, such as:

i. the Child poses an immediate threat to himself or others; or

ii. the Custodial Agency has made an individualized determination that the Child poses a substantial and immediate escape risk.

3. Right to Review and Appeal

a. The Child shall have the right to an expeditious, independent review of the Custodial Agency’s transfer decision. The review shall satisfy due process requirements. The Custodial Agency bears the burden of persuasion that the transfer is necessary.

b. If the Child is dissatisfied with the outcome of the independent review, he may seek de novo review in federal court.

Comments: In order to prevent arbitrary transfers and facilitate a Child’s ability to appeal, this Rule requires the Custodial Agency to provide all relevant information to the Child and his Attorney. The Rule essentially restates the Custodial Agency’s obligation under Flores, adding information about the appellate process to the information the Custodial Agency is required to provide the Child. With respect to the manner in which notice should be given to the

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iii. the procedures for such an appeal.

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4. Procedures Used During Transfer; Conditions of Transfer

a. Standard of Care During Transfer

Rule: The Custodial Agency shall make all reasonable efforts to protect the life, safety, and welfare of a Child during transfer. The Child should not be subjected to hardship or indignity during transfer such as the unnecessary application of restraints. Provision shall be made for the Child to have access to food and restroom facilities as necessary during transfer.

Comments: This rule reflects a standard that the INS previously, and now has recognized in its Detention Operations Manual and that ORR has recognized in its The ORR Guide: Children Entering The United States Unaccompanied. It additionally incorporates a protection from indignity advocated by the United Nations Rules and a common-sense admonition requiring that neither the Immigration Enforcement Agency nor the Custodial Agency deprive Children of basic necessities during transfer.76

75 S.2444 § 332(d)(2)(Y) (absent compelling and unusual circumstances, no Child who is represented by counsel shall be transferred from the Child’s placement to another placement unless advance notice of at least 24 hours is made to counsel of such transfer); Flora § 24(C) (minors should be provided with notice of the reasons for housing the minor in a Detention Facility or medium security Detention Facility what is the difference here?), ¶ 27 (no minor who is represented by counsel shall be transferred without advance notice to such counsel), INS JPM 4.4.1, 4.2.4 (“Juveniles placed in a medium-secure or secure detention facility must be provided written notice of the reasons why”) (“Juveniles represented by counsel in an INS proceeding may not be transferred without advance notice to such counsel except in an emergency, in which case, counsel shall be notified as soon as possible.”), 6.1.4 (“If a juvenile is represented by counsel, that counsel must be notified prior to transfer unless the safety of the juvenile is at issue, the juvenile is in an escape risk, or counsel has waived notice. In any case, counsel must be notified within 24 hours of the transfer.”), UN RP/HL. ¶ 22 (information on admission, place, transfer and release should be provided without delay to the parents and guardians or closest relative of the juvenile concerned).

76 The ORR Guide: Children Entering The United States Unaccompanied is found at https://www.acf.hhs.gov/program/otr/resource/children-entering-the-united-states-unaccompanied. INS DOM, Transportation, I (The INS will take all reasonable precautions to protect the lives, safety, and welfare of officers, other personnel, the general public, and the detainees themselves involved in the ground transportation of detainees). INS JPM 6 (“TNS Officers must adhere to the guidelines contained in the ‘Treaty Agreement.’”); UN RP/HL. ¶ 26 (the transport of juveniles should be carried out at the expense of the administration in conveyances with adequate ventilation and light, in conditions that should in no way subject them to hardship or indignity, ACA Juvenile Standards 3-JDF-3A-15, Comment (“Guidelines for transporting juveniles should emphasize safety and should be made available to all personnel involved in transporting juveniles. The facility should have policies governing the use of restraints.”)).
b. Child’s Possessions, Legal Papers and Medical Records

Rule: Whenever a Child is transferred from one placement to another, all of his possessions, legal papers, and medical records shall be transferred with him, the latter two categories in both paper and electronic format; provided, however, that if the Child’s possessions exceed the amount normally permitted by the carrier in use, the possessions may be shipped to the Child in a timely manner.

Comments: A Child’s possessions may be his only ties to his religion, culture, family, and personal history and may be essential to him maintaining a sense of individuality, self-expression, and identity. Thus, they may be critically important to his health and welfare while he is in the otherwise homogenizing environment of many Detention Facilities. Every effort should be made to ensure that such possessions accompany the Child at all times.77

Same-gender Escorts

Rule: A Child shall be escorted by at least one Immigration Enforcement Agency or Custodial Agency staff person of the same gender or gender identity at all times during transfer.

Comments: In order to appropriately safeguard the safety and welfare of Children, the Immigration Enforcement Agency or Custodial Agency shall make every effort to provide a staff person of the same gender or gender identity.78

Separation of Children from Adults During Transfer

Rule: A Child should be kept separate from detained adults during transfer. Where separate transportation is impossible, the Immigration Enforcement or Custodial Agency shall

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75 Flores ¶ 27 (minor shall be transferred with all of his possessions and legal papers); INS JPM 4.4.1 (“In such cases (where compelling circumstances necessitate transfer), juveniles should be transferred with all their possessions and legal papers . . .”), 6.1.3 (“Juveniles must be transported with their legal papers and possessions unless possessions exceed the amount normally permitted by the carrier, in which case possessions must be shipped in a timely manner.”).

77 Flores ¶ 27 (minor shall be transferred with all of his possessions and legal papers); INS JPM 4.4.1 (“In such cases (where compelling circumstances necessitate transfer), juveniles should be transferred with all their possessions and legal papers . . .”), 6.1.3 (“Juveniles must be transported with their legal papers and possessions unless possessions exceed the amount normally permitted by the carrier, in which case possessions must be shipped in a timely manner.”).

78 INS JPM 6.2.4 (“There must be one escort of the same sex per juvenile.”); OIG Report Chapter 2, Same Sex Transport, Recommendation 3 (The INS should implement procedures that require same-gender escort of juveniles); ACA Juvenile Standards, 3-JDF-3A-07 (“When both males and females are housed in the same facility, at least one male and one female staff member are on duty at all times.”); U.S. Customs and Border Protection, National Standards on Transfer, Escort, Detention, and Search § 5.4.
take all necessary precautions to ensure the safety of the Child, including the physical separation of the Child and detained adults within the vehicle.

Comments: The rule generally follows the rule observed by the INS/DHS pursuant to Flores. The concerns prompted by holding Children in Custody with adults apply equally to the context of transfers.79

A. Legal Rights

1. Right to Legal Information and Legal Representation

Rule:

a. Every Child shall have access to meaningful legal representation throughout all Immigration Questioning, Immigration Adjudications, appellate proceedings, and any court proceedings relevant to his immigration case. Each Child therefore shall have the right to legal representation in these matters by an Attorney who is knowledgeable about

79 Flores ¶ 25 (unaccompanied minors shall not be transported in vehicles with detained adults); INS JPM, 6.1.1. ("Do not transport juveniles with detained adults unless: [(i)] juveniles are being transported from the place of arrest to an INS office; or [(2)] separate transportation would be impractical (but then the juvenile must be kept separate, with precautions taken for his safety). Unaccompanied juveniles will be separated from unrelated adult males by separate passenger compartments or by an empty row of seats."); ACA Juvenile Standards, 3-JDF-3A-14, Comment ("All juvenile movement from one location to another should be controlled and supervised by staff, including individual and group juvenile movement to and from work and program assignments."); 3-JDF-3A-15, Comment ("Guidelines for transporting juveniles should emphasize safety and should be made available to all personnel involved in transporting juveniles."); U.S. Customs and Border Protection, National Standards on Transfer, Escort, Detention, and Search § 5.6. 80 OIG Report, Chapter 2, Documentation of Transportation and Detention, Recommendation 4 (The INS should implement procedures that require juvenile transportation and detention custodial records); UN RPJDL ¶ 21 (complete records concerning the day and hour of admission, transfer and release shall be kept).
immigration law. When a Child is unable to obtain the services of an Attorney with his own resources, the government shall appoint and notify an Attorney at the government’s expense within 72 hours.

b. Each Child shall have the right to communicate regularly with his Attorney. Privacy and confidentiality shall be ensured for all such communications. See Rule V.B.2. supra and Rule VIII.B.3. infra.

c. Every Child shall be informed within 72 hours of apprehension, and in any event prior to the Child’s initial meeting with his Child Advocate (if one has been appointed), of his legal rights by means of a “Know Your Rights” presentation by an Attorney. The Attorney shall be independent of the Immigration Enforcement Agency and the Custodial Agency although he need not be the same Attorney who is appointed to represent the Child. The Attorney’s presentation shall be private and confidential and include an overview of the detention and removal procedures and a discussion of the information provided to the Child by the Immigration Enforcement Agency in its Notice of Rights discussed in Rule VII.C.1. supra. The presentation should also include an explanation that the Child’s communications with Detention Facility Staff, Foster Care parents and caseworkers, and Custodial Agency staff are not confidential, an explanation that the Child has the right to speak privately on the phone, and a summary of the Child’s other rights set forth in these Standards. After the presentation, the Child should be given the opportunity for an individual consultation.

d. The Child’s Attorney should not be required to file a notice of appearance, or similar form, prior to a pre-representational visit. Attorneys, Legal Services Providers, interpreters, and Child Advocates (if one has been appointed) should be given sufficient access, but may be required to provide identification and submit to Detention Facility screening to exclude those who would present a danger to Unaccompanied Children.

e. A Child in Custodial Agency Custody shall not be requested to, and may not, give consent to any immigration action, unless first afforded an opportunity to consult with an Attorney.
The participation of an Attorney on behalf of a Child subject to Immigration Questioning and/or Immigration Adjudication is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those matters. Ample in-person, telephonic, or video access therefore shall be provided. Once secured, the Attorney must promptly advise the Child and take actions necessary to protect the rights and legal interests of the Child. See Rule III.H. supra. It should be noted that a Child’s conversations with counselors and therapists contracted by the Custodial Agency or Detention Facility may not be treated as confidential or privileged. In contrast, a Child Advocate cannot be compelled to testify or provide evidence concerning information provided by the Child.\(^{81}\)

81 American Bar Association Commission on Immigration Policy, Practice and Pro Bono Report to the House of Delegates (Feb. 2001) (Notes ABA support for the appointment of counsel at government expense for unaccompanied children for all stages of immigration processes and proceedings); ABA Standards of Practice (“Effective representation of parties is ‘essential’ and . . . courts should take active steps to ensure that due process is provided in every case.”); ABA JIS (In delinquency cases, the juvenile should have effective assistance of counsel at all stages of the proceeding and the right to counsel should attach as soon as the juvenile is taken into custody by an agent of the state. Procedural Precedents, Part V: §2.444 (Section 332(c) requires that an unaccompanied child have counsel in “all proceedings and actions relating to the child’s immigration status or other actions involving the INS and appear in person for all individual merits hearings before the Executive Office for Immigration Review and interviews involving the INS.”) Sections (d), (f) and (e), respectively, provide that counsel have reasonable access to the child; be given “prompt and adequate notice of immigration matters relating to the Child; and continue to represent the Child until matter is completed, the Child departs the United States, the Child is granted withholding of removal, protection under the Convention Against Torture, asylum, permanent resident status or reaches 18 years of age. Mezei v. U.S. ex rel. Re In Gaule, 345 U.S. 206, 212 (1953) (Holds that aliens, including those present illegally, are guaranteed due process of the law after the Fifth and Fourteenth Amendments); Plyler v. Doe, 457 U.S. 202, 211 (1982) (Holds that aliens are entitled to equal protection of the laws under the Fourteenth Amendment).” Article 22 (unaccompanied children seeking refugee status shall “receive appropriate protection and humanitarian fortitude in the enjoyment of applicable rights set forth in the Convention.”). Article 37(b) (“Every child deprived of his liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”). Beijing Rules (Rule III.H. requires that children have the right to counsel). ICERD (Section 24 recommends that all unaccompanied children be “provided promptly with legal advice and representation throughout the determination procedure, including any appeals . . . at no cost to the child or those caring for the child”). Detailed and Deprieved of Rights (citing to In re Gaule, 387 U.S. 1 (1967); Prison Guard or Parent: INS Treatment of Unaccompanied Refugee Children (Women’s Commission for Refugee Women and Children, May 2002), p.6 (Notes various reasons why children should have a right to counsel, among them: the fact that asylum proceedings are very complex and may not be understood by children, a recent study revealing that represented asylum seekers see four to six times more likely to win their asylum cases, and children are often held in remote detention facilities which create obstacles for pro bono legal services with limited resources to overcome). IBCR Statement, B(12) (“Separated Children should have legal representation at all stages of the refugee process, including any appeals or reviews. Such legal services should be at no cost to the child. Legal representatives should have expertise in refugee law proceedings, be skilled in communicating with and representing child

Comments: The participation of an Attorney on behalf of a Child subject to Immigration Questioning and/or Immigration Adjudication is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those matters. Ample in-person, telephonic, or video access therefore shall be provided. Once secured, the Attorney must promptly advise the Child and take actions necessary to protect the rights and legal interests of the Child. See Rule III.H. supra. It should be noted that a Child’s conversations with counselors and therapists contracted by the Custodial Agency or Detention Facility may not be treated as confidential or privileged. In contrast, a Child Advocate cannot be compelled to testify or provide evidence concerning information provided by the Child.\(^{81}\)

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2. Right to Information and Access to File

Rule: The Child, his Attorney, and his Child Advocate should have unrestricted access to all non-classified records in the possession of any Immigration Enforcement Agency or Custodial Agency relating in any way to the investigation, Removal Proceedings, or Custody of the Child. Where such records are classified, the Child’s Attorney should request access.

Comments: The right to access records should not be limited to custodial records. Currently, Children must make a FOIA request in order to gain access to documents gathered by DHS and HHS. In order to ensure that Children’s due process rights are respected, this obstacle must be eliminated. Uncertainty creates unnecessary anxiety in a Child and may make him receptive to rumors, bad advice, or unrealistic expectations. Unrestricted access to all documents will help ensure that he is informed generally about the process, where he stands in the process, what decisions have been made, and what results are possible.82

3. Procedures to Challenge Violations of The Rights of Children in Custody

Rule:

a. Each Child in Custody shall have the right to challenge violations of their rights, including the denial or limitation of any rights set forth in these Standards.

Comments: The right to access records should not be limited to custodial records. Currently, Children must make a FOIA request in order to gain access to documents gathered by DHS and HHS. In order to ensure that Children’s due process rights are respected, this obstacle must be eliminated. Uncertainty creates unnecessary anxiety in a Child and may make him receptive to rumors, bad advice, or unrealistic expectations. Unrestricted access to all documents will help ensure that he is informed generally about the process, where he stands in the process, what decisions have been made, and what results are possible.82

82 ABA JJS, Standards Relating to Interim Status 5.3(A) (juvenile shall be informed of the right to silence, the making of statements and the right to presence of an attorney, including providing this information in the juvenile’s native language) and Standards for the Juvenile Facility Intake Official, 6.5(A) (the intake official should inform the juvenile of his rights, inform the juvenile that his parent will be contacted immediately to aid in effecting release and explain the basis for detention); Flores Ex. 1 (A)(4) (licensed programs should provide legal services information regarding the availability of free legal assistance and the right to be represented by counsel at no expense to the government); INS DOM, Group Presentations on Legal Rights, I (Detention Facilities holding INS detainees shall permit authorized persons to make presentation to groups of detainees for the purpose of informing them of U.S. immigration law and procedures); INS JPM Secure Juvenile Detention Facility Standard 60-61 (incorporating ACA Juvenile Standards, 3-JDF-5D-01, -02); CRC, Article 37(d) (Every child deprived of his liberty shall have the right to prompt access to legal and other appropriate assistance); UN RPJDL, § 18(a) (Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal adviser); ACA Juvenile Standards 3-JDF-5D-01, -02 (access to counsel and courts); See 8 U.S.C. § 1232 (c)(6) (Child Advocate cannot be compelled to testify or provide evidence concerning information provided by the Child); 82 ABA JJS, Standards Relating To Juvenile Records and Information Systems 5.2 (juvenile, his parent and juvenile’s attorney should be given access to all records and information collected or retained by a juvenile agency).
The Custodial Agency or Temporary Placement Facility shall establish a written grievance procedure to hear such challenges expeditiously, and a Child shall have the right to assistance by his Attorney or any other individual of his choosing in pursuing any grievance. The grievance procedure should include the right to appeal to a senior Custodial Agency or Temporary Placement Facility official.

The Child shall also have the right to report the conditions to an outside agency or independent monitor.

c. The Custodial Agency or Temporary Placement Facility shall provide each Child in Custody with notice of his rights while in Custody and of the grievance procedures to follow if his rights are violated.

d. Detention Facility Staff and residents should be fully informed of grievance procedures.

e. Retaliation for filing grievances should be strictly prohibited.

Comments: After appealing the conditions of his Custody to a senior Custodial Agency or Temporary Placement Facility official, the Child would, of course, have the right to appeal any decision from such an official to federal court or any other appropriate body. Further, nothing in this Rule is intended to limit the Child’s right to challenge his Custody itself or his placement in Immigration Court, federal court, or before any other appropriate body. See Rule VII.F. supra.

Rule VII.F.83

B. Physical Conditions

1. Standards for Detention Facilities; Physical Treatment of the Child

Rule:

a. Safety. The Immigration Enforcement Agency and the Custodial Agency shall ensure the safety of every Child in

83 CRC, Art. 25 (“Children who are placed in a care institution have the right to periodic reviews of their circumstances.”); IBCR Statement B(10) (“Separated Children should be enabled and encouraged to voice their views, concerns and complaints regarding their care and guardianship, education, health services and legal representation.”); Flores, VII. 24. B. (A minor may seek judicial review in federal district court of the INS’s placement of him in a particular facility or of the compliance of that facility with the standards set forth in Flores).
its Custody, whether the Child is in temporary Custody, a Secure Facility, or any other type of Custody.

b. **Point-Based Behavior Tracking Systems.** Detention Facilities should not rely solely on point-based systems to reward compliance with the rules and regulations of a Detention Facility. If a Child displays violent behavior or repeated opposition to the reasonable requests of Staff of a Detention Facility, the Detention Facility may use a point-based behavior monitoring system, but only in conjunction with other behavioral monitoring models until the violent or oppositional behavior subsides.

c. **Discipline.** The Custodial Agency shall formulate standards and rules for discipline giving due consideration to the differing ages and levels of maturity of Children detained in Custody, and should be sensitive to the needs of Children. Such standards should include a grievance procedure in which a Child has the right to assistance by his Attorney or any individual of his choosing. A Child shall not be subjected to corporal punishment, humiliation, or mental abuse. Any sanctions employed shall not:

i. adversely affect the Child’s physical or mental health; or

ii. deny the Child regular meals, sufficient sleep, exercise including outside play, medical care, correspondence privileges, education, or legal assistance.

d. **Restraints.** Restraints should only be used in extremely rare instances in which the Staff has determined that no reasonable alternative to such restraints would prevent escape or physical injury to the Child or others.

i. Should the use of physical restraints be deemed necessary, Staff using them should document in writing the type of restraint used and the justification for such use.

ii. Staff should use only the minimum amount of force for the minimum amount of time necessary to gain control of the Child and under no circumstances should force or physical restraints be used to punish a Child.
iii. Restraints should never be used in a manner that causes physical, emotional, or psychological pain, extreme discomfort, or injury.

iv. A restrained Child should be monitored frequently to ensure his safety.

e. Isolation: Like restraints, isolation should be avoided and used only in accordance with the ABA Juvenile Justice Standards on isolation. In addition, isolation should be documented and imposed for as short a time as possible.

Comments: These rules demand a high standard of care for Children in Detention and Temporary Placement Facilities to ensure that detained Children receive care that meets their physical, emotional, religious, and educational needs. Additionally, these rules encourage the Custodial Agency to house Children in the “least restrictive setting.” See, e.g., Rule VII.B. and Rule VII.G.1. and 2. supra. All circumstances concerning any use of force or the imposition of unusual restrictions on a Child, including the circumstances that gave rise to such sanctions, shall be reported immediately to the Detention Facility administrator and the Child’s Attorney, Child Advocate, and parent or legal guardian. The Custodial Agency or Immigration Enforcement Agency should never use threats or promises regarding the Unaccompanied Child’s immigration case to influence his behavior.84

84 ABA JJS, Standards Relating to Interim Status 10.7 (all juveniles held in interim detention should be afforded access to the educational institution they normally attend, or to equivalent tutorial or other programs adequate to their needs), Standards Relating to Corrections Administration 7.8 (it should not be necessary to use mechanical restraints within the Detention Facility; the program director may authorize the use of mechanical restraints during transportation only; chemical restraints may be used only under extreme situations and under strict controls), and VIII (discipline standards); Flores v. E. S. C. Res. 663C (XXIV), U.N. Doc. A/CONF/61/1, (1957) § 20 (young prisoners shall receive physical and recreational training), § 22 (availability of medical services, including psychiatric care); § 27 (discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life), and § 33 (instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment); ABA Juvenile Standards, 3-JDF-5C (Principle: a written body of policy and
Consistent with treating Children with respect, dignity, and particular concern for their status as Children, physical restraints should not be used on Children at any time except as a last resort, and isolation should be used infrequently. The rule not only severely limits the use of restraints, but also requires that any Staff using restraints on a Child document such use and be held accountable for any misuse. Medication should never be used to subdue an uncooperative Child. 83

2. Physical Condition and Operation of Detention Facilities

Rule:

a. General Standard. The Custodial Agency shall hold each Child in the least restrictive Detention Facility that is safe and sanitary and that protects vulnerable Children. Detention Facilities should be designed and maintained with due regard to the need of Children for privacy, sensory stimuli, opportunities for association with peers, participation in sports and exercise, and leisure-time activities.

b. Compliance with applicable law. Any Detention Facility used for Custody must meet applicable federal, state, and local laws and regulations. The absence of funds is not a justification for allowing a Detention Facility’s conditions, resources, or procedures to fall below such standards.

Detention Facilities should be designed and maintained to procedure the Detention Facility’s academic, vocational education, and work programs for juveniles) and 3-JDF-5G (Principal: a written body of policy and procedure governs the Detention Facility’s mail, telephone, and visiting services for juveniles).

85 ABA JJS, Standards Relating to Corrections Administration 7.8(A) (it should not be necessary to use mechanical restraints within the Detention Facility; mechanical restraints may only be used during transportation) and 7.11(I) (governing isolation); IMMIGRATION AND NATURALIZATION SERVICE DETENTION OPERATIONS MANUAL (2002) (“INS DOM”), Transportation, III (A) (officers shall use authorized techniques and common sense when applying restraints), and Use of Force, III.B. (setting forth principles governing the use of force and application of restraints with adult detainees); INS JPM 6.1.5 (“Escorting Officers have the responsibility to determine the need and level of restraints used at any time while escorting a detainee.”); UNITED STATES DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, UNACCOMPANIED JUVENILES IN INS CUSTODY, Report No. I-2001-009 (2001) (“OIG Report”), Chapter 2, Participation in sports and exercise, and leisure-time activities. Any Detention Facility used for Custody must meet applicable federal, state, and local laws and regulations. The absence of funds is not a justification for allowing a Detention Facility’s conditions, resources, or procedures to fall below such standards. Detention Facilities should be designed and maintained to procedure the Detention Facility’s academic, vocational education, and work programs for juveniles) and 3-JDF-5G (Principal: a written body of policy and procedure governs the Detention Facility’s mail, telephone, and visiting services for juveniles).
minimize, for example, the risks of danger associated with fire and environmental hazards.

c. Physical Housing Requirements. All Detention Facilities shall provide, at minimum, a bed with a mattress, sheet, blanket, and pillow that are appropriate to local weather conditions; regular access to toilets, sinks, and showers; adequate temperature control and ventilation; and adequate supervision to protect the Child from others while in Custody.

d. Clothing. If possible, the Child should have the right to wear his own clothes. If not possible or if the Child prefers, the Custodial Agency should permit him to wear clothing typical of U.S. citizen children and should issue such clothing to the Child.

Comments: This Rule addresses the safety of other aspects of the Detention Facility besides its population. (As set forth in Rule VII.B. supra, for his safety, a Child should not be housed in Detention Facilities that also house adults or children accused of being or adjudicated delinquent except in the extremely limited circumstances set forth in Rules VII.B. and VII.G.2.b. supra.) Detention Facilities should provide access to sanitary facilities; drinking water and food as appropriate for the Child’s culture and religion; adequate temperature control; and adequate protection. Children should be allotted a sufficient amount of clothing and hygiene products that will provide for dignity and respect for them as individuals. Clothing should be suitable to the environment, both indoor and outdoor, and should not be ill-fitting. Children should not, for example, be provided only sweatpants and sweatshirts, nor should they be given clothing, such as flip-flops, as a means to restrict their movement. Only if the wearing of civilian clothing will pose a substantial security risk to the Child or to the Detention Facility should the Child be required to wear a uniform.86
3. Right to Privacy

Rule:

a. In General

A right to individual privacy shall be honored regardless of
the Detention Facility or Foster Care setting in which a Child
is held. Because different Children will desire different
levels of privacy and because Children will, by their nature,
often change their minds, substantial allowance should be
made for a Child’s individual and varying choice.

b. Strip Searches

Strip searches shall not be allowed in the absence of
documented probable cause that they are necessary.

c. Personal Belongings During Custody

i. Every Child shall be permitted to possess personal
effects and to have sufficient private storage facilities
for those effects.

ii. Personal effects that the Child does not choose to
retain or that are confiscated should be placed in safe
custody. Any items, including money, retained by
the Detention Facility should be inventoried. The
Child should sign the inventory and receive a copy
of it. A copy should also be provided to his Attorney
and Child Advocate. All items so retained by the
Detention Facility should be made available if
for the District Juvenile Coordinator to…arrange “to place juveniles in facilities that are safe and sanitary
and consistent with INS’ concern for the particular vulnerabilities of juveniles”); 2.3.6 (District Juvenile
Coordinator required to make weekly visits where juveniles are being housed to …“assess the juveniles’
wellness … and should ensure that their needs are being met … “); 2.3.3 (“if a juvenile cannot be immediately
released (see Section 2.4), and no licensed program is available for immediate placement, he may be held by
INS contract facility with separate accommodations for juveniles, or in a state or county juvenile detention
facility that separates them from delinquent offenders. Make every effort to ensure the safety and well-being
of juveniles placed in these facilities (see Section 4 for further guidance on the use of secure juvenile detention
facilities.”); Beijing Rules: § 26 (the objective of training and treatment of juveniles placed in institutions is
provide care, protection, education and vocational skills, with a view to assisting them to assume socially
constructive and productive roles in society); ACA Juvenile Standards, 3-JDF-2C-01 through 3-JDF-2G-02
(juvenile Detention Facility standards), 3-JDF-2A-01 through 3-JDF-2A-04 (building and safety codes
compliance), 3-JDF-1A-02 (“program meets applicable licensing requirements of the jurisdiction in which it
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compliance), 3-JDF-1A-02 (“program meets applicable licensing requirements of the jurisdiction in which it
is located”).
required by the Child and otherwise returned to the
Child on release or transfer.

iii. A Child shall generally be allowed to keep in his
possession reasonable quantities of the following:

- religious items, religious and secular reading
- material, legal and personal correspondence,
- photographs, and any other materials or objects
- important to the Child, except as provided in Rule
  VIII.B.3.c.iv. infra.

iv. Reasonable quantities of the items listed in Rule
  VIII.B.3.c.iii. supra may be denied to a Child only if
  the Detention Facility Staff determines that they pose
  a security threat to the Detention Facility. Any such
  item should be inventoried and placed with the
  Director of the Detention Facility for safekeeping, to
  be returned to the Child upon his release.

v. All Detention Facilities that hold Children should
  have written policies and procedures for the handling
  of contraband (i.e., all items that pose a direct or
  immediate threat to the health, safety or security of
  people or property). The policy should include a
  requirement to handle religious items with particular
  care. Each Child should be given both oral and
  written notice of the policy in the Child’s language
  and, where applicable, dialect.

d. Interview Rooms

The Custodial Agency shall ensure that interview rooms
providing a confidential, quiet, non-distracting,
Developmentally Appropriate setting in which the Child
feels comfortable are available in Detention Facilities and
other placements for use by Attorneys, Child Advocates, and
others in meeting with Children.

e. Confidential Communications

Every Child shall be entitled to confidential communications
with Attorneys, Child Advocates, consular offices, media,
mental and physical health professionals, and Government
Oversight Agencies. To the extent that a Child’s
communication with medical professionals contracted by the
Custodial Agency will not be kept confidential, the

required by the Child and otherwise returned to the
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with Attorneys, Child Advocates, consular offices, media,
mental and physical health professionals, and Government
Oversight Agencies. To the extent that a Child’s
communication with medical professionals contracted by the
Custodial Agency will not be kept confidential, the
physician or clinician shall so inform the Child in advance of any substantive communication.

f. Medical Records

A Child’s medical records include both mental and physical health records. Such records are confidential and should not be shared with any person or entity including DHS for law enforcement purposes.

g. Privacy for Parenting Children

The Custodial Agency shall provide private space for any Child who is also parenting his or her own child while in Custody.

C. Services for Unaccompanied Children

1. Language/Interpreter Rights

87 ABA JJS, Standards Relating To Interim Status 10.7 (a right to individual privacy should be honored in each institution); CRC, Article 16 (No child shall be subjected to arbitrary or unlawful interference with his privacy); ACA Juvenile Standards 3-JDF-3A-19 (requiring use of alternatives to strip searches where possible). Flores ¶ 27 (minor shall be transferred with all of his possessions and legal papers); INS DOM, Funds and Personal Property (describing the standards and procedures for personal property in adult INS detention); UN RPJDL § 35 (the right of every juvenile to possess personal effects and to have adequate storage facilities for them should be fully recognized and respected); ACA Juvenile Standards 3-JDF-2E-12 (space for storing personal property should be provided); 3-JDF-3A-19 (Detention Facility should have a written policy on contraband); 3-JDF-5A-15 (personal property retained by the Detention Facility should be itemized).

Comments: In the past, some Detention Facilities’ standard operating procedures required a strip search after every contact visit with a visitor. (For the Child’s right to private visits, see Rule III.L.1 supra.) This procedure unnecessarily demeans and frightens Children. In the unusual case when a strip search is necessary and supported by documented probable cause, it must be conducted by a person of the same gender as the Child, who should also be someone with an understanding of the Child’s cultural background.

The right of every Child to possess personal effects and have private storage facilities for them shall be fully recognized and respected.

A corollary to the Child’s right recognized by Flores to participate in religious services is the Child’s right to possess all religious items necessary to maintain his religious practices.87

87 ABA JJS, Standards Relating To Interim Status 10.7 (a right to individual privacy should be honored in each institution); CRC, Article 16 (No child shall be subjected to arbitrary or unlawful interference with his privacy); ACA Juvenile Standards 3-JDF-3A-19 (requiring use of alternatives to strip searches where possible). Flores ¶ 27 (minor shall be transferred with all of his possessions and legal papers); INS DOM, Funds and Personal Property (describing the standards and procedures for personal property in adult INS detention); UN RPJDL § 35 (the right of every juvenile to possess personal effects and to have adequate storage facilities for them should be fully recognized and respected); ACA Juvenile Standards 3-JDF-2E-12 (space for storing personal property should be provided); 3-JDF-3A-19 (Detention Facility should have a written policy on contraband); 3-JDF-5A-15 (personal property retained by the Detention Facility should be itemized).
a. A Child shall have the right to communicate in his best language and dialect whenever he chooses. A Child therefore should not be discouraged from speaking in his best language and dialect to anyone, including other Children in Custody.

b. A Child whose best language and dialect is not spoken by the Detention Facility Staff or Foster Care parents or caseworker shall have the right to the services of a trained, independent interpreter in his best language and dialect provided free of charge whenever necessary to ensure that his Detention complies with these Standards, and in particular during medical examinations and disciplinary proceedings. The Custodial Agency shall also provide the Child with such an interpreter for all communications with his or her Attorney at government expense. Any Child whose best language is not English shall have the right to the services of a trained, independent translator to translate any official documents which the Child receives into his best language and dialect to enable full comprehension of his rights. Similarly, the Child shall have the right to the services of a trained, independent translator to translate any documents which the Child sends pertaining to his immigration matter into English. A Child’s best language and dialect should be determined upon his arrival at the Detention Facility or the Foster Care setting.

Comments: The maintenance of the best language and dialect is a critical factor in retaining identity. Indeed, the Custodial agency should in some circumstances assist Children in acquiring and maintaining proficiency in their best language and dialect. However, in the past, Children in Detention have been disciplined for using their best language and dialect to communicate with other Children. This rule will ensure that Children are encouraged to use and preserve their own language and dialect. Access to an interpreter is essential to assist Children in Detention Facilities and Foster Care settings that lack any personnel proficient in their best language and dialect to exercise the rights outlined in these Standards.

Flores, V. 12. A. 4. (acknowledging the INS’s responsibility to locate interpreters to facilitate processing of minors); Augustin v. Sava, 735 F. 2d 32, 37 (2d Cir. 1984) (an asylum applicant “must be furnished with an accurate and complete translation of official proceedings...translators and interpreters to enable the applicant to place his claim before the judge.”); INS DOM, Access to Legal Material, III. L. (mandating that Detention Facilities establish procedures to help non-English-speaking and/or illiterate detainees access legal materials, draft legal documents and contact pro bono legal assistance; INS JPM, Secure Juvenile Detention Facility Standard 126, 54, 93 (incorporating ACA Juvenile Standards 3-JDF-05A-...
2. Right to Health Care

a. Basic Health Care

**Rule:**

i. Every Child has a right to be examined by a physician immediately upon placement in any Detention Facility or Foster Care setting to record any evidence of prior ill-treatment, identify any physical or mental condition requiring medical attention, and ensure that any necessary screenings and immunizations are provided. As soon as possible after being taken into Custody, each Child should be interviewed in his own language and dialect by a licensed psychological professional who should then prepare an individualized psychosocial needs assessment identifying any factors relevant to the specific type and level of care and program required by the Child. When special rehabilitative treatment is required, trained personnel of the Detention Facility or Custodial Agency should prepare a written, individualized treatment plan specifying the objectives, timeframe, and means of

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15. 3-JDF-3C-03, 3-JDF-4C-07; CRC Article 40(b)(vi) (“Every child alleged as or accused of having infringed the penal law has at least the following guarantees: ... to have the free assistance of an interpreter if the child cannot understand or speak the language used”), UN RPJDL, I.6 (“Juveniles who are not fluent in the language spoken by the personnel of the detention facility should have the right to communicate with the child in their mother tongue.”), 70 (“Legal representatives should have the skills to interview and support children throughout the asylum procedure; they should make every effort to communicate with the child regularly, openly, and in language which the child can understand.”), ACA Juvenile Standards, 3-JDF-3C-03 (rulebook must be in language understood by juvenile); 3-JDF-4C-07 (orientation materials must be in language understood by juvenile); IBCR Statement, A(5) (“Separated children must be provided with gender sensitive and child-friendly interpreters who speak their preferred language whenever they are interviewed or require access to services or legal procedures (noting that “a problem identified repeatedly in our interviews was the unavailability of translation” and recommending that the INS “ensure that all written rights advisory forms are translated into the language spoken by each child and provided to each child” and that the INS “provide a sufficient number of trained interpreters at facilities housing unaccompanied children.”)).
treatment. When a licensed psychological professional finds that a Child should be seen by a psychiatrist, that Child should promptly be so referred to and seen.

ii. Where a Child is held in detention for more than 30 days, individualized psychosocial needs assessment for the Child shall be reviewed and modified as necessary. The assessment shall specify short- and long-term treatment objectives. The assessment shall be conducted by competent physical and mental health professionals who take into consideration the particular requirements of the Child as dictated by his age, personality, gender, mental and physical health, and life experiences. Individual plans shall be implemented and closely coordinated through an operative case management system.

iii. Every Child in a Detention Facility or Foster Care should receive adequate medical care, both preventive and remedial, including dental, ophthalmologic, and mental health care, as well as medicines and special diets as medically indicated. Female Children should have access to gynecological and reproductive health services and counseling.

iv. The Detention Facility or Custodial Agency should have a written health policy that designates a health-care-providing agency employing pediatric or family practice providers to make all final medical judgments with respect to Children. All workers in the health-care-providing agency should be licensed, certified, or registered by the appropriate state and/or local authorities.

v. The health-care-providing agency should direct to Detention Facility management or the Custodial Agency regular reports on the health of each Child in the Detention Facility or Foster Care, and should review each policy and program in the health care delivery system at least annually. The Child, the Child’s Attorney, or the Child Advocate has the right to seek an independent medical or psychosocial opinion at any time with the Child’s consent.
vi. All Detention Facility personnel or Foster Care parents should be trained in basic first aid, and the health care-providing agency should have procedures in place to handle medical emergencies 24 hours per day, either directly or through a prompt referral to a local provider.

Comments: This rule is intended to enhance the medical care provided to Children in Custody. The health-care-providing agency shall employ pediatricians or family practice providers to ensure that the medical treatment provided offers both sufficient expertise concerning, and specific attention to, the needs of Children and, in particular, adolescent girls. Detention Facilities and Custodial Agencies should conduct training in personal hygiene as necessary as a preventive medical service. Such training should also include reproductive health and family planning, STD/HIV prevention, eating habits, exercise, and alcohol and drug abuse prevention. Medical staff should be familiar with recent research about any health or nutritional issues related to the Child’s culture or country of origin and any relevant U.S. guidelines on health concerns. Trained, independent interpreters for physicians and psychologists should be provided as necessary and should not be Detention Facility Staff or Foster Care parents to preserve the Child’s confidentiality. Special requirements for Children who have experienced sexual abuse or harassment have been established by federal law and regulation. The following federal regulations provide for access to reproductive health care in accordance with state laws and mandate that health care providers must engage the Child’s Attorney in discussions.89

89 ABA JIS, Standards Relating To Rights of Minors IV (provision of medical care to juveniles); §2444 ¶ 12A(A)(ii) (Detention Facilities will provide medical assistance if the minor is in need of emergency services) and Ex. I (A)(2) (licensed programs shall provide appropriate routine medical and dental care, family planning services, and any relevant U.S. guidelines on health concerns. Trained, independent interpreters for physicians and psychologists should be provided as necessary and should not be Detention Facility Staff or Foster Care parents to preserve the Child’s confidentiality. Special requirements for Children who have experienced sexual abuse or harassment have been established by federal law and regulation. The following federal regulations provide for access to reproductive health care in accordance with state laws and mandate that health care providers must engage the Child’s Attorney in discussions.)
b. Physical Integrity

Rule:

i. A Child shall not be subjected to medical research or experimentation of any kind. This Rule does not preclude a Child from receiving a medical treatment that is not generally available and that has a reasonable potential for therapeutic value.

ii. While in Detention, the Child should receive an initial medical exam to, among other things, screen for communicable disease. After the initial medical exam, the Child should be examined and treated only:

A. where the Child gives informed consent;
B. where his parent/legal guardian gives informed consent;
C. in the absence of a parent/legal guardian, where the Child Advocate gives informed consent;
D. upon order of a court; or
E. in an emergency, including a communicable disease such as tuberculosis that threatens the health of others, in which case any such consent or order is unnecessary.

Comments: This rule reinforces the requirement of consent by the Child, or someone appropriate to consent for the Child, before medical treatment is administered, except in emergency circumstances. This includes the administration of any medication including psychotropic medication. 90

examination requirements), 3-JDF-4C-25 (dental care), 3-JDF-4C-26 (emergency care), 3-JDF-4C-26 through C-30 (emergency care and first aid), 3-JDF-4C-33 (agreement with local hospital for transfer); 3-JDF-4C-34 (health education); IBCR Statement, B(11) (“Separated children should have access to health care on an equal basis with national children. This should include dental care, mental health care and, for adolescents, sexual and reproductive health care.”); HHS Prison Rape Elimination Act (“PREA”) Interim Final Rule, §§ 411.93(d) and 411.55 (requirements for Children who have experienced sexual abuse and harassment).

90 ABA JIS, Standards Relating To Rights of Minors IV (provision of medical care to juveniles); S.2444 § 323(A)(4)(a)(ii) (at a minimum minors should be provided with medical care); Flores ¶ 12(A) (Detention Facilities will provide medical assistance if the minor is in need of emergency services), and Ex. 1 (A)(2)
c. Right to Mental Health Care

Rule:

i. A Child who is suffering from mental illness shall, when necessary, be placed in a facility or institution that provides appropriate psychological services and treatment. Steps should be taken, by arrangement with appropriate agencies, to ensure any necessary continuation of mental health care after release from the Custodial Agency, facility or institution. (ABA Policy 111, Psychotropic Medication of Children in State Custody (Feb. 2016).)

ii. When any Child, as a result of mental or emotional disorder or intoxication by alcohol or drug, is suicidal, has a documented pattern of destructive behavior towards others, or otherwise similarly evidences an immediate need for emergency psychiatric or medical evaluation and possible care, the Custodial Agency shall, upon such reasonable cause, transfer him to a psychiatric or medical facility approved by the state department of health (or relevant governing body) as a facility for emergency evaluation and emergency treatment.

iii. Detention Facilities and Custodial Agencies shall provide Children with appropriate individual counseling sessions and group counseling conducted by trained social work personnel with the specific objectives of reviewing the Child’s progress, establishing objectives, and addressing both the developmental and crisis-related needs of each Child.

iv. Detention Facilities and Custodial Agencies should provide acculturation and adaptation services which include information regarding the development of (licensed programs shall provide appropriate routine medical and dental care, family planning services, and emergency health care services); INS DOM, Medical Care, l (all detainees shall have access to medical services that promote detainee health and general well-being); INS JPM Secure Juvenile Detention Standards 93-95, 116-121 (incorporating relevant ACA Juvenile Standards with the exception of the requirement of informed consent); UN RPJDl § 49 (Every juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated); ACA Juvenile Standards 3-JDF-4C-43, 3-JDF-4C-44 (prohibiting participation in medical experiments), §§ 3-JDF-4C-07 through -09 (unimpeded access to care), 3-JDF-4C-42 (informed consent); ABA Policy 111; Psychotropic Medication of Children in State Custody (Feb. 2016).)
social and interpersonal skills necessary to live independently and responsibly appropriate to each child's age and skill set.

Comments: Because their psychological development is incomplete, children face greater psychological risks than adults. Moreover, a child's developmental needs cannot be deferred until the uncertain resolution of his immigration status is reached. In addition, child refugees often have special difficulties such as trauma due to witnessing or being the victim of torture, sexual assault, or other forms of violence. Addressing these special difficulties may require the involvement of a qualified mental health professional trained to work with children. Such a professional will preferably be of the same ethnic background as the child or at least possess good cross-cultural skills. In addition, the professional should be unaffiliated with any Immigration Enforcement Agency to ensure that his primary purpose in treating the child in a detention facility or foster care setting is to resolve any mental health issues.

A child's mental health records are confidential and should not be shared without the consent of the child. See Rule VIII.B.3.f. supra. Appropriate placements for children suffering from mental illness may be mental hospitals, counseling centers, psychiatric institutions, diversion programs, or other agencies which function as independent mental health facilities.91

The custodial agency, attorney, child advocate, or anyone else with the ability to refer the child for counseling or psychological therapy should initially consider that counseling for a child whose culture does not include Western notions of therapy may be unproductive and potentially damaging. If notions of counseling and psychological therapy are not rooted in the child's culture, the child advocate should exercise caution in seeking counseling or psychological therapy for the child. If counseling or psychological therapy is deemed appropriate, such therapy should be undertaken in a stable environment where the session is not likely to be disrupted, where support and follow-up are available for the child.

91 ABA JJS, Standards Regarding Rights of Minors IV (provision of medical care to juveniles); S.2444 § 323(A)(f)(i)(ii) (at a minimum minors should be provided with mental health care, including treatment of trauma); Flores v. U.S. (detention facilities will provide medical assistance if the minor is in need of emergency services) and Ex. 1 (A)(2) (licensed programs shall provide appropriate routine medical and dental care, family planning services, and emergency health care services); INS DOM, Medical Care, 1 (all detainees shall have access to medical services that promote detainee health and general well-being); UN RPDL § 49 (Every juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated); ACA Juvenile Standards 3-JDF-4C-16 (Mental Health services should be provided by qualified professionals). 3-JDF-4C-35, -39 through -41 (suicide prevention and intervention and management of chemical dependency). 3-JDF-5B-01 through -05 (social services and counseling).
3. Right to Education

Rule:

a. A Child held in a Detention Facility or Foster Care setting should be afforded access to the educational institution, if any, which he attended prior to apprehension, if possible, or to be immediately enrolled in an appropriate school or educational program adequate to his needs, including those necessary to address any physical, mental, or behavioral disabilities.

b. Upon placement in a Detention Facility or Foster Care setting, a Child should be given placement tests to determine his level of English comprehension and his educational level, including whether he has Special Needs.

c. A Child should be placed in a school and classroom based upon the results of his placement tests. A Child with Special Needs should be provided with the necessary services, education, and treatment.

d. Educational services should be provided in a structured classroom setting, Monday through Friday. Some educational options should be provided in the Child’s preferred tongue, whether through an interpreter or in a class specifically designed to accommodate the Child’s language needs.

e. The quality of education for each Child should be equal to that for U.S. citizens of the same age.

f. Each Child above compulsory school age who wishes to continue his education should be permitted and encouraged to do so.

g. Each Child should be provided the opportunity to earn academic credits that can be used for matriculation to the

92 UNHCR Action for the Rights of Children – Identifying and Communicating with Distressed Children, Revision Version, December 2000 ("[E]xtreme caution should be exercised in providing counseling or psychological therapy unless these are rooted in the local culture. Most approaches to counseling and psychological therapy have been developed in the West and cannot easily be translated into non-western societies. The inappropriate use of such approaches can not only be unhelpful, but potentially damaging to the child.").
next grade level or to a more advanced educational institution. Documentation of such credits shall be provided to such educational institutions when the Child so requests.

h. Every Detention Facility and Foster Care setting should provide reasonable access to a library that is adequately stocked with materials, including Internet access, that meet the Child’s best language and dialect where practicable.

Comments: Education is vital to the development of Children and is recognized as a universal human right. Failure to deliver adequate educational services may hinder a Child for a lifetime. In addition, school provides continuity and structure for Children and is essential to their well-being. For these reasons, education should be a priority. The Detention Facility or Custodial Agency should make every effort to secure textbooks and reading materials from the Child’s country of origin and Staff should encourage the Children to make full use of these materials. If Children attend schools which lack instruction in a language that they understand, in addition to the interpreter discussed in the Rule, special provisions may be necessary to enable them to learn, become literate in, and/or retain their preferred tongue. Children should be, to the extent possible and when in their Best Interests, placed in the local school. Upon the release of a Child who attended an educational program at his Detention Facility, the Custodial Agency should provide the Child with a certified copy of his record and credits to facilitate their transfer to a new school. Should a Child not be afforded these opportunities, his Attorney should consider making a complaint to the U.S. Department of Health and Human Services Office for Civil Rights.

93 Education services while a Child is in detention should be compliant with the IDEA, the Rehabilitation Act and all federal and state laws pertaining to education. *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) (holding that the fourteenth amendment’s equal protection clause prohibited a public school system from denying equal access to education to children lacking legal status); ABA JIS, Standards Relating To Interim Status 10-6 (all juveniles held in detention should be afforded access to education); S.2444 § 323(A)(4)(a)(i) (at a minimum, minors should be provided with educational services appropriate to their minor’s level of development, and communication skills in a structured classroom setting. Monday through Friday, which concentrates primarily on the development of the basic academic competencies and secondarily on English Language Training); United Nations Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 (1948), Art. 26 (Everyone has the right to education); CRC, Article 28 (every child has the right to education); UN RPJDL § 38 (every juvenile of compulsory school age has the right to education); Res. 217A (III), U.N. Doc A/810 (1948), Art. 26 (Everyone has the right to education); CRC, Article 28 (every child has the right to education); UN RPJDL § 38 (every juvenile of compulsory school age has the right to education).
4. Right to Vocational Training and Work

Rule:

a. Every Child in Custody over the age of fourteen should have the opportunity to participate in a voluntary vocational training program in relevant occupations. Vocational training can occur through work assignments, apprenticeships, and on-the-job training. Each Child should be able to choose the type of work he wishes to perform from that which is available and appropriate.

b. No Child in Custodial Agency Custody should ever be forced to perform labor against his will. All international child labor standards should apply to any work setting.

Comments: Through voluntary vocational training, Children will gain essential skills that will help them successfully gain employment upon release from Detention. The Child’s age will determine in large measure the type of work assignment or vocational training program for which he is eligible. Children should be encouraged to work or participate in vocational training, but should not be required to do so.

94 ILO Protocol to the Forced Labour Convention (recognizing that the prohibition of forced or compulsory labor forms part of the body of fundamental rights, and that forced or compulsory labor violates the human rights and dignity of children as well as adults); 29 U.S.C. §§ 203(b) and 212 (defining “oppressive child labor” under the Fair Labor Standards Act of 1938); ILO Convention No. 182 Worst Forms of Child Labour Convention; ILO Convention No. 138 Minimum Age Convention; INS DOM, Voluntary Work Program, I (every Detention Facility with a work program will provide detainees the opportunity to work and earn money); UN RPJD, § 18(b) (Juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be forced to do so. Work, education or training should not cause the continuation of the detention); IV-B; ACA Juvenile Standards 3-JDF-5C-05, 3-JDF-5C-06 (Juveniles are not required to work unless they are compensated or unless the work is related to maintenance of the Detention Facility or is part of a training program. Work should not violate labor laws)

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Right to Recreation

Rule:

a. All Detention Facilities should provide Children with access to recreational programs and activities under conditions of security and supervision that protect their safety and welfare. Activities should include daily outdoor activity, weather permitting, and at least one hour per day of large muscle activity and two hours per day of structured leisure time activities.

b. The Child should have access to a wide variety of information and material, especially those aimed at the promotion of his social, cultural, and spiritual well-being and physical and mental health.

c. The Detention Facility should respect and promote the right of the Child to participate fully in cultural and artistic life and should encourage the provision of appropriate opportunities for cultural, artistic, recreational, and leisure activity, both inside and outside the Detention Facility.

Comments: Cognitive, imaginative, and physical play is vital to the healthy development of a Child. Play assists a Child in relieving tension, and in assimilating and coping with what he has experienced and learned. Play therefore is crucial to a Child’s healthy development and ability to function within the family and the community. Recreational activities, such as training in traditional music, dance, other arts, and sports activities, can be important to the Child’s retention of culture and to his mental and psychosocial health, and should therefore be organized for him. Appropriate footwear and other gear should be provided. Watching television should not be counted toward the Child’s two hours per day of structured leisure time activities. Opportunities for additional activities outside the Detention Facility should be utilized where they will have a positive impact on the Child. Examples of the information and material aimed at promoting the Child’s social, cultural, and spiritual well-being and physical and mental health include newspapers, magazines, books, religious literature, music, electronic technology, and television programming.95

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D. Freedom of Expression

1. Visitation Rights

Rule:

a. Every Child in a Detention Facility shall have the right to receive regular and frequent visits (not less than once a week) from family and friends in circumstances that respect the Child’s needs for privacy, contact, and unrestricted communication. Children in Foster Care should have the opportunity to visit regularly with family and friends.

i. The Detention Facility and Foster Care setting should permit the Child to visit with his Attorney, Child Advocate, or other persons necessary for the representation of the Child, including but not limited to interpreters, paralegals, experts, and witnesses any day of the week, including holidays. Such visits should be permitted at any time during the period of at least eight hours a day discussed in Rule VIII.D.1.a.ii. infra.

ii. Detention Facilities should have interview rooms for Children to meet privately with his Attorney, his Child Advocate, other persons necessary for the representation of the Child, family, and friends. Private areas within each Detention Facility should be available as contact visiting areas. Visitation hours, although subject to reasonable regulation by the Detention Facility Staff, should be at least eight hours per day, seven days a week. The duration of visits should not be unduly restricted. Custodial facilities shall provide INS detainees with access to recreational programs and activities, under conditions of security and supervision that protect their safety and welfare. INS JPM Secure Juvenile Detention Facility Standard 135 (incorporating ACA Juvenile Standards, 3-JDF-5E-04), CRC, Article 31 (every child has the right to a suitable amount of time for daily free exercise, in the open air whenever weather permits, during which time appropriate recreational and physical training should normally be provided); IBCR Statement, B(11) (“Separated Children should have access to sporting, recreational and cultural activities on a par with national children. Where it has jurisdiction, the child welfare authority should provide resources to facilitate access to these activities.”).

b. Every Child in a Detention Facility shall have the right to receive regular and frequent visits (not less than once a week) from family and friends in circumstances that respect the Child’s needs for privacy, contact, and unrestricted communication. Children in Foster Care should have the opportunity to visit regularly with family and friends.

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Agencies should provide private space for interviews of Children in Foster Care.

b. The Detention Facility’s procedures should establish guidelines concerning documentation requirements for visits, as well as permissible conduct and activities during visits. The Detention Facility should delegate authority to appropriately trained Staff to assist Custodial Agency personnel in complying with these visitation requirements.

The Custodial Agency should establish similar guidelines for Children in Foster Care.

c. The Detention Facility or Custodial Agency may deny visitation to a Child in a Detention Facility or Foster Care any time it has clear and credible evidence that the prospective visitor is a smuggler, trafficker, or someone who might seek to victimize or otherwise engage the Child in criminal, harmful, or exploitive activity.

Comments: Visits should be actively encouraged in order to maintain a link between the Child and his family and community and to facilitate his social reintegration. If the visit occurs during meal times, arrangements should be made for a meal to be provided to the Child to eat during or after the visit. This Rule differs from the Flores standards regulating visitation because those standards often interfere with visits involving family, the Child’s Attorneys and other persons necessary for the representation of the Child. For example, the requirement that visits be scheduled no less than seven business days in advance is unrealistic and prohibitively inconvenient for many Attorneys and family members.  

2. Communication Rights: Phone and Mail

Rule:

96 ABA JJS, Standards Relating to Interim Status 10.7(C) (private areas available for visitation at least 8 hours a day); Flores Ex, 1 (AA)(1) (licensed programs shall provide visitation and contact with family members regardless of their immigration status); INS DOM, Visitation, I (Detention Facilities holding INS detainees shall permit authorized persons to visit detainees; INS encourages visits from family and friends); INS JPM Secure Juvenile Detention Facility Standard 147-150 (incorporating ACA Juvenile Standards 3-JDF-5G-12 through -15); OIG Report Chapter 2, Visits, Recommendation 2 (The INS should implement procedures that ensure weekly visits with all juveniles in custody and to all juvenile housing facilities); CRC, Article 37(c) (every child shall have the right to maintain contact with his family through correspondence and visits); UN RPJDL, § 60 (Every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family and the counsel); ACA Juvenile Standards 3-JDF-5G-12 through -15 (encouraging visits, including physical contact visits).
Each Child in Custody should have ready access to a telephone for at least 12 hours a day and be permitted to make calls of reasonable duration. Local calls, as well as long distance calls in reasonable number, to a parent, legal guardian, other Adult Family Member, former caregiver, Attorney, or Child Advocate should be at the expense of the Detention Facility or Custodial Agency. Children who wish to have daily telephone contact with a parent, legal guardian, Adult Family Member, or former caregiver should be permitted to do so. Calls to Attorneys, Child Advocates, consular offices, media, mental and physical health professionals, and Government Oversight Agencies shall under no circumstances be monitored. Other calls may be monitored, but only to ensure the safety of the Child or others in the Detention Facility or Foster Care setting.

Correspondence, such as written communications between a Child and his Attorney, Child Advocate, government trial attorneys, judges, courts, embassies, consulates, or any other member of the executive, legislative, or judicial branch of the government, generally shall not be opened by Detention Facility Staff or Custodial Agency personnel. If reasonable, articulable grounds exist to believe that mail may contain contraband, it may be examined, but only in the Child’s presence, and those grounds must be documented in the Child’s file. Each Child should be provided with a postage allowance and writing materials, and be permitted to post a reasonable amount of mail each week. All correspondence received by a Detention Facility or Custodial Agency from which a Child was previously transferred or released should be forwarded via First Class mail to the Child’s current location. If no forwarding address is available, all mail should be returned to sender unopened.

To the extent feasible, each Child in a Detention Facility or Foster Care setting should have supervised access to the Internet, including no-cost email services if desired. Email correspondence to Custodial Agencies, Child Advocates, Attorneys, consular offices, and courts shall under no circumstances be monitored. Other email correspondence may be monitored but only to ensure the safety of the Child or others in the Detention Facility or Foster Care setting.
The Child should be encouraged, and granted special permission, to leave the Detention Facility for educational, cultural, religious, and vocational reasons. The Child should be encouraged, and assisted as necessary, to communicate with outside contacts at least once a week, including family members, friends, his Child Advocate, or his Attorney.

Comments: The Detention Facility and Custodial Agency should utilize every reasonable means to ensure that a Child has adequate communication with the outside world. Such communication is an integral part of the right to fair and humane treatment and is essential to the preparation of the Child for his return to society. Children should be encouraged to communicate with their families, friends, and other persons or representatives of reputable outside organizations; where feasible, to leave Detention Facilities or Foster Care settings for visits to their homes and families; and to leave the Detention Facility or Foster Care settings to take advantage of educational, cultural, religious, vocational, and other opportunities in their locale. The Detention Facility and Foster Care setting should respect the right of the Child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, unless it is contrary to the Child’s Best Interests and the basis for that determination is documented in the file. Rule VIII.C. 1.b. supra provides for translation of correspondence which a Child not literate in English wishes to send.97

97 ABA JDS, Standards Relating to Interim Status 10.7(D) (juvenile shall have ready access to a telephone between 9:00 a.m. and 9:00 p.m. daily; calls should not be monitored; institution shall bear expense of all local calls and long distance to parent or attorney) and 10.7(F) (mail to and from the juvenile shall not be opened by another unless there is a reasonable suspicion of contraband, in which case the mail shall be opened in front of the juvenile); 5.2444 § 323(h)(h)(iv)(iv) (access to telephones); INS DOM, Telephone Access, 1 (Detention Facilities holding INS detainees shall permit them to have reasonable and equitable access to telephones) and Correspondence and Other Mail, 1 (all Detention Facilities will ensure that detainees send and receive correspondence in a timely manner); INS JPM Standards 135-146 (incorporating ACA Juvenile Standards 3-JDF-5E-04, 3-JDF-5F-03, 3-JDF-5G-01 through -05, 3-JDF-5G-07 through -11); INS Field Memorandum, issued Aug. 22, 2001, re: implementation of notice of telephone privileges (detainees can make free, private, unmonitored phone calls to the immigration court, consular officials, and to pro bono representatives and legal service providers through pre-programmed phone technology); OIG Report Chapter 2, Telephone Access, Recommendation 7 (The INS should revise its policy regarding telephone use by juveniles to ensure juveniles without funds are able to make appropriate telephone calls and juveniles are permitted access to telephones that at least meet the minimum requirements); CRC, Article 13 (right of the child shall have the right to freedom of expression, including the freedom to seek and impart information and ideas of all kinds through any media of the child’s choice). UN RPDJL, § 61 (every juvenile should have the right to communicate in writing or by telephone). ACA Juvenile Standards 3-JDF-5E-1 through -11 (juveniles shall have access to telephones and mail).
3. Religious Practices

Rule:

a. The religious and cultural beliefs, practices, and moral concepts of the Child shall be respected.

b. To the extent possible, the Child shall have access to religious services of the Child’s choice.

c. The freedom to manifest one’s religion or beliefs, including the possession of religious items, may be subject only to such limitations as are prescribed by law or are necessary to protect public safety, order, health, or the fundamental rights and freedoms of others.

d. The Child’s dietary needs as dictated by his religion shall be accommodated.

e. Detention Facility and Custodial Agency personnel as well as foster care providers, shall receive regular training on respecting and accommodating the religious beliefs and practices of the Children.

Comments: The Child’s connection with his culture of origin must be preserved by permitting him to follow his religious practices. The conservation of one’s religion, and one’s right to practice it, are well recognized human rights. Moreover, the renewed practice of religious and ritual activities can assist a Child to retain or regain cultural identity and normalcy. For these reasons, Detention Facilities, Custodial Agency personnel and foster care providers should afford the Child broad religious rights. The Child’s right to possess a reasonable number of religious objects is set forth in Rule VIII.B.3.c.ii. supra.98

4. Right to Communicate with the Media

b. The Child’s right to privacy and, concurrently, from adverse effects resulting from publication in the mass media); UN RPJDL, I. 8 (protecting a juvenile’s right to privacy and, concurrently, from adverse effects resulting from publication in the mass media); UN RPJDL, I. 59-62 (acknowledging the juvenile’s right to communicate with and receive correspondence from persons and organizations, in writing, via telephone, and in person). ACA Juvenile Standards 3-JDF-JD-05 (juveniles should have reasonable access to general public through communications media, subject only to limitations necessary to maintain Detention Facility order).
Rule: A Child shall have the right to communicate with the media, individually or through representatives, when desired and appropriate. Consent to communicate with the media should be secured from a Child’s Attorney or Child Advocate in consultation with the Child as set forth in Rule V.B.2.c. supra.

Comments: Access to the media can be critical in ensuring that the Child’s legal rights are protected. This issue is more fully discussed at Rule V.B.2. Comments supra.

IX. Repatriation of Unaccompanied Children

A. Requisite Steps Prior to a Repatriation Determination

1. Unaccompanied Children shall consult with an Attorney regarding their legal rights, legal options, including seeking voluntary departure, the legal remedies available, and the implications and consequences of receiving a removal order or voluntary departure order, as well as to pursuing available legal remedies.

2. The Adjudicator shall consider:

   a. Whether repatriation is in the Child’s Best Interests, including any recommendation by the Child Advocate, consistent with Rule V.D and Rule VII.B.6. supra.

   b. Information regarding safety of the Child upon his return.

   c. Whether a family member or other appropriate caregiver is able and willing to care for the Child following repatriation.

   d. When safety concerns regarding the potential caregiver have been identified, the Adjudicator shall appoint a Child Advocate, who may request a Home Study. When no appropriate caregiver is available, the Child advocate

99 ABA JJS, Standards Relating to Counsel for Private Parties 3.1 (the determination of the client’s interests in the proceedings ... is ultimately the responsibility of the client after full consultation with the attorney.”); INS DOM, Correspondence and Other Mail, L. (acknowledging a detainee’s right to communicate with representatives of the news media, and ensuring that such correspondence will be treated as confidential material by Detention Facility staff); Beijing Rules, I. 8 (protecting a juvenile’s right to privacy and, public release effects resulting from publication in the mass media); UN RPJDL, I. 59-62 (acknowledging the juvenile’s right to communicate with and receive correspondence from persons and organizations, in writing, via telephone, and in person); ACA Juvenile Standards 3-JDF-3D-05 (juveniles should have reasonable access to general public through communications media, subject only to limitations necessary to maintain Detention Facility order).
B. Requisite Steps after a Repatriation Determination

1. DHS shall consider the Best Interests and safety of the Child prior to the implementation of such determination.

2. The Child shall maintain the right to seek and receive consultation from an Attorney regarding the Child’s potential legal options, including the right to seek to reopen his case to pursue previously unpursued legal remedies.

3. DHS shall inform consular officials from the Child’s country of the impending repatriation as soon as possible following the removal or voluntary departure order to avoid unnecessary delays.

4. DHS shall provide information about the repatriation to the Child, the Child’s caregiver in the country of origin, and the relevant legal proceedings.

Comments: A repatriation determination generally includes a removal order, a grant of voluntary departure, or the withdrawal of an application for admission in the case of a Child from a contiguous country and other removal procedures. Unaccompanied Children sometimes seek voluntary departure because they believe that they have no other options; because they have been informed, sometimes incorrectly, that they will not be released from federal custody while proceedings are pending; and/or the prospect of long-term detention seems even worse than a return to unsafe, unstable, or detrimental circumstances. To ensure that a Child’s decision regarding voluntary departure is truly voluntary, it is critical that he have an opportunity to speak with an attorney about his legal options and rights and is informed of the implications of seeking and receiving a voluntary departure order. Repatriating a Child when not in his Best Interests can make the child vulnerable to potential harm. Unaccompanied Children are extremely vulnerable to abuse or exploitation, by family members or by others. Therefore, appropriate caregivers must be identified prior to returning a Child to his country of origin. If concerns about past abuse are present, a Child Advocate can work with the Child and family to make Best Interest recommendations, and determine if the risk of abuse remains. A Home Study enables an informed decision as to the level of risk a Child faces upon return, and how to ensure his safety and protection.

Unaccompanied Children sometimes seek voluntary departure orders. Repatriating a Child when not in his Best Interests can make the child vulnerable to potential harm. Unaccompanied Children are extremely vulnerable to abuse or exploitation, by family members or by others. Therefore, appropriate caregivers must be identified prior to returning a Child to his country of origin. If concerns about past abuse are present, a Child Advocate can work with the Child and family to make Best Interest recommendations, and determine if the risk of abuse remains. A Home Study enables an informed decision as to the level of risk a Child faces upon return, and how to ensure his safety and protection.
government agencies in the Child’s country of origin as soon as possible, e.g., the Child’s date of arrival and flight information, as well as any changes to the flight schedule or plans.

5. ORR shall coordinate with the relevant government agencies in the Child’s country of origin to ensure proper care and attention and continuity of care upon return for the Child, in particular Children with special needs or particular vulnerabilities. ORR shall also communicate with the Child’s family to provide accurate information about logistical details of repatriation.

6. DHS shall provide Children with developmentally appropriate information about the repatriation process and their rights from the determination of repatriation until their reunification with family or placement with another suitable caregiver.

7. ORR shall provide Children in its custody with their records such as a copy of their legal records, school records, vocational or other skills training records, medical records, mental health records, identification documents, and any other relevant documents from the Child’s time in the United States.

8. ORR shall provide Children who have been prescribed medication while in its custody with a 60-day supply of medication at the time of their return. Prior to the Child’s return, ORR shall work with relevant government and civil society organizations in the Child’s country of return to secure a follow-up medical appointment there after return.

9. DHS shall pay for the costs associated with voluntary departure for Children whether or not they are in federal custody.

Comment: Consideration by ICE of the safety and Best Interests of a Child prior to implementation of a removal or voluntary departure order is consistent with the spirit of the TVPRA, as well as with section 235(a)(5)(B) and (C)(iii) requiring assessment of country conditions prior to repatriation and a report to Congress on the same. Sometimes after a Child has received a voluntary departure order the Child discloses harm suffered or feared in the country of origin that may qualify the Child for relief, or the Child may change his mind and decide to seek relief that he previously declined to pursue. Unaccompanied Children need to maintain access to an Attorney to receive legal consultation regarding these and other rights and options even following a grant of voluntary departure. Detained Children in removal proceedings are highly vulnerable and may experience a great deal of pressure or anxiety when making decisions about whether to pursue relief or seek
voluntary departure. Those who seek voluntary departure and
decline to seek legal relief for which they may be eligible, or who
do not initially feel safe to disclose harm suffered or feared and
later decide to pursue a motion to reopen to seek asylum or
another form of relief, should not be penalized or subject to
potential return to danger because they initially sought and
received voluntary departure. Rather, they should be provided an
opportunity to seek protection.

Repatration is a disruptive and potentially traumatic experience
for Children. Unaccompanied Children have more success in
reintegrating into their families and communities if they are able to
build upon the counseling, schooling, and services they have
received while in the U.S. Receiving governments can better
coordinate follow-up support and reintegration services if they are
aware of education and services the Child has received while in
the U.S., and what his plans and needs are post-return. When
ORR shelter case-managers and government officials in the
country to which the Child is returning do not provide consistent
information to families regarding requirements to reunify with a
returning Child, the Child and family suffer unnecessary delays,
expenses, and upset in the reunification process. Coordination to
ensure consistency of information also ensures efficient and less
traumatic family reunification.

The return process for unaccompanied Children can be confusing
and anxiety producing. Providing as much information as possible
in a form that the Child can understand will help to alleviate
anxiety, assuage uncertainty, and contribute to a smooth and less
traumatic return process. This documentation is essential for successful reintegration,
including continued medical care and re-enrollment in school
without delay. It also helps to minimize duplication of services
once the Child is returned to home country. Children who have
been diagnosed with and begun treatment for medical or mental
health conditions while in the U.S. should have access to
appropriate follow-up services prior to their return to ensure no
adverse effects from a disruption in treatment, and to ensure that
they will have access to on-going care.

C. Requisite Steps to Repatriate an Unaccompanied Child

1. Children under the age of 12 as well as Children with particular
vulnerabilities, such as those warranting appointment of a Child
Advocate, and those with Special Needs, shall be accompanied
during their travel by a child welfare professional or otherwise by a
consular official from the Child’s country, rather than by an immigration enforcement agent.

2. Unaccompanied Children under the age of 12 shall only be repatriated on commercial flights.

3. Unaccompanied Children being repatriated on Justice Prisoner and Alien Transportation System (JPATS) flights shall be kept separate from unrelated adults.

4. Children shall receive food, drink, and access to restrooms in a manner appropriate to their age throughout the repatriation process.

5. Prior to leaving the Child in his country of origin, the U.S. representative who has accompanied the Child shall ensure that the Child is transferred to the designated official(s) from the agency or agencies responsible for receiving repatriated Children and reuniting them with their family.

Comments: Unaccompanied Children identified to have Special Needs or to be of a sensitive age should be accompanied by an adult who is trained in how to care for children and address their anxieties during travel. In the event that a child welfare professional is unavailable, a Consular official from the Child’s country of origin could accompany the Child. Commercial flights provide a more child-friendly atmosphere for younger Unaccompanied Children than flights through the Justice Prisoner and Alien Transportation System (JPATS). Unaccompanied Children returning to their countries of origin are highly vulnerable, and should be received directly by government entities to ensure that they are appropriately screened for safety and protection concerns and reunified with an appropriate caretaker.

AGENDA FOR PROTECTION (2002), Part III, Goal 2(7) (“States, working in consultation with relevant intergovernmental organizations, should develop strategies to promote return and readmission of persons not in need of international protection, in a humane manner and in full respect for their human rights and dignity, without resort to excessive force, and in the case of children, taking due account of their best interests.”); IBCR Statement, B(14) (noting that “[t]he best way for returns and family reunification to be carried out is on a voluntary basis, following a detailed assessment of family and country situation.”) and that, before a child is returned to a country of origin, several things must be considered, including (1) whether it is safe to return the child to his home country; and (2) whether it is in the child’s best interests to return, and noting that “the child should be fully informed and consulted at all stages ...”).
1. Right to Full and Fair Process

Rule: All proceedings concerning a Child’s immigration status shall be conducted as promptly as possible consistent with a full and fair adjudication.

Comments: This rule seeks to avoid any harm caused to the Child’s well-being or development by an unduly lengthy Immigration Adjudication. The Rule also recognizes that, in some cases, a less expeditious process may actually be in the Child’s Best Interests. Examples include circumstances where a Child’s asylum case requires additional time for adequate investigation or trial preparation, or where legislation or other proceedings are pending that would benefit the Child.

2. Adjudicator’s Role in Reporting Unethical or Criminal Behavior of Attorneys

Rule: The Adjudicator shall ensure that, in all administrative and court proceedings, all Attorneys before her are acting in accordance with the applicable rules of professional conduct. Where an Adjudicator is aware of unethical or criminal behavior on the part of any Attorney, she should report it to the proper authorities and should take whatever other action is necessary to ensure that the Child before her is afforded full and fair process.

Comments: The Adjudicator should be cognizant of the fact that some individuals, such as smugglers and traffickers, seek to victimize or otherwise engage Children in criminal, harmful or 119
Right to Be Present and Free from Restraint

Rule: A Child shall have the right to be physically present at any Immigration Adjudication or any other court proceeding involving the Child. It is the obligation of the Custodial Agency to ensure the Child’s physical presence at any such proceeding. A Child shall not be shackled or otherwise restrained during any such proceeding, except in extraordinary circumstances where Custodial Agency personnel have demonstrated to the Adjudicator that no reasonable alternative would prevent physical injury to the Child or others or the Child’s escape. Comments: The Child’s right to be present at any Immigration Adjudication requires all proceedings, including both master calendar and merits hearings, to be conducted live and not via videoconference. The risk of misunderstandings and confusion during hearings conducted by videoconference is very high for Children in particular, who may not understand that an Adjudicator who appears on a television screen is actually conducting the Child’s hearing. In addition, the Child’s Attorney faces the difficult choice of being present with the Adjudicator or with the Child. By contrast, when hearings are conducted in person, a Child may feel more at ease in the courtroom and testify more effectively, and the Adjudicator can directly observe and respond to the Child’s body language that may not be observable by camera in a videoconference. While the Child being present is generally preferable, the Child has the right to choose to appear through technological means such as phone or video.

Consistent with treating Children with respect, dignity, and particular concern for their status as Children, physical restraints shall not be used on Children at any time except as a last resort. Restraints of any type may be used only when permitted by the Adjudicator. Any person using restraints on a Child in the Adjudicator should be alert to situations where the Attorney appears to be serving the interests of someone other than the Child, or is neglecting the Child’s case.

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connection with adjudicatory proceedings should document such use and be held accountable for any misuse. Hard restraints (e.g., steel handcuffs and leg irons) should be used only after soft restraints prove ineffective with the child. Medication should not be used to subdue an uncooperative child.

4. Right to Be Fully and Timely Informed

Rule: In all proceedings concerning a Child’s immigration status, the Child shall be fully and timely informed by the Adjudicator in a Developmentally Appropriate manner as to the purpose of the proceeding; the procedures to be followed; and any actions to be taken, including any decisions made, the possible consequences of such decisions, and the consequences for failure to appear.

Comments: In providing this information, the Adjudicator should present it in an appropriate manner given the Child’s age, level of education, gender, cultural background, development, degree of language proficiency, Special Needs, and other individual

103 ABA JFS, Standards Relating to Adjudication, § 1.3.A-B ("The presence of the respondent should be required for EOIR Proceedings to begin. The respondent should be afforded the right to be present throughout EOIR Proceedings, although the juvenile court should be permitted to proceed without a respondent who is voluntarily absent after EOIR Proceedings have begun."). Standards Relating to Corrections Administration 7.6(A) (it should not be necessary to use mechanical restraints within the Detention Facility; mechanical restraints may only be used during transportation); ABA- Standards of Practice, § D.5 (Child at Hearing) ("In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify."). American Bar Association Recommendation: Best Practices for Immigration Proceedings Involving Alien Child Respondents (Jan. 6, 2002) (ABA Best Practices) § 5 ("Judges may refuse to hear cases, if the conditions in the courtroom... adversely affect [children’s] meaningful participation in the proceedings and thus, their due process rights."); Immigration and Nationality Act of 1952 8 U.S.C. (2002) § 242 (b) (providing reasonable opportunity to be present); In re A-A, 22 I&N Dec. 140, Interim Decision 3357 (BIA 1998), n.2 (collecting cases where right to appear is determined to be an essential liberty interest); 8 C.F.R. § 240.6 (An attorney, legal representative, legal guardian, near relative or friend is permitted to appear on behalf of the respondent); INS DOM, Transportation, III(AA) (officers shall use authorized techniques and common sense when applying restraints); OIG Report, Chapter 2, Use of Restraints, Recommendations 6 (The INS should implement specific rules that govern the use of restraints on juveniles); CRC, Article 8 (protection of identity), Article 27 (recognizing the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development); Canadian Child Refugee Guidelines, [B.I, n.20] ("A child refugee claimant has the right to be present at his or her refugee proceedings."); Canadian Immigration Act §69(2) ("[P]roceedings before the Refugee Division shall be held in the presence of the person who is the subject of the proceedings, wherever practicable"); ACA Adult Standards 3-JDF-3D-06 ("In situations where physical force or disciplinary detention is required, only the least drastic means necessary to secure order or control should be used."); 3-JDF-4A-07 (prohibiting use of food as sanction); 3-JDF-3A -16 (restraints are never applied as punishment"); 3-JDF-3A -17 ("A written record detailing who receives restraint equipment and the nature of the equipment they receive is necessary to establish responsibility and accountability for use.");
5. Right to Interpretation and to Have Interpreter Physically Present

Rule: A Child whose best language is not English shall have the right to any Immigration Adjudication relevant to the Child’s immigration status fully interpreted into the Child’s best language and dialect and to have a trained, independent interpreter physically present and available for the Child throughout any Immigration Adjudication relevant to the Child’s immigration status to interpret the entire proceeding. Such interpreter shall be appointed by the court or agency at government expense.

Comments: The right to an interpreter is essential to the Child’s ability to comprehend his rights and obligations in any Immigration Adjudication. An interpreter should speak the Child’s best language and dialect. A Child should be introduced to an interpreter in advance of the hearing and given the opportunity to speak to the interpreter so as to develop a rapport.  

104 UNHCR Guidelines §5.14 (“Children should be kept informed in an age-appropriate manner, about the procedures, what decisions have been made about them, and the possible consequences of their refugee status.”); Canadian Child Refugee Guidelines § B.1.1. (“The process which is to be followed should be explained to the child throughout the hearing to the extent possible, taking into account the age of the child.”).  

105 ABA JJS, Standards relating to Adjudication, §2.7 (“When a witness or respondent is incapable of hearing, speaking or understanding the English language, or of speaking the English language as understood by counsel and court, an interpreter who the witness or respondent can understand and who can understand the witness or respondent should be appointed to translate all proceedings. Such interpreter should be fluent in both the language used and the dialect. Such interpreter shall be appointed by the court and compensated from public funds”) and relating to Interim Status, 5.3(A) (“Interpreters shall be informed of the right to silence, the making of statements and the right to presence of an attorney, including providing this information in the juvenile’s native language.”); 8 C.F.R. § 240.5 (any person acting as an interpreter shall be sworn to interpret and translate accurately); Flores, V. 12. A. 4 (acknowledging the INS’s responsibility to locate interpreters to facilitate processing of minors); Matter of Tomas, 19 I&N Dec. 464 (BIA 1987) (finding an absolute right to competent translation); Peres-Laster v. INS, 208 F.3d 773, 778 (9th Cir. 2002) (finding due process violation for failure to properly translate); Immigration and Naturalization Service Guidelines for Children’s Asylum Claims, Immigration and Naturalization Service File No. 120/11.26 (Dec. 10, 1998) (“INS Guidelines”) § 1.1d. (“Interpreters play a critical role in ensuring clear communication between the child and Asylum Officer. Asylum Officers should confirm that the child can understand and speak the language used.”); UNHCR GPC, Chapter 8: Legal Status (“Trained independent interpreters should be used when the interpreter does not share the child’s native language, even if the child appears to speak the interpreter’s language adequately.”); UNHCR ARC, Topic 1: The Importance of Skills in Communicating with Children (“When the use of an interpreter is unavoidable, it is vital that the interpreter is fluent in both languages, understands any specialist terminology and is able to use words which the child can understand. He or she needs to be acceptable within the community and be seen as impartial. It is vital to ensure that the interpreter has good skills at communicating with children, can cope with any emotions being expressed and does not influence the conversation by mistranslating, summarizing or omitting selected sections of what was said.”); UN RPJDL § 1.6 (Right to services of circumstances in order to ensure the Child’s comprehensive and meaningful participation).  

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6. Right to Privacy in Adjudication

Rule:

a. Unless otherwise prohibited by law, a Child shall have the right to choose whether any proceeding, or any portion thereof, concerning the Child’s immigration status is open or closed to the public. If a Child has chosen to close the proceeding or any part thereof, an Adjudicator nevertheless shall admit members of the public selected by the Child.

b. All persons attending closed proceedings shall be admonished by the court to maintain the confidentiality of all matters revealed therein.

Comments: This Rule seeks to protect and promote the Child’s Best Interests. It is not meant to preclude a Court from sharing basic information on a Child with entities providing pro bono representation, such as docket information, Notices to Appear, and other public records, for the purpose of facilitating a Child’s representation.108

106 ABA JJS § 6.1 (requiring that jurisdictions enact legislation permitting a juvenile to waive right to a public trial) and § 6.2 (permitting a juvenile to select certain members of the public to be admitted to his adjudication where he has waived the right to a public trial); Homeland Security Act of 2002, P.L. 107-296 (H.R. 5005) § 462(b)(2)(A) (providing that a concern in making determinations regarding the custody of, the individual to whom the record pertains …” unless one of certain exceptions applies, including where disclosure of the record would be required under the Freedom of Information Act); Interpreters who are used in the natural language spoken by each child and provided to each child“ and that the INS “provide a sufficient number of trained interpreters at facilities housing unaccompanied children.”).
Right to Present Evidence

Rule:

a. In any Immigration Adjudication, the Child shall have the right to present evidence on his behalf, including without limitation the right to testify or not testify, to call witnesses, to examine adverse witnesses, to object to evidence, and to compel the attendance of witnesses.

b. Where the Child seeks to compel the attendance of a witness in Custodial Agency Custody, the Custodial Agency shall transport the witness to the hearing at the Government’s expense.\textsuperscript{707}

8. Right to Have Proceedings Concerning a Child’s Immigration Status Transcribed and to a Copy of the Transcript

Rule: In all Immigration Adjudications:

a. The proceeding shall be recorded in full and preserved. Where electronic means are used to record such a proceeding, all parties present shall be notified on the electronic record when the electronic recording device is turned on and off, and shall be permitted to object on the record.

b. A Child shall have the right upon request to receive a copy of any transcript or to have any electronic recording of any transcript or to have any electronic recording of any transcript or to have any electronic recording

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\textsuperscript{707} 8. Immigration and Nationality Act of 1952 8 U.S.C. (2002) §§ 240 (b)(1) and (4)(B) (providing for the right to have proceedings concerning a child’s immigration status transcribed and to a copy of the transcript).

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CRC, Art. 8 (protection of identity), Art. 16 (“Children have the right to protection from arbitrary or unlawful interference with their privacy, family, home and correspondence.”), Art. 40.2(b)(iv) (“Every child alleged as or accused of having infringed the penal law has at least the following guarantees … [t]o have his or her privacy fully respected at all stages of the proceedings.”); Beijing Rules § 8.1 (“The juvenile’s right to privacy shall be respected at all stages of the proceedings in order to avoid harm being caused to him or her by undue publicity or by the process of labeling.”); American Convention on Human Rights (“ACHR”), Art. 11(2) (“No one may be the object of arbitrary or abusive interference with his or her private life, family, home or correspondence.”); IBCR Statement, A(6) (“Care must be taken not to disclose information about a separated child that could endanger the child’s family members in her or his home country. The permission of separated children must be sought in an age appropriate manner before sensitive information is disclosed to other organizations or individuals.”), Elaine Cassel, “The Shameful Treatment of John Lee Malvo,” CNN.com, Nov. 21, 2002 (available at www.cnn.com/2002/LAW/11/21/findlaw.analysis.cassel.malvo); https://www.justice.gov/eoir/observing-immigration-hearings; Best Practices for Immigration Proceedings Involving Alien Child Respondents Recommended by the ABA (ABA Best Practices) § 4. 107 Immigration and Nationality Act of 1952 8 U.S.C. (2002) §§ 240 (b)(1) and (4)(B) (providing for the right to present evidence and cross-examine witnesses); CRC, art. 40.2(b)(iv) (right not to be compelled to testify). Canadian Child Refugee Guidelines § 8.1 (“Like an adult claimant, a child claimant also has a right to be heard in regard to his or her refugee claim.”). ECRE ¶ 4 (“Each refugee has the right to be heard in any procedure affecting the child.”)
transcribed and a copy of the transcript provided to the Child at no charge. Comments: This rule is designed in part to prevent the practice on the part of some Adjudicators of turning the electronic recorder off unannounced during testimony, oral argument, or the Adjudicator’s decision. A Child’s request for a transcript should be processed as expeditiously as possible.  

9. Right of Access to the Child’s File

Rule: A Child, upon request, should have the right to review and receive a copy of any document in written, audio, or video format or any other electronic medium contained in any records maintained by any agency or court at no charge. The agency or court should timely comply with any such request.

Comments: In order to ensure that the Child has the ability to prepare and present his case or appeal, the Child must have timely access to all documents in his file.

B. Immigration Adjudications Involving Unaccompanied Children

1. Creation of a Children’s Docket

Rule: Immigration Adjudications involving Children should be scheduled on a separate docket and prioritized over other Immigration Adjudications, subject to the ability of the Child’s Attorney to prepare the case.

Comments: Creating a separate Children’s docket would serve several important purposes. First, a separate docket would

108 ABA JJS, Standards relating to Adjudication § 2.1.A-B (A verbatim record should be made of all EOIR Proceedings, and the record and any exhibits should be preserved and kept confidential); 8 C.F.R. § 240.9 ("The hearing before the immigration judge, including the testimony, exhibits, applications, profilers, and requests, the immigration judge's decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the immigration judge. In his or her discretion, the immigration judge may exclude from the record any arguments made in connection with motions, applications, requests, or objections, but in such event the person affected may submit a brief.").

109 ABA JJS, Standards Relating To Juvenile Records and Information Systems 5.2 (juvenile, his parent and juvenile’s attorney should be given access to all records and information collected or retained by a juvenile agency); Augustin v. Sava, 735 F. 2d 32, 37 (2d Cir. 1984) (an asylum applicant “must be furnished with an accurate and complete translation of official proceedings … translation services must be sufficient to enable the applicant to place his claim before the judge.”).
facilitate the expeditious handling of Children’s cases and eliminate the difficulties many Children experience in transitioning between child-friendly and adult environments. Second, a Children’s docket would ensure a Child’s separation from adults, in furtherance of other aspects of these standards. See, e.g., Rule VII.B. supra. Third, such a docket would allow Adjudicators to more rapidly familiarize themselves with the special issues involving Children, and would afford them a better opportunity to provide Children with a setting and procedures that are child-friendly. For example, Adjudicators and government trial attorneys, like the Child’s Attorney, should be mindful that Children require frequent bathroom and snack breaks which they may be too intimidated to request. See Rule IV.C. Comments supra. Thus, a series of shorter sessions may be more effective than a few longer ones. Children should also be granted breaks when they appear distressed, upset, tired, increasingly fidgety, or confused.

2. Structure of Proceedings

Rule:

a. Immigration Adjudications involving Children shall never be conducted in adult Detention Facilities.

b. The Child shall be physically present at any Immigration Adjudication unless it is better for the Child to appear through technological means such as phone or video.

Comments: In some instances, the Child may live several hundred miles from the Immigration Court where they are due to appear. In such cases, the Child may elect to appear via technological means. See V.A.3. supra.

3. Participants in Immigration Adjudications

Rule:

a. With the exception of the initial intake interview, an Immigration Adjudication concerning a Child shall not take place until the Child is represented by an Attorney.

b. At the request of the Child, an Adult Family Member, other trusted adult, or friend should be permitted to attend any Immigration Adjudication concerning the Child. See Rule V.C.2. Comments supra.
4. Child-Friendly Setting

Rule:

a. In order to facilitate a Child’s full participation at all stages of the Immigration Adjudication, a child-friendly environment shall be created and maintained.

b. The Adjudicator shall ensure adequate time during the proceedings to permit the use of child-sensitive and developmentally appropriate questioning and a full exploration of the Child’s claims.

Comments: In order to create a child-friendly environment, an Adjudicator should consider not wearing a robe, acting more informally, and conducting proceedings in a conference room instead of a courtroom.

The Adjudicator and government trial attorney should be cognizant of the Child’s potentially limited attention span as it affects the Child’s ability otherwise to participate in a long hearing. At the same time, the hearing should be permitted to continue as long as necessary to allow full disclosure of the Child’s relevant experiences. In light of these considerations, if necessary, the hearing should be continued until the next available day to accommodate the Child.

If a Child becomes upset while testifying about traumatic events, the Adjudicator should consider staying the hearing until the Child is accommodated.

able to proceed and/or to consider the use of alternative sources of evidence. In such circumstances, the Adjudicator should also consider whether the retraumatization may be made worse by questioning about these events on more than one occasion.

5. Special Evidentiary Considerations

Rule:

a. Documentary evidence is not required in order for a Child to establish a claim. The Adjudicator should consider that Children, even more so than adults, frequently lack the ability to obtain relevant evidence to support their claims.

b. When two reasonable inferences can be drawn from the evidence, one in the Child’s favor and the other adverse to the Child, the Adjudicator shall adopt that reasonable inference in the Child’s favor or in support of the Child’s asylum claim.

119 ABA Rest Practices § 1. (“Judges are encouraged to provide flexibility in scheduling cases handled by pro-bono attorneys. In addition, judges are encouraged to provide pro-bono rooms for attorneys to meet with child clients before the proceedings.”), ¶ 2. (“Judges may establish formal juvenile dockets at sites with significant numbers of children. The juvenile docket, in which all children’s cases are consolidated for a designated day with a designated rotating judge, facilitates pro bono representation. The practice helps legal service providers screen and refer the children for pro bono representation.”); National Benchbook on Psychiatric and Psychological Evidence and Testimony, ABA Commission on Mental and Physical Disability Law (“Competency is the capacity to testify.”); 8 C.F.R. 208.9(b) (“The purpose of the [asylum] interview shall be to elicit all relevant and useful information bearing on the applicant's eligibility for asylum.”); 8 C.F.R. § 208.25(a) (“The Immigration Judge may, for good cause, consistent with the Act, waive the presence of the alien at a hearing when the alien is represented or when the alien is a minor child and at least one of whose parents or whose legal guardian is present.”) interview shall to be elicit all relevant and useful information bearing on the applicant's eligibility for asylum.”); 8 C.F.R. § 208.25(a) (“The Immigration Judge may, for good cause, consistent with section 240(b) of the Act, waive the presence of the alien at a hearing when the alien is represented or when the alien is a minor child and at least one of whose parents or whose legal guardian is present.”).
c. Any statement made by a Child outside the presence of his Attorney to any Custodial Agency or Immigration Enforcement Agency official, including but not limited to statements made by the Child at apprehension, shall not be admissible in Immigration Adjudications for any purpose.112

6. Testimony of the Child

Rule:

a. In assessing the credibility of a Child’s testimony, the Adjudicator shall consider the Child’s development and cultural background; the subject matter of the Child’s testimony; and the circumstances under which the Child is testifying, including whether the Child may be suffering, or has suffered, from post-traumatic stress disorder, malnutrition, or other physical or psychological conditions.

b. Where appropriate and upon timely notice, a Child shall have the right to introduce his testimony through the use of a previously recorded videotape or other electronic means, with due consideration given to the government trial attorney’s right to cross-examine the Child. The Adjudicator also should allow a Child to provide narrative testimony.

Comments: Many valid reasons exist why a Child may find it difficult to give clear, consistent testimony to Adjudicators or government trial attorneys, such as: the Child’s fear of being returned to the country that he has fled or threats by a smuggler who brought the Child into this country to harm him if he testifies truthfully. In addition, some Children simply do not trust those who ask them for information. Many Children are likely to reveal more information relevant to their case only after they have had an opportunity to become more comfortable with the system and its environment.

112 See in re S-M-J-, Interim Decision 3303 at 722 (BIA 1997); INS Guidelines § II(F) (discussing evidentiary issues and noting, among other things, that “[a] child, like an adult, is not required to provide corroborating evidence in all cases. . . .” “The level of detail and consistency required of a child ... should be appropriate to the child’s age and maturity level.” and noting also that, although “certain elements of a child’s claim ... such as those relating to identity or verifiable incidents of persecution, may require corroborating evidence ...” the adjudicator should evaluate the strength of the evidence presented, in part, on the child’s individual circumstances.”); INS Guidelines II(F) (“Children’s testimony should be given a liberal ‘benefit of the doubt’ with respect to evaluating a child’s alleged fear of persecution”), citing UNHCR guidelines at ¶ 219; Doris Meissner, Exercising Prosecutorial Discretion, Memorandum to Regional Directors, District Directors, Chief Patrol Agents and Regional and District Counsel (Nov. 17, 2000); 8 C.F.R. § 208.13(a) (the “testimony of the applicant, if credible, may be sufficient to sustain the burden of proof for establishing refugee status without corroboration”). This is in contrast to the general burdens for adults. 8 C.F.R. §§ 208.13(a), 208.16(b), 240.11(c)(3)(ii), 240.33(c)(3), and 240.49(c)(4)(iii) (The burden of proof is on the applicant for asylum or withholding of removal).
personnel. The Immigration Court should require of the Child only the level of detail and consistency appropriate to the age and development of the Child at the time of the events about which he testifies, the ability of the Child to recall past events, the time that has elapsed since the events, the possibility that the Child may have been protected by his family and thus may not know the relevant details of his case, and the ability of the Child to recall and communicate his experiences.

In assessing credibility based upon the Child’s demeanor, the Adjudicator should be mindful that cultural differences or the types of experiences about which the Child is testifying may result in the Child appearing nervous or uncooperative. For example, an Adjudicator should not perceive unrelifulness or lack of credibility based upon a Child averting his eyes, shifting posture, hesitating when speaking or generally appearing nervous. Furthermore, Adjudicators should take care to avoid misinterpreting certain emotional reactions and psychiatric symptoms as credibility indicators. By allowing testimony through a previously recorded statement, a judge should be able to see the Child testify under less intimidating circumstances and thus be able to make a much fairer and more informed decision regarding the Child’s claim.

The Child to testify in the narrative form will likely put the Child more at ease and permit him to give a more expansive account of the facts surrounding his claim.

At apprehension, Children often are traumatized, frightened, vulnerable, and uncertain what to say to the law enforcement personnel who have captured them. Statements made under such conditions should therefore not be considered in assessing the credibility of the Child in a later formal proceeding after he has received the advice of counsel.113

113 INS v. Cardoza-Fonseca 480 U.S. 421 (1987) (establishing that the “well founded fear” standard is more generous than withholding standard as long as the Child establishes by evidence and testimony a subjective fear and an objective situation); INS v. Stovice 467 U.S. 407 (1984) (stating the standard for withholding of removal is “clear probability” or “more likely than not”); 8 C.F.R. §208.15(a), 208.16(b) and Matter of Moghavvghi, 19 I&N Dec. 439 (BIA 1987) (for asylum claims, uncorroborated but credible testimony by the applicant may be sufficient to sustain the burden of proof). Immigration and Nationality Act of 1952 8 U.S.C. §240(b)(3) (If the Child cannot be present at his hearing because of mental incompetency, the Attorney General has allowed an attorney, legal representative, legal guardian, near relative or friend to appear on behalf of the Child); INS Guidelines, p. 14, ¶ 11(b) (Some children can appear uncooperative for reasons having nothing to do with the reliability of their testimony. For example, there may be cultural reasons why a child will not maintain eye contact … during an interview … in other cultures … body language does not convey the same message) and p. 15, ¶ 11(b) (Asylum Officers must remember the possible development and cultural reasons for a child’s vagueness or inconsistency, and not assume that it is an indicator of unreliability …).
7. Preservation of Evidence

Rule: All records of any Immigration Adjudication involving a Child, including exhibits, shall be preserved and kept confidential.

C. Determinations of Competency in Immigration Adjudications

Rule:

1. Standard

Where indicia exist that a Child lacks competency to participate in an Immigration Adjudication, the Adjudicator shall order an evaluation of the Child by a professional qualified in determining the competency of children in legal proceedings to determine the Child’s competency. If the Adjudicator, after consideration of such an evaluation as well as other relevant information, determines that the Child is not competent, the Adjudicator shall not permit the Child to make decisions in the Immigration Proceedings.

2. Evaluation

The Child’s competency shall be evaluated for four competencies: factual understanding of the proceedings; rational understanding of the proceedings; ability to consult and assist defense counsel; and decisional capacity.

Comments: Not all children lack competency to participate in an Immigration Adjudication merely because of their age. A careful evaluation must therefore be made by the Adjudicator. Assessing the four competencies articulated in this rule can provide such an evaluation. Factual understanding of the proceedings includes the Child’s capacity to understand the basic roles, duties, and interests of the participants in the adjudication; his rights in the adjudication; and the consequences of his various choices in responding to questioning, allegations of fact, and charges of removability, as well as forensic further inquiry.]

Canadian Child Refugee Guidelines § B(1)(5) (“Where appropriate, the evidence of the child may also be obtained by using videotape evidence of an expert as a liaison between the CRDD and the child. For example, the panel may be able to indicate to a medical expert the questions which the panel would like the child to answer.”)
as seeking legal relief. Rational understanding of the proceedings includes an abstract ability to manipulate what the Child factually understands and to understand the implications of various choices. The ability to consult and assist defense counsel includes the capacities to: both receive and to express communications with counsel about matters relevant to the adjudication; identify witnesses with relevant information; follow and comprehend testimony; and provide relevant testimony coherently and with independence of judgment. Decisional capacity contemplates an ability to act autonomously and direct a self-interested course of action, rather than cede decision-making to the Child’s Attorney or others.

The BIA issued its first precedential decision on competency in Immigration Adjudications in Matter of M-A-M, 25 I&N Dec. 474 (BIA 2011) (holding that respondents in Immigration Adjudications are presumed to be competent, and that if indicia of incompetency are present, the immigration judge must determine if the respondent is competent to participate in the proceedings employing a three-part test that includes whether the respondent (1) has a rational and factual understanding of the nature and object of the proceedings; (2) can consult with the Attorney or representative if there is one; and 3) has a reasonable opportunity to examine and present evidence and cross-examine witnesses). Although the test in Matter of M-A-M provides helpful language for Children’s cases, the circumstances of Children in Removal Proceedings requires a stronger construct of analysis that takes into account Children’s unique developmental context and capacities set forth herein.115

D. Review of a Waiver of Rights

Rule: After determining that a Child is competent to participate in an Immigration Adjudication, the Adjudicator shall not approve the

Child’s waiver of rights and remedies and acceptance of a removal order without first directly informing the Child of his right to a full hearing if available on all rights and remedies and determining, by speaking directly with the Child, that:

- the Child factually and rationally understands the nature of the proceedings;
- the Child understands his legal rights;
- the Child understands the consequences of the waiver of rights and remedies and acceptance of a removal order;
- the Child has agreed to forego all rights and remedies; and
- the Child’s acceptance is truly voluntary.

Comments: In decisions involving the acceptance of a remedy or the waiver of a right, the Adjudicator must ascertain whether the Child has knowingly, intelligently, and voluntarily accepted the remedy or relinquished the right involved. In conducting this inquiry, the Adjudicator should consider that child development research suggests that the concepts of “knowing, intelligent and voluntary” are fluid prior to adulthood. An Adjudicator should therefore assess whether the Child has (1) sufficiently understood the information received about the remedy or right involved; (2) engaged in rational decision making; and (3) accepted the remedy or waived the right volitionally. Furthermore, the Adjudicator should evaluate the totality of the circumstances each time a Child wishes to accept a remedy or waive a right. With respect to acceptance of removal, the inquiry should include personally questioning the Child about the Child’s intent to be removed and, if necessary, inquiring into any suspicious circumstances surrounding the Child’s acceptance of a remedy.

119 Dudley v. United States, 362 U.S. 402 (1960); Drope v. Missouri, 420 U.S. 162 (1974); Fare v. Michael C., 442 R.S. 707, 724-28 (1979); ABA Criminal Justice Mental Health Standards; ABA JIS, Standards relating to Adjudication, § 3.2 (before accepting plea, court should address respondent in a language translated to communicate effectively with the respondent); Wallace J. Mlyniec, *A Judge’s Ethical Dilemma: Assessing a Child’s Capacity to Choose*, Ford. L. Rev. 1873 (March 1996).
XI. Bibliography and Glossary


ABA Criminal Justice Mental Health Standards (American Bar Association Staff, 1989).


AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, ANNOTATED (American Bar Association Center for Professional Responsibility, 2016 ed.).

AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES (2003).

American Bar Association Section of Individual Rights and Responsibilities, Coordinating Committee on Immigration Law, Recommendation Regarding Gender-Based Persecution as Grounds for Asylum (2001).


Federal Rules of Evidence.


Immigrant’s Eligibility for Public Benefits, Community Service Society/Public Benefits Resource Center (1999).


In re Gault et al., 387 U.S. 1 (1967).

In re Hernandez-Jimenez, No. A29-988-097 (BIA Nov. 8, 1991) [unpublished decision].

INS General Counsel, Memorandum: Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information (2001).


INS Field Memorandum re: implementation of notice of telephone privileges (2001).
Maycock v. Nelson, 938 F.2d. 1006, 1008 (9th Cir. 1991).
Doris Meissner, Exercising Prosecutorial Discretion, Memorandum to Regional Directors, District Directors, Chief Patrol Agents and Regional and District Counsel (Nov. 17, 2000).
Perez-Lastor v. INS, 208 F.3d 773, 778 (9th Cir. 2002).
“Privacy Act” - Privacy Act of 1974, 5 U.S.C. § 552(a) and (b) (2000).
Rusu v. INS, 296 F.3d 316 (4th Cir. 2002).

Juvenile Law Center, Youth Law Center, June 2000.


United States Department of Justice, Departmental Plan Implementing Executive Order 13166 (2001).


United States v. Lopez-Valdez, 178 F.3d 282 (5th Cir. 1999).

United States v. Jimenez-Medina, 173 F.3d 752 (9th Cir. 1999).


Xiao v. Reno, 81 F.3d 808 (9th Cir. CA 1996).


Appendix to Rules IV.C and V.C: Additional Training in Child-Sensitive and Culturally Appropriate Interviewing Techniques

1. Preparing For the Interview:

- Understanding the Child and Child Background Review:
  - Child development: Determine the Child’s development based on her age and cognitive capacity and consider how to interview accordingly.
  - Cultural and Migration Experience: Learn the Child’s culture and how cultural factors may impact the interview. Be familiar with in-country risk factors and migration experiences of Children from the Child’s country of origin. (For example, for children from Northern Triangle countries [El Salvador, Guatemala and Honduras], school attendance drops significantly at nine years of age; children from these countries also experience high levels of gang violence.117)
  - Review trauma-informed interviewing techniques.119 Understand how the cultural and migration experience informs the Child’s mental health risk factors and trauma response. Anticipate possible reactions a Child may have and how to address them.
  - Discover if the Child has mental health or medical disabilities, or other special needs by contacting program staff or family members prior to meeting the Child. If the Child has such issues, consider whether additional support or consulting with a specialist is needed and adjust the interview accordingly.

- Interpreter/Translator:
  - Determine if you will require an interpreter and/or documents translated.
  - If documents will be reviewed in an interview, be sure to provide them to the interpreter in advance.
  - Make sure the interpreter understands her responsibilities.

- Obtain a child-appropriate interviewing space:

117 Male and Female pronouns are used for convenience only and are not meant to exclude others except where the context so indicates.
119 The Substance Abuse And Mental Health Services Administration defines the trauma-informed approach to the delivery of behavioral health services to include an understanding of trauma and an awareness of the impact it can have across settings, services, and populations. Such an approach involves viewing trauma through an ecological and cultural lens and recognizing that context plays a significant role in how individuals perceive and process traumatic events, whether acute or chronic. It involves four key elements of a trauma-informed approach: (1) realizing the prevalence of trauma; (2) recognizing how trauma affects all individuals involved with the program, organization, or system, including its own workforce; (3) responding by putting this knowledge into practice; and (4) resisting retraumatization. http://www.samhsa.gov/samhsaNewsLetter/Volume_22_Number_2/trauma_tip/key_terms.html.
Consider Attorney Appearance, Materials Needed for the Interview, and Appropriate Preparation:

- Consider the location and environment of the space, the set-up of the furniture, and the manner in which best to ensure privacy in the space. (For example, avoid barriers between the Child and the Interviewer, and between the Child and the exit; consider child-sized furniture if available.) Consider other alternative spaces or activities depending on what space is available and what setting will best put the Child at ease (for example, a play room, outdoor recreation area, etc.).
- Consider providing toys and drawing materials. (Determine in advance if such items may be brought into the detention facility).
- Consider using emotional mapping tools and other illustrative materials to help the Child understand specific concepts or talk about events. For instance, body maps are often used so that Children can point to parts of a body to show where they have been hurt. Consider using tools and materials that do not interfere with the Child's privacy can be adequately guarded.
- In a detention context, a private child-appropriate interviewing space may be difficult to obtain. However, bringing resources with you is one way to make the space more child-centered. You may decide that sitting in a room on the floor or sitting side-by-side at school-room desks will be the best way to make the Child feel comfortable. For more secure areas, your only option may be to meet with the Child in his holding cell. No matter what space is initially offered, the Attorney should insist upon a setting in which the Child’s privacy can be adequately guarded.

Consider Attorney Appearance, Materials Needed for the Interview, and Appropriate Preparation:

- Consider attire that may be more suitable to a child interview (for example, for younger Children, consider dressing more casually).
- Consider using tools and materials that do not interfere with the Child-Attorney interview (for example, avoid using a laptop or smartphone that may interfere with eye contact).
- Bring the appropriate agreements/releases.
- Take time to formulate specific questions as well as transition questions in advance, especially if abuse or another traumatic event is involved (for example, “Now we are going to talk about your time in border patrol detention. Can you tell me what you happened when you first got there?” Or, “Let’s talk about the gangs in your home country. Can you share examples of where they would talk to you or your family members?”)
- Take time to consider alternative explanations for statements or behavior by the Child that appears inconsistent or confusing.

Consider Attorney Appearance, Materials Needed for the Interview, and Appropriate Preparation:

- Consider attire that may be more suitable to a child interview (for example, for younger Children, consider dressing more casually).
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- Take time to consider alternative explanations for statements or behavior by the Child that appears inconsistent or confusing.

129 LRS has an illustrated mapping exercise for to help Children talk about their journeys in which Children can draw in their own experiences: http://lirs.org/downloads/ABA_Poster_English_8.5x11.pdf (English version) and http://lirs.org/downloads/ABA_Poster_Spanish_8.5x11.pdf (Spanish version). See also A. Walker and J. Kenniston, Handbook on Questioning Children: A Linguistic Perspective (3d ed.) (ABA 2013).
Determine whether additional persons should be present in the interview:

- Does the Child want a parent or other relative present? It is essential to ask the Child this question outside the parent’s or relative’s presence.
- The Attorney should also consider how this will interfere with confidentiality.
- Should a social worker or paralegal be present in addition to the Attorney? In some cases where a traumatic event is being discussed, the presence of a social worker may be helpful. In other cases, additional support such as a paralegal to take notes may be useful so that the Attorney is free to be more engaged to talk and play, especially with a young Child.

2. Beginning the Interview:

- Introduce yourself:
  - Explain your responsibilities to the Child and distinguish your role from that of the immigration authorities, in a manner that the Child can understand. This should be repeated at every interview.
  - Provide an overview of what you will discuss.
  - Explain how the information that the Child provides will be used. (See Confidentiality section below).
  - Use developmentally appropriate language and tools to help with this explanation.
  - Ask the Child to explain back her understanding of your role.

- Introduce any other individuals in the room and their roles (for example, interpreters, observers or social workers).

- Consider a few preliminary conversational questions or observations to build rapport. (See Rapport section below.)

- Explain your documentation method:
  - Tell the Child about your method of documenting (for example, handwritten notes or recorded interview).
  - Explain how others, such as an interpreter, may also take notes and the purpose for this.
  - Offer the Child paper and a pen or crayons to take notes or draw if s/he would like.

3. Establishing Ground Rules:

- Explain confidentiality:

- Tailor the length of time of the interview based on child development, rapport, and the sensitive nature of content.

- Determine whether additional persons should be present in the interview:
  - Does the Child want a parent or other relative present? It is essential to ask the Child this question outside the parent’s or relative’s presence.
  - The Attorney should also consider how this will interfere with confidentiality.
  - Should a social worker or paralegal be present in addition to the Attorney? In some cases where a traumatic event is being discussed, the presence of a social worker may be helpful. In other cases, additional support such as a paralegal to take notes may be useful so that the Attorney is free to be more engaged to talk and play, especially with a young Child.

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- Consider a few preliminary conversational questions or observations to build rapport. (See Rapport section below.)

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  - Explain how others, such as an interpreter, may also take notes and the purpose for this.
  - Offer the Child paper and a pen or crayons to take notes or draw if s/he would like.

- Explain confidentiality:

- Tailor the length of time of the interview based on child development, rapport, and the sensitive nature of content.
• Determine whether the Child understands this concept, for example, by asking her to explain the concept back. Repeat this with every interview.

• Give examples of how confidentiality works. Tell the Child, for example, that if her mother asks you what she shared about her home life in [country of origin], you cannot tell her mother without the Child’s permission.

• Explain that sometimes you may ask permission to share information. Explain when and how you might do that.

• Explain when you may be required to disclose confidential information, for example, where the Child reveals that she may harm herself, has been a victim of child abuse at home or in a placement, plans to harm another or intends to commit a crime. (See AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, ANNOTATED, Rule 1.6 [American Bar Association Center for Professional Responsibility, 2016 ed.] and your applicable state rules and statutes for mandatory reporting requirements.)

  ➢ Note: Social workers have their own professional rules of conduct.
  
  The Attorney should therefore ascertain what rules of conduct govern any social worker on her team and convey that information to the Child.

  ➢ Note: Attorneys may always consult state ethics boards for guidance concerning their duty of confidentiality.

• Explain the Difference Between the Truth and a Lie:

  □ Ask if the Child understands the difference between the truth and a lie. Use age appropriate tools and questions. For example, when interviewing a Child in an office, ask the Child “Where are you right now?” Allow the Child to answer, then ask “If someone said that you’re in the park right now, would that be the truth or a lie?”

  □ Ask the Child to promise to tell the truth. Tell him that it is important to tell the truth, not what he may think you or others want to hear.

  □ Make sure that the Child understands the consequences of lying.

• Provide the Child with Authority by telling him:

  □ That he may correct the Attorney if she misstates something;

  □ That it is never wrong for the Child to say he does not remember or does not know the answer to a question, if that is the case;

  □ That he may stop the interview whenever he likes, that he may ask if the interview will be over soon, that he can end the interview if he is tired and wants to stop, or that he can take a break if he likes;

  □ That he may bring up topics not covered by the Attorney or ask additional questions; and

  □ That he may ask the Attorney to talk to other individuals and provide permission for her to do so, about matters of concern to the Child. For instance, if the Child has a complaint about treatment in a facility, the Child can ask the Attorney to help him make a complaint.

• Determine whether the Child understands this concept, for example, by asking her to explain the concept back. Repeat this with every interview.

• Give examples of how confidentiality works. Tell the Child, for example, that if her mother asks you what she shared about her home life in [country of origin], you cannot tell her mother without the Child’s permission.

• Explain that sometimes you may ask permission to share information. Explain when and how you might do that.

• Explain when you may be required to disclose confidential information, for example, where the Child reveals that she may harm herself, has been a victim of child abuse at home or in a placement, plans to harm another or intends to commit a crime. (See AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, ANNOTATED, Rule 1.6 [American Bar Association Center for Professional Responsibility, 2016 ed.] and your applicable state rules and statutes for mandatory reporting requirements.)

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  □ That he may stop the interview whenever he likes, that he may ask if the interview will be over soon, that he can end the interview if he is tired and wants to stop, or that he can take a break if he likes;

  □ That he may bring up topics not covered by the Attorney or ask additional questions; and

  □ That he may ask the Attorney to talk to other individuals and provide permission for her to do so, about matters of concern to the Child. For instance, if the Child has a complaint about treatment in a facility, the Child can ask the Attorney to help him make a complaint.
4. Attorney Techniques & Ground Rules During the Interview

**Attorney interactions:**
- Avoid leading the Child into thinking that the Attorney is the Child’s friend or parent.
- Avoid stepping into the role of a therapist.
- Avoid inappropriate reactions such as crying or scolding.
- Be empathetic and provide counsel consistent with an attorney-client relationship.
- Sit at eye-level with the Child and consider the power dynamics inherent in adult-child interactions.
- Be aware that a child often expresses perceptions of events in a different manner than adults. For example, it is natural for children to fantasize, invent explanations for unfamiliar or frightening events, express themselves in symbolic ways, regress or emphasize issues which may seem unimportant to adults.
- Avoid leading the Child into thinking that the Attorney is the Child’s friend or parent.
- Avoid inappropriate reactions such as crying or scolding.
- Be empathetic and provide counsel consistent with an attorney-client relationship.
- Sit at eye-level with the Child and consider the power dynamics inherent in adult-child interactions.
- Be aware that a child often expresses perceptions of events in a different manner than adults. For example, it is natural for children to fantasize, invent explanations for unfamiliar or frightening events, express themselves in symbolic ways, regress or emphasize issues which may seem unimportant to adults.

**The Attorney should be an active listener:**
- Tell the Child you may ask additional questions to make sure you fully understand an event.
- Avoid interrupting the Child whenever possible.
- Avoid overly positive or negative responses to answers so as not to mislead the Child into thinking that there is a right or wrong way to answer.
- Affirm responses and ask follow-up questions. Use prompts and questions to elaborate whenever appropriate. Younger Children may need additional prompting, but guard against leading the Child.
- Use open-ended questions to facilitate the Child’s response in the form of a narrative. Children who do not respond in this fashion may need additional time and conversational questions to build a rapport.
- Allow the Child to come to his own conclusions and solutions. While recommending a course of action is appropriate, do not tell the Child what he should do in his case.

**Build Rapport with the Child:**
- When appropriate, attempt to first engage the Child in topics of interest to him (for example, discuss a hobby or what they did that day).
- While building a rapport, avoid discussing details about the Child’s relationship to family members as the Child may have experienced abuse at their hands.
- Try to have the Child provide an account of a neutral event, (for example, ask the Child to describe the house he lived in or what he did in school that day) to help you understand the Child’s ability to provide a sequence of events, the Child’s language and pacing, and the Child’s development.
5. The Interview—Eliciting the Child’s Story

- **Chronology:**
  - Begin with basic biographical information and build towards critical events.
  - Be aware that the Child’s account may be out of order, as children often discuss events in cyclical patterns or out of order based on their own emotional perception. Illustrative mapping tools may help guide the Child.¹²¹
  - Children may need follow-up questions on time segmentation and sensory questions to fully elicit the event chronology.

- **Eliciting Narratives of Substantive Issues**
  - Formulate questions ahead of time and review any factual information you may have (for example, I-213s, FOIAs, assessments, family reports, etc.). As noted, use open-ended questions to invite a narrative.
    - “Tell me about…”
    - “What happened next?”
    - “Tell me about when the gang member first approached you, where were you?”
  - You may need a transition statement to frame up a series of questions that reference a time or place for the information you are seeking.
    - “Now we are going to talk about your trip through Mexico.”
    - “Tell me about…”
  - **Elicit time details:** Ask Yes or No questions or directed questions to ascertain specifics. For example, “Were there any other persons present when the gang member threatened you?” “Did [sponsor] know about the abuse by [family member] in the home country?” “Think about what the agent was wearing—was it a green or blue uniform?”
  - **Abuse/Trauma:** The Attorney should help focus the Child in describing the most recent incident of abuse/trauma, and then follow-up with time segmentation and sensory focus questions to elicit additional information, instead of asking how many times an incident occurred. For example, “You told me that a Border Patrol agent locked you in a cold room. Tell me about what happened before he took you to that room.” You may want to use emotional mapping tools, drawing or other illustrative tools to facilitate discussion of these topics. For example, “Can you show me using this doll what part of the man’s body touched you?”
    - **Note:** The Attorney should be very careful not to re-traumatize the Child during such questioning. A social worker or other clinical professional should be employed whenever possible in eliciting details of traumatic events.

¹²¹ See footnote iv.
Note: The Attorney should never ask the Child to show where on their own body they were hurt/abused. For younger children it may be easier for them not to talk about how they were abused but instead point to a part of a doll or use therapeutic illustrations. Push/Pull factors: A Child will usually have more than one reason for coming to the U.S. and for wanting to leave their country of origin. The Attorney should have this fact in mind when framing her questions to elicit a more complete answer. Fear in Home Country: Many Children have become acculturated to violence. Asking Children if they are afraid to return to their home country may elicit a negative response. However, if the question is rephrased, the Child may express fear of death or other harm (for example, “Does anyone want to harm you in your home country? What do you think would happen if you returned?”).

Trauma Signs: Be alert for signs of anxiety and reluctance, such as aggression, sorrow, nonresponsiveness, or apathy when discussing traumatic events. You should adjust your interview accordingly. This may include providing tissues, taking a break, getting some water, stopping the interview, getting help or calling for emergency health services.122

☐ Breaks: Ask the Child if he needs a break during a lengthy interview. Remind the Child that he can ask for a break if needed and may also stop the interview and continue it another day.

☐ Closing:

☐ Thank the Child for their time.

☐ Ask the Child safety questions (for example, “Who can help you if you are sick?”). Ask the Child if he would like referrals or suggest services to the Child for mental health issues, medical issues, or education when such needs are identified (depending on available resources). For released Children, be sure to provide information for the ORR Help Line.123

122 The Substance Abuse And Mental Health Services Administration definition of “Trauma-informed” is found at http://www.samhsa.gov/child-trauma/recognizing-and-treating-child-traumatic-stress/signs.

123 Information about services offered by the ORR Help Line, as well as the phone number, may be found at https://www.acf.hhs.gov/orr/resource/orr-national-call-center.
Note: For many Children, mental health services or other medical services may not be the cultural norm. Be prepared to explain how these services can be helpful and can be utilized.

- Ask the Child if there is anything he would like to discuss and share before you end the interview.
- Ask the Child if he has any questions for you.
- Ask the Child if he would like you to do anything specific on his behalf.
- Be clear that you may not be able to help depending on the request.
- If necessary, ask the Child for permission to share some information he provided with specific individuals. (See the Confidentiality section above; it may be necessary to review confidentiality basics with the Child.) Complete the necessary consent and/or release of information forms.
- Provide Business Card/Contact information. Explain what other adults will also have the Attorney’s contact information.¹²⁴

¹²⁴ https://www.childwelfare.gov/topics/responding/ia/investigation/interviewing/.
When these Standards were originally published in 2004, they provided critical assistance to practitioners and adjudicators at a time when very little guidance of any sort existed. The Standards have heavily influenced the practice of law as it relates to Unaccompanied Alien Children. They have informed immigration adjudications as well as numerous trainings and academic articles. In so doing, the Standards have served to protect countless Unaccompanied Children.

The past 14 years have seen many important developments in children’s immigration law and policy. Collectively, they represent an unmistakable trend that has moved the treatment and representation of Unaccompanied Children closer to that which the original Standards envisioned. Since 2004, federal laws including the Violence Against Women Act of 2005 (“VAWA of 2005”), Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA of 2008”), Trafficking Victims Protection Reauthorization Act of 2013 (“TVPRA of 2013”), Violence Against Women Act Reauthorization of 2013 (“VAWA of 2013”), and amendments to other U.S. immigration laws have provided further protections for this uniquely vulnerable population. For example, VAWA of 2005 protects a child applying for Special Immigrant Juvenile Status (SIJS) from being compelled to contact his abusive parent. The TVPRA of 2008 expanded several provisions regarding the care and custody of Unaccompanied Children and protections available to them, including asylum protections for Unaccompanied Children and eligibility for SIJS. The TVPRA of 2013 further expanded protection for Unaccompanied Children, increased opportunities for federal foster care for certain Unaccompanied Children, and ordered a study of border screenings. Administrative changes in policy over the last decade have also resulted in improved treatment for Unaccompanied Children, although many of these improvements are currently being eliminated.

In addition to the significant changes in law and policy, the numbers of Unaccompanied Children entering the United States each year from the “Northern Triangle” countries of El Salvador, Guatemala, and Honduras have increased dramatically since these Standards were initially adopted. The Preamble to the 2004 edition explains that “[a]pproximately 5000 Unaccompanied Alien Children, ranging from infants to teenagers, are held in custody each year.” Since that time the number of Unaccompanied Children has increased gradually and culminated in the unprecedented “surge” of FY2014.

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when Customs and Border Protection (CBP, an agency within the Department of Homeland Security) apprehended over 68,000 Unaccompanied Children along the Southwest border. That number has since fluctuated between approximately 40,000 to 80,000 per year, but has remained at historically high levels. As of March 2018, there were 369,561 juvenile cases pending before the immigration court system.

Typically, once children are apprehended by Border Patrol agents they are transported to a CBP station and held for hours or days in concrete cells during processing. The TVPRA of 2008 requires that CBP determine whether these children meet the statutory definition of “unaccompanied” within 48 hours and if deemed to be Unaccompanied Children, transferred to the custody of the Department of Health and Human Services, Office of Refugee Resettlement (ORR) within 72 hours. In FY 2017, the Department of Homeland Security referred 40,810 children to ORR care; 94% of the referred children came from Honduras, Guatemala and El Salvador. Currently over 100 shelters and federal foster care programs around the country have a total capacity of approximately 9,800 beds where ORR houses children as they are processed for release to a sponsor, either a parent, adult family member of family friend. The majority of the ORR shelters are located along the Southwest border. At the ORR shelters, the children live in a group environment where they receive medical care, counseling, education and legal services. Legal service providers meet with the children and provide “Know Your Rights” presentations and perform individual screenings within seven to ten days of their arrival to the shelter. The screenings are used to make referrals to legal service programs and pro bono attorneys for some children who are identified as eligible for legal relief. In FY 2017, children remained in ORR custody for an average of 51 days. During the same period ORR released 93% of children to a sponsor. Of those sponsors, attorneys for some children who are identified as eligible for legal relief. In FY 2017, children remained in ORR custody for an average of 51 days. During the same period ORR released 93% of children to a sponsor. Of those sponsors, attorneys for some children who are identified as eligible for legal relief. In FY 2017, children remained in ORR custody for an average of 51 days. During the same period ORR released 93% of children to a sponsor. Of those sponsors, attorneys for some children who are identified as eligible for legal relief. In FY 2017, children remained in ORR custody for an average of 51 days. During the same period ORR released 93% of children to a sponsor. Of those sponsors, attorneys for some children who are identified as eligible for legal relief. In FY 2017, children remained in ORR custody for an average of 51 days. During the same period ORR released 93% of children to a sponsor. Of those sponsors,
49% were parents, 41% were close relatives, and 10% were other-than-close relatives or non-relatives.\textsuperscript{134}

The TVPRA requires that children from non-contiguous countries be placed in removal proceedings before an immigration judge and provides that children have the right to apply for legal relief and receive counsel “to the greatest extent practicable.”\textsuperscript{135} On the other hand, children from contiguous countries (Mexico and Canada) can be immediately returned to their countries after a cursory screening by a uniformed Border Patrol agent.\textsuperscript{136} There have been proposals in Congress to extend this summary process to children from non-contiguous countries, a proposal which is of great concern to the ABA and violates due process principles and long-standing ABA policy to the contrary.

In late 2014, in recognition that legal services and other non-profit organizations were already overburdened and under-resourced, past ABA President William Hubbard created the Working Group on Unaccompanied Minor Immigrants to enlist ABA members and others to help these children increase access to pro bono counsel. While the number of children crossing the border has fluctuated, the legal crisis continues as approximately 50% of children awaiting hearings in immigration court are unrepresented.\textsuperscript{137}

Since 2004, country conditions affecting the migration of Unaccompanied Children to the United States have deteriorated significantly. Increasing drug- and gang-related violence in Central America has contributed to mass migration from El Salvador, Guatemala and Honduras. Indeed, in 2012, San Pedro Sula was named the murder capital of the world.\textsuperscript{138} That city ceded its title to San Salvador in 2014.\textsuperscript{139} In May and June of 2014, at the peak of the “surge,” more than 10,000 Unaccompanied Children were being apprehended at the

\textsuperscript{134} See Testimony of Steven Wagner, supra note 7.
\textsuperscript{135} 8 U.S.C. § 1232(c)(5).
\textsuperscript{136} A confidential report from the United Nations High Commissioner for Refugees (UNHCR), leaked to the media, found these Border Patrol screenings to be woefully inadequate and concluded that they fail to protect Mexican children. The UNHCR concluded that Border Patrol agents are not equipped to recognize signs of victimization and should not be charged with screening children for risks of trafficking, persecution or voluntariness of return. Dara Lind, The Process Congress Wants to Use for Child Migrants is a Disaster Vox, July 15, 2014, https://www.vox.com/2014/7/15/5898349/border-children-mexico-central-american-deport-quickly-2008-law.
\textsuperscript{137} See Transactional Records Access Clearinghouse (TRAC), Syracuse University, Juveniles-Immigration Court Deportation Proceedings: Court Data through March 2018, http://trac.syr.edu/iptools/immigration/immcjune17/. According to this data, there are currently 369,561 cases of juveniles pending in the immigration court system. In those pending cases, 288,696 children are represented (51%) and 180,865 are unrepresented (49%).
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Southwest border by U.S. immigration authorities each month. In those times of unprecedented volume, the Standards provided a vital guide to the work of all those involved in the apprehension, detention, care, release, legal representation and Immigration Adjudication of Unaccompanied Children. At the same time, the Standards reminded all involved that this influx was made up of individual Children, each with a unique history, vulnerability and need.

What began as an unprecedented surge in 2014, has become the new normal at the Southwest border, despite the federal government’s substantial efforts to stop the flow. Adhering to our highest ideals by adequately caring for, advocating for and adjudicating the immigration matters of Unaccompanied Children continues to provide unique challenges. Fortunately, hundreds of attorneys throughout the country continue to provide quality representation to Children in partnership with the American Bar Association and a national network of nonprofit organizations and pro bono attorneys. And the federal government, as well as some states and cities, have invested significant resources to partially meet this critical need. Despite these advances, the federal government recently cancelled critical programs and funding for legal representation of Unaccompanied Children. Many improvements in both law and policy remain desperately needed. Advocates have yet to secure for all Unaccompanied Children the right to appointed counsel in their Immigration Adjudications at government expense, despite significant advocacy and litigation towards this end.

Another example of progress in the care and custody of Unaccompanied Children since 2004 is government funding for the Child Advocate program, although the resources provided for this purpose remain insufficient. Immigration Courts must maintain their efforts to make their proceedings child-friendly in a variety of areas. In fact, existing policies protecting Children throughout the system are often ignored, and many are in jeopardy of being rescinded. Representatives of Unaccompanied Children can and should learn from practitioners in well-established practice areas in the juvenile justice and child welfare systems, especially on issues related to the many ethical concerns that arise in representing children. Finally, in addition to their legal needs, Unaccompanied Children require other services to better integrate them into their communities.

141 In August 2017, the Trump Administration ended the justice AmeriCorps program, which from January 1, 2015 to August 31, 2017, provided legal representation to noncitizen children through various legal service organizations across the nation. On May 18, 2018, the Vera Institute of Justice informed legal service providers that the Department of Health and Human Services, Office of Refugee Resettlement will no longer fund future legal services for majority of children who have been released to sponsors.
143 A Child Advocate is an individual who is appointed pursuant to federal law to identify and advocate for the Child’s Best Interests on issues including the Child’s custody, care, placement, legal relief and repatriation. 8 U.S.C. § 1232(c)(6)(A).

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communities and address their social, educational and medical needs. In short, much work remains to be accomplished.

This second edition to the Standards has been drafted to update specific provisions relating to the needs of Unaccompanied Children as well as address significant and wide-ranging changes in law and policy. Despite the passage of time, the core values of the Standards have remained constant, but much of the progress over the past 14 years presently appears to be in jeopardy. Regardless of changes in politics, we must remember that these Children remain children, with all their needs and vulnerabilities. We must continue to afford them special consideration to ensure that our immigration enforcement and adjudication systems acknowledge their need for protection and our nation’s fundamental traditions of welcoming immigrants and asylum-seekers.

Respectfully submitted,

Mary Meg McCarthy
Chair, Commission on Immigration
August, 2018
1. **Summary of Resolution(s):** This resolution replaces and updates the 2004 ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States. Over the past 14 years there have been many significant changes to immigration law and policy related to unaccompanied children. This update was the result of several meetings of a broad array of experts over almost two years. It reflects changes to the treatment of Unaccompanied Children by government stakeholders and the laws that bind and protect them.


3. **Has this or a similar resolution been submitted to the House or Board previously?** The 1st Edition was passed by the House of Delegates at the Annual Meeting 2004 (2004 Annual 117).

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** These Standards are comprehensive in nature and complement existing policy with regard to unaccompanied children: 106A Midyear 2001 (supports appointment of counsel at government expense for unaccompanied children for all stages of immigration processes and proceedings); 113 Midyear 2015 (appointment of counsel at government expense for unaccompanied children, immigration courts should not conduct substantive hearings until child has had a meaningful opportunity to consult with counsel, state judges should receive training); 301 Midyear 2017 (preservation of laws and protections for unaccompanied children).

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.** Several bills introduced in this Congress would strip legal and other protections for unaccompanied immigrant children that are provided by current law, including H.R. 495, the Protection of Children Act, which was voted out of the House Judiciary Committee in June 2017.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. An online version of these Standards will be distributed to the private bar, legal service providers and pro bono community to use in training of lawyers, child advocates, immigration enforcement officials and government adjudicators of Unaccompanied Children’s cases.

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

9. Disclosure of Interest. (If applicable) N/A

10. Referrals.

   - Section of Litigation
   - Standing Committee on Pro Bono and Public Service
   - Solo, Small Firm and General Practice Division
   - Judicial Division
   - Section of Family Law
   - Commission on Domestic and Sexual Violence
   - Commission on Women in the Profession
   - Special Committee on Hispanic Legal Rights and Responsibilities
   - Commission on Youth at Risk
   - Center for Professional Responsibility
   - Young Lawyers Division

11. Contact Name and Address Information.

   Meredith Linsky
   Director, Commission on Immigration
   American Bar Association
   1050 Connecticut Ave., NW, Suite 400
   Washington, DC 20036
   (202) 662-1006
   (956) 202-1093 (cell)
   Meredith.Linsky@americanbar.org

12. Contact Name and Address Information.

   Mary Meg McCarthy
   Chair
   Commission on Immigration
   (312) 660-1351
   MMccarthy@heartlandalliance.org
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution serves to replace the original 2004 version of the ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States. Over the past 14 years there have been many significant developments in children’s immigration law and policy. The updated version of these Standards reflects these changes and provides an updated framework for lawyers, accredited representatives, adjudicators, child care workers and law enforcement officials.

2. Summary of the Issue that the Resolution Addresses

The resolution provides guidance to legal representatives and other stakeholders who regularly interact with Unaccompanied Children in the immigration context. The number of children entering the United States has increased significantly beginning in 2012 and peaking in FY2014 when Customs and Border Protection officials apprehended over 68,000 Unaccompanied Children. The number has remained high, between 40,000 to 60,000 since 2014. Because there is no right to government appointed counsel in removal proceedings, the need for additional legal representation has been a priority for government, pro bono and legal service providers. Increased federal, state, local and private funding has resulted in many new practitioners taking cases of Unaccompanied Children and seeking additional resources to guide this unique practice. The updated ABA Standards will fill this gap and provide expert advice and best practices for the legal field.

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

The Standards provide practical advice to lawyers, accredited representatives, adjudicators, child care workers and law enforcement officials on how to best interact with, care for, represent and adjudicate unaccompanied children’s legal claims in the immigration context.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

none identified
RESOLVED, That dues for lawyer members of the Association shall be in accordance with the following schedule, effective for dues commencing with FY2020 and each year thereafter:

1. $ 75 if admitted to the bar for less than five years
2. $150 if admitted to the bar five years but less than ten years
3. $250 if admitted to the bar ten years but less than fifteen years
4. $350 if admitted to the bar fifteen years but less than twenty years
5. $425 if admitted to the bar twenty or more years

FURTHER RESOLVED, That lawyers employed by any federal, state, local, territorial or tribal government, lawyers employed by nonprofit public interest programs, judges, solo practitioners, small firm lawyers (those in firms of 2-5 lawyers), and retired lawyers shall pay $150 for dues effective in FY2020 and each year thereafter;

FURTHER RESOLVED, That paralegals shall pay $75 for dues effective in FY2020 and each year thereafter;

FURTHER RESOLVED, That affiliated professionals shall pay $150 for dues effective in FY2020 and each year thereafter;

FURTHER RESOLVED, That international lawyers shall pay $250 for dues effective in FY2020 and each year thereafter;

FURTHER RESOLVED, That if a lawyer licensed by a state, commonwealth, territory or tribal government qualifies for more than one dues category, the lawyer shall pay the lowest amount;

FURTHER RESOLVED, That the Board of Governors is authorized to determine those benefits to be included as part of membership in the Association.

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After nearly two years of research, the Standing Committee on Membership (SCOM) is recommending a new pricing model along with adding more value at all levels of membership.

**PROPOSAL**

SCOM’s pricing recommendations are as follows:

- Match Association dues for nearly all lawyers in practice for more than one year with the market’s willingness to pay and use a low rate to drive growth among young lawyers
- Eliminate the free rate for New Bar Admittees
- Continue to offer special rates for judges, solos and government lawyers
- Add a special rate for retirees and small firm attorneys (those in 2-5 lawyer firms)
- Simplify the number of categories and different pricing rates to five

**Proposed ABA Dues Schedule**

<table>
<thead>
<tr>
<th>FY2019</th>
<th>Current Rate</th>
<th>Proposed new rate</th>
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<tbody>
<tr>
<td>Lawyers</td>
<td></td>
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<tr>
<td>Year 0 - New Bar Admittees</td>
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<td>Year 4</td>
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<td>Year 5</td>
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<td>Year 7</td>
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HOW THE PROPOSAL WAS DEVELOPED

The cost of ABA membership is in many ways out of synch with the market and over-complicated. In order to make sure the revised structure was a data driven process, the ABA hired recognized pricing expert Dr. Jean-Pierre Dubé, Sigmund E. Edelstone Professor of Marketing at the University of Chicago Booth School of Business. Dr. Dubé assisted the ABA in 2009/10, and his predictions for where we would be now proved uncannily accurate. Once again, Dr. Dubé conducted a Willingness to Pay Study, which shows how the probability of joining or renewing ABA membership shifts as dues pricing and membership benefit packages change. In other words, he looked at demand curves for membership in the ABA. Dr. Dubé’s research found that the ABA could increase its market share and long-term dues revenue by bundling ‘a la carte’ benefits as part of the membership package and pricing it more in line with the marketplace.

Additionally, the ABA retained Avenue, a business strategy and marketing firm from Chicago, to test the new membership model and develop projections regarding the market adoption rate and timeline. Avenue conducted numerous focus groups, interviews, and surveys to evaluate how members and non-members would react to the new membership model. The overall market reaction suggests that the new membership model would be an improvement towards reversing our decline in dues paying members. The research also indicated that potential members desired increased access to content as part of a membership in the ABA.

The data was compelling, but for the new membership model to be successful major organization change is needed. In an effort to develop the new membership model as an association-wide initiative, key ABA stakeholders were involved in the membership model refinement process. A working group was formed and included active participation by members of SCOM, senior staff, appointed representatives from SOC, members of the Board of Governors, and any other member or staff who asked to participate. The Working Group held telephonic meetings on a regular basis beginning October 2016 and a day-long in-person meeting in December. Since July 2017, ABA leadership, the Board, the House of Delegates, attendees at the SOC Fall Conference, members of the SOC Executive and class committees, and the leadership of various sections, divisions, forums, committees, and commissions received briefings, some multiple times, about the status of efforts to develop the new model. During the last several months work among these groups has been particularly intense.

* Please note that this reflects Constitution and Bylaw changes to the Associate category.
Using conservative assumptions and data from Dr. Dube’s and Avenue’s market research, Avenue was able to project dues revenue and dues paying member totals for five years post implementation (FY2020 – FY2024). Projections against the status quo (if we do nothing) indicate that the ABA would increase the number of dues paying members already in the first year of implementation. And, by the fifth year, the ABA would have additional 80,000+ dues paying members. Annual dues revenue, while taking a short-term loss because of lower rates in some cases, would exceed dues revenue under the status quo model by year four, depending on the membership bundle. Five-year cumulative dues revenue under this new model exceeds the status quo.

Bottom-line, this new membership model should lead to a significant improvement in market share, improving both retention and acquisition.

**CONSEQUENCES**

Until the membership share increase is realized, this new pricing carries financial implications for the ABA. The association already has implemented cost containment measures, having taken significant budget cuts for the last three years. While other steps will be required to absorb the short-term revenue hit, our goal is to continue the high level of service the association provides its members.

As the data indicates, the new membership model should provide long-term increases in revenue through increasing the number of dues paying members and market share. These measures will provide the stability of membership and revenue that will allow the Association to continue its many important services and initiatives, and to remain a valued resource and strong advocate for lawyers and the rule of law in years ahead.

**CONCLUSION**

This association was founded on August 21, 1878. For 140 years, it has been the voice of the legal profession. We justifiably point to our representational status. In the House of Delegates, we afford a voice to lawyers and judges in every corner of the profession. Our voice is important—not only to protect the legal system from attacks on judicial independence and the independence of lawyers and the organized bar, but to protect those without a voice and thereby protect the constitutional values and civic institutions that are so important to preserving our democracy.

The cycle of charging ever increasing dues on an ever-decreasing membership is simply not sustainable in the long run. Failure to pass this request will result in fewer dues paying members, and a less representative membership as compared to the profession. We must not settle for the status quo. Now is the time to use our financial strength to make changes that research shows will be well-received by the lawyers in our country and begin to build an American Bar Association for the next 140 years.
Respectfully submitted,

Tracy Giles
Chair, Standing Committee on Membership
August, 2018
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Membership
Submitted By: Tracy Giles, Chair

1. Summary of Resolution(s).
The Standing Committee on Membership together with the Board of Governors recommends a new simpler pricing model with five price points to be effective with the 2019/20 fiscal year.

2. Approval by Submitting Entity.
Approved by the Board of Governors on June 22, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously?
Dues pricing changes are submitted periodically based on the needs and/or interests of the Association.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?
This resolution affects the dues pricing of the Association, offering a simplified dues structure with five different dues rates, and authorizes the Board to determine what benefits should be provided as part of membership.

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

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 new dues structure will be implemented for the 2020 fiscal year, which begins on September 1, 2019.

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Membership
Submitted By: Tracy Giles, Chair

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7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
The new dues structure will be implemented for the 2020 fiscal year, which begins on September 1, 2019.
8. **Cost to the Association.** (Both direct and indirect costs)

Initially, dues revenue is projected to decline but over the course of five years should increase as a result of growth in dues paying members to exceed membership and dues revenue projections for the same five year period should the change not be adopted. Investments in personnel, technology, and marketing will also be required.

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

10. **Referrals.**

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

    Tracy Giles  
    Giles & Lambert PC  
    129 East Campbell Avenue, Suite 300  
    Roanoke, VA 24011  
    540-981-9000  
    tgiles@gileslambert.com

12. **Contact Name and Address Information.** (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

    Tracy Giles  
    Giles & Lambert PC  
    129 East Campbell Avenue, Suite 300  
    Roanoke, VA 24011  
    540-981-9000  
    tgiles@gileslambert.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Standing Committee on Membership together with the Board of Governors recommends a new simpler pricing model with five price points to be effective with the 2019/20 fiscal year.

2. Summary of the Issue that the Resolution Addresses

The new pricing will simplify the dues structure and offer reduced pricing to younger lawyers, government lawyers, judges, solos, and small firm lawyers to drive growth in Association membership.

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

Analysis indicates dues simplification and revised pricing will result in Association membership growth.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None identified.
RESOLVED, That the Association policies set forth in Attachment 1 to Report 400A, dated August 2018, are archived and no longer considered to be current policy of the American Bar Association and shall not be expressed as such.

FURTHER RESOLVED, That policies which have been archived may be reactivated at the request of the original sponsoring entities. If the original sponsoring entities no longer exist, requests may be brought to the Secretary to be placed on a reactivation list for action by the House of Delegates. Such reactivated policies shall be considered current policy for the Association and shall be expressed as such.

FURTHER RESOLVED, That the Board of Governors may act to reactivate policies when the House of Delegates is not in session.
7. Paralegal Education Programs  
   February 2008, Standing Committee on Paralegals

8. Certification Programs for Lawyers  
   February 2008, Standing Committee on Specialization

20. Interpretation 301-6 of Approval of Law Schools  
    February 2008, Section of Legal Education and Admission to the Bar

26. Paralegal Education Programs  
   August 2008, Standing Committee on Paralegals

    August 2008, Section of Family Law

35. International Criminal Court  
    August 2008, Section of International law

36. International Trade  
    August 2008, Section of International Law

42. Examination Preparation Courses  
    August 2008, Section of Legal Education and Admission to the Bar
RESOLVED, That the American Bar Association grants approval to National University, Paralegal Studies Program, Los Angeles and Sherman Oaks, CA; Rockford Business College, Paralegal/Legal Assistant Program, Rockford, IL; and Baker College of Auburn Hills, Paralegal Studies Program, Auburn Hills, MI.

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal programs: Fullerton College, Paralegal Studies Program, Fullerton, CA; University of California San Diego, USD Extension, Paralegal Certificate Program, La Jolla, CA; Kaplan College (F/K/A Denver Career College), Paralegal Studies Program, Thornton, CO; Johnson County Community College, Paralegal/Legal Nurse Consultant Program, Overland Park, KS; University of New Orleans, Paralegal Studies Program, New Orleans, LA; Harford Community College, Paralegal Studies Program, Bel Air, MD; North Hennepin Community College, Paralegal Program, Brooklyn Park, MN; Mississippi College, Paralegal Studies Program, Clinton, MS; Carteret Community College, Paralegal Technology Program, Morehead City, NC; Marist College, Paralegal Program, Poughkeepsie, NY; St. John’s University, Legal Studies Program, Jamaica, NY; Cuyahoga Community College, Paralegal/LNC Program, Parma, OH; Lehigh-Carbon Community College, Paralegal Studies Program, Schnecksville, PA; Horry-Georgetown Technical College, Legal Assistant/Paralegal Program, Myrtle Beach, SC; National American University, Paralegal Studies Program, Rapid City, SD; Volunteer State Community College, Paralegal Studies Program, Gallatin, TN; Marymount University, Paralegal Studies Program, Arlington, VA; and Skagit Valley College, Paralegal Program, Mt. Vernon, WA.

FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the August 2008 Annual Meeting of the House of Delegates for the following programs: University of Alaska Fairbanks, Paralegal Studies Program, Fairbanks, AK; Auburn University Montgomery, Paralegal Education Program, Montgomery, AL; Samford University, Division of Paralegal Studies, Birmingham, AL; University of Arkansas Fort Smith, Legal Assistant/Paralegal Program, Fort Smith, AR; Everest College, Legal Assistant Education Program, Phoenix, AZ; Lamson College, Legal Assistant Program, Tempe, AZ; Coastline Community College, Paralegal Studies Program, Fountain Valley, CA; El Camino Community College, Paralegal Studies Program, Torrance, CA; Fremont College (F/K/A Western College of Southern California), Paralegal Studies Program, Cerritos, CA; Pasadena City College, Paralegal Studies Program, Pasadena, CA; Santa Ana College, Legal Assistant Program, Santa Ana, CA; University of California Irvine, Paralegal Certificate Program, Santa Ana, CA; University of California Irvine, Paralegal Certificate Program, Torrance, CA; Fremont College (F/K/A Western College of Southern California), Paralegal Studies Program, Cerritos, CA; Pasadena City College, Paralegal Studies Program, Pasadena, CA; Santa Ana College, Legal Assistant Program, Santa Ana, CA; University of California Irvine, Paralegal Certificate Program,
University of Toledo, Paralegal Studies Program, Toledo, OH; East Central University, Legal Studies Program, Ada, OK; Central Pennsylvania College, Paralegal Program, Summerdale, PA; Harrisburg Area Community College, Paralegal Studies Program, Harrisburg, PA; Orangeburg-Calhoun Technical College, Paralegal Program, Orangeburg, SC; Technical College of the Low Country, Legal Assistant Program, Beaufort, SC; Western Dakota Technical Institute, Paralegal Program, Rapid City, SD; University of Memphis, Paralegal Studies Program, Memphis, TN; Walters State Community College, Legal Assistant Program, Morristown, TN; Southeastern Career Institute, Legal Assistant Program, Dallas, TX; Utah Valley State College, Paralegal Studies Program, Orem, UT; Northeast Wisconsin Technical College, Paralegal Program, Green Bay, WI; Marshall Community and Technical College, Legal Assistant Program, Huntington, WV; Casper College, Paralegal Studies Program, Casper, WY; and Laramie County Community College, Legal Assistant Program, Cheyenne, WY.

8. Certification Programs for Lawyers
February 2008, Standing Committee on Specialization (Report 104 – 08MM104)

RESOLVED, That the American Bar Association reaccredit the following designated specialty certification programs for lawyers: Elder Law program of the National Elder Law Foundation of Tucson, Arizona; Legal Professional Liability program of the American Board of Professional Liability Attorneys of Malverne, New York; and Medical Professional Liability program of the American Board of Professional Liability Attorneys of Malverne, New York.

FURTHER RESOLVED, That the American Bar Association withdraws accreditation of the Accounting Professional Liability program of the American Board of Professional Liability Attorneys of Malverne, New York.

RESOLVED, That the American Bar Association reaccredit the following designated specialty certification programs for lawyers: Elder Law program of the National Elder Law Foundation of Tucson, Arizona; Legal Professional Liability program of the American Board of Professional Liability Attorneys of Malverne, New York; and Medical Professional Liability program of the American Board of Professional Liability Attorneys of Malverne, New York.

FURTHER RESOLVED, That the American Bar Association withdraws accreditation of the Accounting Professional Liability program of the American Board of Professional Liability Attorneys of Malverne, New York.
STANDARDS FOR THE APPROVAL OF LAW SCHOOLS
Interpretation 301-6 (February 2008)

A. A law school’s bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests: 1) That for students who graduated from the law school within the five most recently completed calendar years:

   (a) 75 percent or more of these graduates who sat for the bar passed a bar examination, or
   (b) in at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.

In demonstrating compliance under sections (1)(a) and (b), the school must report bar passage results from as many jurisdictions as necessary to account for at least 70% of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency.

2) That in three or more of the five most recently completed calendar years, the school’s annual first-time bar passage rate in the jurisdictions reported by the school is no more than 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions.

In demonstrating compliance under section (2), the school must report first-time bar passage data from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. When more than one jurisdiction is reported, the weighted average of the results in each of the reported jurisdictions shall be used to determine compliance.

B. A school shall be out of compliance with the bar passage portion of 301(a) if it is unable to demonstrate that it meets the requirements of paragraph A (1) or (2).

C. A school found out of compliance under paragraph B and that has not been able to come into compliance within the two-year period specified in Rule 13(b) of the Rules of Procedure for Approval of Law Schools, may seek to demonstrate compliance.

RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section on Legal Education and Admissions to the Bar in adopting Interpretation 301-6 (February 2008) of the Standards for Approval of Law Schools concerning the sufficiency of a law school’s bar passage rate.
good cause for extending the period the school has to demonstrate compliance by submitting evidence of:

(i) The school’s trend in bar passage rates for both first-time and subsequent takers: a clear trend of improvement will be considered in the school’s favor, a declining or flat trend against it.

(ii) The length of time the school’s bar passage rates have been below the first-time and ultimate rates established in Paragraph A: a shorter time period will be considered in the school’s favor, a longer period against it.

(iii) Actions by the school to address bar passage, particularly the school’s academic rigor and the demonstrated value and effectiveness of the school’s academic support and bar preparation programs: value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the school’s favor; ineffective or only marginally effective programs or limited action by the school against it.

(iv) Efforts by the school to facilitate bar passage for its graduates who did not pass the bar on prior attempts: effective and sustained efforts by the school will be considered in the school’s favor; ineffective or limited efforts by the school against it.

(v) Efforts by the school to provide broader access to legal education while maintaining academic rigor: sustained meaningful efforts will be viewed in the school’s favor; intermittent or limited efforts against it.

(vi) The demonstrated likelihood that the school’s students who transfer to other ABA-approved schools will pass the bar examination: transfers by students with a strong likelihood of passing the bar will be considered in the school’s favor, providing the school has undertaken counseling and other appropriate efforts to retain its well-performing students.

(vii) Temporary circumstances beyond the control of the school, but which the school is addressing: for example, a natural disaster that disrupts the school’s operations or a significant increase in the standard for passing the relevant bar examination(s).

(viii) Other factors, consistent with a schools demonstrated and sustained mission, a significant increase in the standard for passing the relevant bar examination(s).

Paralegal Education Programs
August 2008, Standing Committee on Paralegals (Report 101 – 08AM101)
RESOLVED, That the American Bar Association grants approval to North West Arkansas Community College, Paralegal Studies Program, Bentonville, AR.

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal programs: Samford University, Legal Assistant Certificate Program, Birmingham, AL; Everest College, Legal Assistant Education Program, Phoenix, AZ; Quinnipiac University, Legal Assistant Program, Hamden, CT; Sullivan University, Institute for Legal Studies, Louisville, KY; Villa Julie College, Paralegal Program, Owings Mills, MD; Eastern Michigan University, Legal Assisting Program, Ypsilanti, MI; Kellogg Community College, Legal Assistant Program, Battle Creek, MI; University of Southern Mississippi, Paralegal Studies

Paralegal Education Programs
August 2008, Standing Committee on Paralegals (Report 101 – 08AM101)
RESOLVED, That the American Bar Association grants approval to North West Arkansas Community College, Paralegal Studies Program, Bentonville, AR.

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal programs: Samford University, Legal Assistant Certificate Program, Birmingham, AL; Everest College, Legal Assistant Education Program, Phoenix, AZ; Quinnipiac University, Legal Assistant Program, Hamden, CT; Sullivan University, Institute for Legal Studies, Louisville, KY; Villa Julie College, Paralegal Program, Owings Mills, MD; Eastern Michigan University, Legal Assisting Program, Ypsilanti, MI; Kellogg Community College, Legal Assistant Program, Battle Creek, MI; University of Southern Mississippi, Paralegal Studies
Program, Hattiesburg, MS; Pitt Community College, Paralegal Technology Program, Greenville, NC; Berkeley College, Paralegal Studies Program, West Paterson, NJ; Raritan Valley Community College, Legal Assistant Program, Somerville, NJ; New York City College of Technology, Legal Assistant Studies Program, Brooklyn, NY; Kent State University, Paralegal Studies Program, Kent, OH; University of Cincinnati, Paralegal Program, Cincinnati, OH; East Central University, Legal Studies Program, Ada, OK; Harrisburg Area Community College, Paralegal Studies Program, Harrisburg, PA; Western Dakota Technical Institute, Paralegal Program, Rapid City, SD; Walters State Community College, Legal Assistant Program, Morristown, TN; Southeastern Career Institute, Legal Assistant Program, Dallas, TX; Casper College, Paralegal Studies Program, Casper, WY; and Laramie County Community College, Legal Assistant Program, Cheyenne, WY.

FURTHER RESOLVED, That the American Bar Association withdraws the approval of Berkeley College, Paralegal Studies Program, White Plains, NY, at the request of the institution, and Interboro Institute, Paralegal Studies Program, New York, NY, because the program has closed and has been transferred to another institution, as of the adjournment of the August 2008 Annual Meeting of the House of Delegates.

FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the February 2009 Midyear Meeting of the House of Delegates for the following programs: University of Alaska Fairbanks, Paralegal Studies Program, Fairbanks, AK; Auburn University Montgomery, Paralegal Education Program, Montgomery, AL; University of Arkansas-Ft. Smith, Legal Assistant/Paralegal Program, Ft. Smith, AR; Lamson College, Legal Assistant Program, Tempe, AZ; Coastline Community College, Paralegal Studies Program, Fountain Valley, CA; El Camino Community College, Paralegal Studies Program, Torrance, CA; Fremont College, Paralegal Studies Program, Cerritos, CA; Miramar College, Legal Assistant Program, San Diego, CA; Mount San Antonio College, Paralegal Studies Program, Walnut, CA; Pasadena City College, Legal Studies Program, Pasadena, CA; Santa Ana College, Legal Assistant Program, Santa Ana, CA; University of California, Irvine, Paralegal Certificate Program, Irvine, CA; University of California, LA, UCLA Ext., Attorney Assistant Training Program, Los Angeles, CA; University of California Santa Barbara, Paralegal Professional Certificate Program, Santa Barbara, CA; Pikes Peak Community College, Paralegal Program, Colorado Springs, CO; Norwalk Community College, Legal Assistant Program, Norwalk, CT; Widener University Law Center, Paralegal Studies Program, Wilmington, DE; Nova Southeastern University, Paralegal Studies Program, Fort Lauderdale, FL; Seminole Community College, Paralegal/Legal Assisting Program, Sanford, FL; South University, Paralegal Studies Program, West Palm Beach, FL; Kirkwood Community College, Legal Assistant Program, Cedar Rapids, IA; Northwestern Business College, Institute of Legal Studies, Chicago, IL; Roosevelt University, Paralegal Studies Program, Chicago, IL; William Rainey Harper College, Paralegal Program, Hattiesburg, MS; Pitt Community College, Paralegal Technology Program, Greenville, NC; Berkeley College, Paralegal Studies Program, West Paterson, NJ; Raritan Valley Community College, Legal Assistant Program, Somerville, NJ; New York City College of Technology, Legal Assistant Studies Program, Brooklyn, NY; Kent State University, Paralegal Studies Program, Kent, OH; University of Cincinnati, Paralegal Program, Cincinnati, OH; East Central University, Legal Studies Program, Ada, OK; Harrisburg Area Community College, Paralegal Studies Program, Harrisburg, PA; Western Dakota Technical Institute, Paralegal Program, Rapid City, SD; Walters State Community College, Legal Assistant Program, Morristown, TN; Southeastern Career Institute, Legal Assistant Program, Dallas, TX; Casper College, Paralegal Studies Program, Casper, WY; and Laramie County Community College, Legal Assistant Program, Cheyenne, WY.

FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the February 2009 Midyear Meeting of the House of Delegates for the following programs: University of Alaska Fairbanks, Paralegal Studies Program, Fairbanks, AK; Auburn University Montgomery, Paralegal Education Program, Montgomery, AL; University of Arkansas-Ft. Smith, Legal Assistant/Paralegal Program, Ft. Smith, AR; Lamson College, Legal Assistant Program, Tempe, AZ; Coastline Community College, Paralegal Studies Program, Fountain Valley, CA; El Camino Community College, Paralegal Studies Program, Torrance, CA; Fremont College, Paralegal Studies Program, Cerritos, CA; Miramar College, Legal Assistant Program, San Diego, CA; Mount San Antonio College, Paralegal Studies Program, Walnut, CA; Pasadena City College, Legal Studies Program, Pasadena, CA; Santa Ana College, Legal Assistant Program, Santa Ana, CA; University of California, Irvine, Paralegal Certificate Program, Irvine, CA; University of California, LA, UCLA Ext., Attorney Assistant Training Program, Los Angeles, CA; University of California Santa Barbara, Paralegal Professional Certificate Program, Santa Barbara, CA; Pikes Peak Community College, Paralegal Program, Colorado Springs, CO; Norwalk Community College, Legal Assistant Program, Norwalk, CT; Widener University Law Center, Paralegal Studies Program, Wilmington, DE; Nova Southeastern University, Paralegal Studies Program, Fort Lauderdale, FL; Seminole Community College, Paralegal/Legal Assisting Program, Sanford, FL; South University, Paralegal Studies Program, West Palm Beach, FL; Kirkwood Community College, Legal Assistant Program, Cedar Rapids, IA; Northwestern Business College, Institute of Legal Studies, Chicago, IL; Roosevelt University, Paralegal Studies Program, Chicago, IL; William Rainey Harper College, Paralegal Program, Hattiesburg, MS; Pitt Community College, Paralegal Technology Program, Greenville, NC; Berkeley College, Paralegal Studies Program, West Paterson, NJ; Raritan Valley Community College, Legal Assistant Program, Somerville, NJ; New York City College of Technology, Legal Assistant Studies Program, Brooklyn, NY; Kent State University, Paralegal Studies Program, Kent, OH; University of Cincinnati, Paralegal Program, Cincinnati, OH; East Central University, Legal Studies Program, Ada, OK; Harrisburg Area Community College, Paralegal Studies Program, Harrisburg, PA; Western Dakota Technical Institute, Paralegal Program, Rapid City, SD; Walters State Community College, Legal Assistant Program, Morristown, TN; Southeastern Career Institute, Legal Assistant Program, Dallas, TX; Casper College, Paralegal Studies Program, Casper, WY; and Laramie County Community College, Legal Assistant Program, Cheyenne, WY.

FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the February 2009 Midyear Meeting of the House of Delegates for the following programs: University of Alaska Fairbanks, Paralegal Studies Program, Fairbanks, AK; Auburn University Montgomery, Paralegal Education Program, Montgomery, AL; University of Arkansas-Ft. Smith, Legal Assistant/Paralegal Program, Ft. Smith, AR; Lamson College, Legal Assistant Program, Tempe, AZ; Coastline Community College, Paralegal Studies Program, Fountain Valley, CA; El Camino Community College, Paralegal Studies Program, Torrance, CA; Fremont College, Paralegal Studies Program, Cerritos, CA; Miramar College, Legal Assistant Program, San Diego, CA; Mount San Antonio College, Paralegal Studies Program, Walnut, CA; Pasadena City College, Legal Studies Program, Pasadena, CA; Santa Ana College, Legal Assistant Program, Santa Ana, CA; University of California, Irvine, Paralegal Certificate Program, Irvine, CA; University of California, LA, UCLA Ext., Attorney Assistant Training Program, Los Angeles, CA; University of California Santa Barbara, Paralegal Professional Certificate Program, Santa Barbara, CA; Pikes Peak Community College, Paralegal Program, Colorado Springs, CO; Norwalk Community College, Legal Assistant Program, Norwalk, CT; Widener University Law Center, Paralegal Studies Program, Wilmington, DE; Nova Southeastern University, Paralegal Studies Program, Fort Lauderdale, FL; Seminole Community College, Paralegal/Legal Assisting Program, Sanford, FL; South University, Paralegal Studies Program, West Palm Beach, FL; Kirkwood Community College, Legal Assistant Program, Cedar Rapids, IA; Northwestern Business College, Institute of Legal Studies, Chicago, IL; Roosevelt University, Paralegal Studies Program, Chicago, IL; William Rainey Harper College,
Paralegal Studies Program, Palatine, IL; Vincennes University, Paralegal Program, Vincennes, IN; Eastern Kentucky University, Paralegal Programs, Richmond, KY; University of Louisville, Paralegal Studies Program, Louisville, KY; Western Kentucky University, Paralegal Studies Program, Bowling Green, KY; Tulane University, Paralegal Studies Program, New Orleans, LA; Oakland Community College, Paralegal Program, Farmington Hills, MI; Oakland University, Paralegal Program, Rochester, MI; Minnesota State University, Moorhead, Paralegal Program, Moorhead, MN; Avila University, Paralegal Program, Kansas City, MO; Missouri Western State University, Legal Assistant Program, St. Joseph, MO; Webster University, Legal Studies Program, St. Louis, MO; University of Montana Missoula, Paralegal Studies Program, Missoula, MT; College of Saint Mary, Paralegal Studies Program, Omaha, NE; Metropolitan Community College, Legal Assistant Program, Omaha, NE; Brookdale Community College, Paralegal Studies Program, Lincroft, NJ; Cumberland County College, Paralegal Studies Program, Vineland, NJ; Fairleigh Dickinson University, Paralegal Studies Program, Madison, NJ; Mercer County College, Paralegal Program, Trenton, NJ; Middlesex County College, Legal Studies Department, Edison, NJ; Berkeley College of New York City, Paralegal Studies Program, New York, NY; Genesee Community College, Paralegal Studies Program, Batavia, NY; Long Island University, Paralegal Studies Program, Brooklyn, NY; Mercy College, Paralegal Studies Program, Dobbs Ferry, NY; Nassau Community College, Paralegal Program, Garden City, NY; Queens College, Paralegal Studies Program, Flushing, NY; Suffolk County Community College, Paralegal Studies Program, Selden, NY; Capital University Law School, Paralegal Program, Columbus, OH; David N. Myers University, Paralegal Education Program, Cleveland, OH; Lake Erie College, Legal Studies Program, Painesville, 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; Rose State College, Legal Assistant Program, Midwest City, OK; University of Oklahoma Law Center, Legal Assistant Education, Norman, OK; Central Pennsylvania College, Paralegal Program, Summerdale, PA; Central Carolina Community College, Legal Assistant Program, Sumter, SC; Midland Technical College, Paralegal Program, Columbia, SC; Orangeburg-Calhoun Technical College, Paralegal Program, Orangeburg, SC; Technical College of the Low Country, Legal Assistant Program, Beaufort, SC; South College, Paralegal Studies Program, Knoxville, TN; University of Memphis, Paralegal Studies Program, Memphis, TN; Lee College, Legal Assistant Program, Baytown, TX; Utah Valley State College, Paralegal Studies Program, Orem, UT; J. Sargeant Reynolds Community College, Paralegal Studies Program, Richmond, VA; Edmonds Community College, Paralegal Program, Lynnwood, WA; Chippewa Valley Technical College, Paralegal Program, Eau Claire, WI; Wisconsin Technical College (f/k/a Western Wisconsin Technical College), Paralegal Program, LaCrosse, WI; and Marshall Community and Technical College, Legal Assistant Program, Huntington, WV.
RESOLVED, That the American Bar Association urges the Senate to give its advice and consent to the ratification of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, the final text of which was adopted by the Hague Conference on Private International Law on November 23, 2007.

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation to enable the United States to fully and uniformly implement this Convention.

RESOLVED, That the American Bar Association urges the United States Government to expand and broaden United States interaction with the International Criminal Court, including cooperation with the Court’s investigations and proceedings;

FURTHER RESOLVED, That the Association calls on the United States Government to participate in all future sessions of the International Criminal Court’s governing body, the Assembly of States Parties, and preparations for the Review Conference to be held in 2010.

RESOLVED, That the American Bar Association supports the contribution that the negotiated liberalization of international trade in goods and services, through government-to-government trade agreements, makes to the spread of the Rule of Law, both at the state-to-state level and within participants’ domestic legal systems.

RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in deleting Interpretation 302-7 of the Standards for Approval of Law Schools concerning bar examination preparation courses.
Interpretation 302-7
If a law school grants academic credit for a bar examination preparation course, such credit may not be counted toward the minimum requirements for graduation established in Standard 304. A law school may not require successful completion of a bar examination preparation course as a condition of graduation.
At the 1996 Annual Meeting, the House of Delegates adopted a set of Recommendations establishing a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant and is to be presented to the House at the Annual Meeting. See Report 400 attached as Appendix A. The Resolution now before the House affects policies 10 years old or older. The Board of Governors or House of Delegates adopted these policies in 2008.

To accomplish this objective, the Division for Policy and Planning compiled an index of such policies set forth in either the ABA Policy and Procedures Handbook or the American Bar Association Legislative Issues list maintained by the Governmental Affairs Office. Some 52 policies were thus identified. Each entity, which had been the original sponsor, was sent a list of the policies it had sponsored. In cases where the original sponsoring entity was no longer in existence, the policies were sent to an appropriate successor entity. The 27 entities to which the policies were sent are listed in Appendix B.

Each entity was asked to identify which of the policies should be archived and which should be retained as current policy. In addition, each was requested to identify and include a recommended disposition for any other policies that had been generated which were not in the materials they received.

In adopting Recommendation 400 in 1996, the House realized that there might be old and outdated policies which would not be identified through this process. The House, therefore, included a provision to deal with this issue by providing that such policies would also be archived. See Appendix A, paragraph 6. The second Resolved clause in this Resolution implements that provision with respect to all policies 20 years old or older.

Policies that are archived pursuant to the Resolution are not considered to be rescinded. Rather, the Association will retain them for historical purposes, however, they cannot be expressed as ABA policy. Those retained as current policy through this process will be reviewed again in 10 years. Retained policies are listed in Appendix C.

Respectfully submitted,

Mary L. Smith, Secretary
American Bar Association
August 2018
RESOLVED, That the American Bar Association adopts a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant. Such archived policies will be retained for historical purposes but shall not be considered current policy for the Association and shall not be expressed as such.

FURTHER RESOLVED, That the archiving shall be implemented as follows:

1. All policies adopted by the House of Delegates shall be reviewed, with the exception of uniform state laws, model codes, guidelines, standards, ABA Constitution and Bylaws, and House Rules of Procedures.

2. To phase in this process, the periodic mandated review will in the first year, 1997, address policies 20 years old or older; in the second year policies 15 years old or older; and in the third year and each year thereafter, policies 10 years old or older.

3. Prior to each Annual meeting, a list of affected policies will be compiled and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.

4. At each Annual Meeting, a recommendation will be submitted to archive certain policies and the House will vote on the recommendations.

5. Those policies which are not archived will be subject to review every ten years thereafter.

6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.

7. This archival process is not intended to affect the rights of any member of the House to propose amendments or rescission of any policies as presently permitted under House rules.

FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.

RESOLVED, That the American Bar Association adopts a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant. Such archived policies will be retained for historical purposes but shall not be considered current policy for the Association and shall not be expressed as such.

FURTHER RESOLVED, That the archiving shall be implemented as follows:

1. All policies adopted by the House of Delegates shall be reviewed, with the exception of uniform state laws, model codes, guidelines, standards, ABA Constitution and Bylaws, and House Rules of Procedures.

2. To phase in this process, the periodic mandated review will in the first year, 1997, address policies 20 years old or older; in the second year policies 15 years old or older; and in the third year and each year thereafter, policies 10 years old or older.

3. Prior to each Annual meeting, a list of affected policies will be compiled and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.

4. At each Annual Meeting, a recommendation will be submitted to archive certain policies and the House will vote on the recommendations.

5. Those policies which are not archived will be subject to review every ten years thereafter.

6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.

7. This archival process is not intended to affect the rights of any member of the House to propose amendments or rescission of any policies as presently permitted under House rules.

FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.
The entities below reviewed and recommended disposition of the policies contained in the report:

**Sections and Divisions**
- Administrative Law and Regulatory Practice
- Civil Rights and Social Justice
- Criminal Justice
- Environment, Energy and Resources
- Family Law
- Health Law
- International Law
- Judicial Division
- Legal Education and Admissions to the Bar
- Litigation
- Science and Technology Law

**Standing Committees**
- Election Law
- Medical Professional Liability
- Paralegal
- Specialization

**Commissions**
- Domestic and Sexual Violence
- Human Rights
- Immigration
- Law and Aging
- Lawyer Assistance Programs
- Youth at Risk

**Task Force**
- Gatekeeper Regulation and the Profession

**State, Local and Territorial Bar Associations**
- Bar Association of the District of Columbia
- Ohio State Bar
- Missouri Bar Association
- New York County Lawyers Association
- New York State Bar Association

**Sections and Divisions**
- Administrative Law and Regulatory Practice
- Civil Rights and Social Justice
- Criminal Justice
- Environment, Energy and Resources
- Family Law
- Health Law
- International Law
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**Standing Committees**
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**Commissions**
- Domestic and Sexual Violence
- Human Rights
- Immigration
- Law and Aging
- Lawyer Assistance Programs
- Youth at Risk

**Task Force**
- Gatekeeper Regulation and the Profession

**State, Local and Territorial Bar Associations**
- Bar Association of the District of Columbia
- Ohio State Bar
- Missouri Bar Association
- New York County Lawyers Association
- New York State Bar Association
1. Compact for Long-Term Care  
   February 2008, New York State Bar Association

2. Supports 10-day Time Limit in Rule 8002 of Federal Rules of Bankruptcy  
   February 2008, Ohio State Bar Association

3. Solidarity with the Pakistani Bar  
   February 2008, New York State Bar Association

4. Ecosystems  
   February 2008, Standing Committee on Environment, Energy and Resource

5. Redistricting Process  
   February 2008, Section of Administrative Law and Regulatory Practice

6. Identity Theft Programs  
   February 2008, Section of Administrative Law and Regulatory Practice

9. Special Elder Abuse Unit  
   February 2008, Criminal Justice Section

10. Amendment to Rule 3.8 of the ABA Model Rules of Professional Responsibility  
    February 2008, Criminal Justice Section

11. Youthful Offenders  
    February 2008, Criminal Justice Section

12. Black Letter Standards on Prosecutorial Investigation  
    February 2008, Criminal Justice Section

13. Religion Clauses  
    February 2008, Section of Civil Rights and Social Justice

14. Model Act Governing Assisted Reproductive Technology  
    February 2008, Section of Family Law

15. Veterans Advocacy Act of 2007  
    February 2008, Section of Litigation
16. Climate Change
   February 2008, Standing Committee on Environment, Energy and Resource

17. Fee Levels for Immigration and Naturalization benefits
   February 2008, Commission on Immigration

18. Customs Enforcement National Detention Standards
   February 2008, Commission on Immigration

19. Model Rule on Conditional Admission to Practice Law
   February 2008, Commission on Lawyers Assistance Programs

21. Dual Jurisdiction in Juvenile Dependency Cases
    February 2008, Commission on Youth

22. Unrepresented Litigants in Settlement and Trial Cases
    August 2008, New York County Lawyers Association

23. Federal Tort Claims Act
    August 2008, Bar Association of The District of Columbia

24. State Court Assessment Project
    August 2008, Missouri Bar Association

    August 2008, Section of Science and Technology Law

27. Child Welfare
    August 2008, Center for Human Rights

28. Physicians Orders
    August 2008, Commission on Aging

29. Rule 32 Federal Rules of Criminal Procedure
    August 2008, Criminal Justice Section

30. Monitoring of Correctional and Detention Facilities
    August 2008, Criminal Justice Section

31. Territorial Government Discrimination
    August 2008, Criminal Justice Section
32. Cross Racial Identification Jury Instructions
   August 2008, Criminal Justice Section

34. Representation in the Child Welfare System
   August 2008, Commission on Youth at Risk

   August 2008, Commission on Domestic Violence

38. Principles for Juries and Jury Trials
   August 2008, Judicial Division

39. Model Statute on Local Land Use Planning Procedures
   August 2008, Section of Administrative Law and Regulatory Practice

40. Standards of Judicial Review
   August 2008, Section of Administrative Law and Regulatory Practice

41. Model Rule for Registration of In-House Counsel
   August 2008, Section of Legal Education and Admission to the House

43. Examination of Final Pretrial Submission Orders
   August 2008, Section of Litigation

44. Patient Safety
   August 2008, Standing Committee on Medical Professional Liability

45. Expedited Partner Therapy
   August 2008, Health Law Section

46. Telemedicine Licensure Recognition
   August 2008, Health Law Section

47. Funding for Tribal Justice Systems
   August 2008, Section of Civil Rights and Social Justice

48. Bipartisan Commissions to Nominate Candidates to U.S. District Court of Appeals
   August 2008, Judicial Division

49. Election Administration Guidelines and Commentary
   August 2008, Standing Committee on Election Law
50. Community Service by Lawyers
   August 2008, Standing Committee on Election Law

51. Beneficial Owners
   August 2008, Task Force on Gatekeeper Regulation

52. Computer or Digital Forensic Work
   August 2008, Section of Science and Technology Law
GENERAL INFORMATION FORM

Submitting Entity: Secretary of the Association
Submitted By: Mary L. Smith

1. **Summary of Resolution:**
   In an ongoing effort to keep the Association's policies up to date, this resolution consists of policies 10 years old or older. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as current policy of the ABA. The Secretary recommends that the policies set forth in Attachment 1 of the resolution be archived.

2. **Approval by Submitting Entity:**
   The policies that have been placed on the archival list were reviewed by the entities that originally submitted them. In cases in which the submitting entity is now defunct, a successor entity was given the policy to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

3. **Has this or a similar resolution been submitted to the House or Board previously?**
   Although the Association has from time to time culled its records, the policies on the archival list have not been subject to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

4. **What existing Association policies are relevant to this resolution and how would they be affected?**
   The archiving of any policy would have no affect on existing policies.

5. **What urgency exists which requires action at this meeting of the House?**
   Resolution 400 adopted August 1996 mandates the annual review of policies 10 years old or older.

6. **Status of Legislation:**
   N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Policy and Procedures Handbook will be updated to reflect those policies that have been archived.

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

None.

9. Disclosure of Interest: N/A.

10. Referrals.

The policies identified in the Resolution with Report have been circulated to 27 entities as noted in Appendix B and also will be sent to the Government Affairs Office.

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

Mary L. Smith
321 North Clark Street
Chicago, Illinois 60654-7598
(312) 988-5162
marysmith828@hotmail.com

Richard Collins
American Bar Association
321 North Clark Street
Chicago, Illinois 60610
312/988-5162
Richard.Collins@americanbar.org

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

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The Policy and Procedures Handbook will be updated to reflect those policies that have been archived.

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Mary L. Smith
321 North Clark Street
Chicago, Illinois 60654-7598
(312) 988-5162
marysmith828@hotmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution
   This resolution archives Association policies that are 10 years old or older. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA.

2. Summary of the Issue which the Recommendation Addresses
   The archiving project, mandated by the House of Delegates in 1996, will improve the usefulness of the catalogued Association positions on issues of public policy. Many of the Association’s positions were adopted decades ago and are no longer relevant or effective.

3. An Explanation of How the Proposed Policy will Address the Issue
   The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

4. A Summary of Any Minority Views or Opposition Which Have Been Identified
   None at this time.
RESOLVED, That the Association policies adopted in 1998 which were previously considered for archiving but retained as set forth in Attachment 1 to Report 400B dated August 2018, are archived and no longer considered to be current policy of the American Bar Association and shall not be expressed as such.

FURTHER RESOLVED, That policies which have been archived may be reactivated at the request of the original sponsoring entities. If the original sponsoring entities no longer exist, requests may be brought to the Secretary to be placed on a reactivation list for action by the House of Delegates. Such reactivated policies shall be considered current policy for the Association and shall be expressed as such.

FURTHER RESOLVED, That the Board of Governors may act to reactivate policies when the House of Delegates is not in session.

RESOLVED, That the Association policies adopted in 1998 which were previously considered for archiving but retained as set forth in Attachment 1 to Report 400B dated August 2018, are archived and no longer considered to be current policy of the American Bar Association and shall not be expressed as such.

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FURTHER RESOLVED, That the Board of Governors may act to reactivate policies when the House of Delegates is not in session.
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3. Court Education
February 1998, National Conference of State Trial Judges (Report 104B-98-MM104B)

RESOLVED, That the American Bar Association urges trial judges to encourage processes which inform and educate victims of crimes about programs, procedures and restitution, while observing the legal rights of criminal defendants and assuring impartiality to all who appear before them, including the use of videos, brochures and educational materials, presented to victims by law enforcement officials, at an early stage of the criminal proceeding.

6. Certification Programs for Lawyers
February 1998, Standing Committee on Specialization (Report 113-98-MM113)

RESOLVED, That the American Bar Association re-accredit the following designated specialty certification programs for lawyers: Accounting Professional Liability, Legal Professional Liability and Medical Professional Liability programs of the American Board of Professional Liability Attorneys of Great Neck, New York; and the Elder Law program of the National Elder Law Foundation of Tucson, Arizona.

18. Technology Advances
Annual 1998, Standing Committee on Technology and Information Systems (Report 100-98-MM100)

RESOLVED, That the American Bar Association recognizes that the coherent, integrated electronic provision of information relating to the legal system, including the judicial system, in a way which makes full use of the capabilities of existing technology, will provide significant benefits and efficiencies for governmental entities, the bar, and the public;

FURTHER RESOLVED, That the American Bar Association:

1. Urges all federal, state, territorial and local government entities, including courts, administrative agencies, and legislative bodies, to provide public electronic access to governmental information through the Internet at no cost to the user and to forgo the required use of proprietary networks for such access;
2. Urges all such governmental entities to provide for electronic filing and retrieval of all appropriate documents through the Internet using open data interchange standards;
3. Urges the Executive Branch, the Congress, and the Federal Judiciary, with input from the Association and representatives of other information consumers, to work together to develop a coherent uniform approach to...
the electronic provision and exchange of public information consistent with the principles of this recommendation; and

4. Urges state, territorial and local bar associations to act as catalysts in their respective jurisdictions to bring together representatives of governmental entities and information consumers to develop a coherent uniform approach to the electronic provision and exchange of public information within their respective jurisdictions consistent with the principles of this recommendation.

30. Lawyer Specialty Certification Programs
August 1998, Standing Committee on Specialization (Report 114-98AM114)

RESOLVED, That accreditation by the American Bar Association be continued for the lawyer specialty certification programs as reorganized and described as follows:

The accredited Business Bankruptcy lawyer certification program, sponsored by the Commercial Law League of America Academy of Commercial and Bankruptcy Law Specialists, which is to be merged with the accredited Business Bankruptcy lawyer certification program sponsored by the American Bankruptcy Board of Certification;

The accredited Creditors’ Rights lawyer certification program, sponsored by the Commercial Law League of America Academy of Commercial and Bankruptcy Law Specialists, which is to be transferred to the American Bankruptcy Board of Certification; and

The accredited programs in Business Bankruptcy, Consumer Bankruptcy and Creditors’ Rights of the American Bankruptcy Board of Certification, which organization will change its name to and be known hereafter as the American Board of Certification.

36. Civil Litigation Process
August 1998, National Conference of State Trial Judges (Report 122-98AM122)

RESOLVED, That the American Bar Association adopts the black letter of the Discovery Guidelines for State Courts, dated August 1998, in order to encourage state and territorial judicial rulemaking authorities to incorporate the guidelines and applicable rules of procedures in an effort to improve the civil litigation process by curbing discovery abuses and promoting expense and delay reduction in civil courts.

DISCOVERY GUIDELINES FOR STATE COURTS
(AUGUST 1998)
1. Each party to an action shall make initial disclosure of discoverable information relevant to its claims and defenses asserted in the action, except on order of the court for good cause shown.

2. No formal discovery request should be permitted until counsel for the parties hold a mandatory early discovery conference to resolve disclosure disagreements and develop a binding discovery plan in writing.

3. Discovery should be limited unless the court, on motion of a party, permits expanded discovery in an appropriate case.

4. The court shall promptly schedule a supervised discovery conference at which counsel shall submit a reasonable and comprehensive discovery plan, subject to court approval, which shall designate the time, place and the most cost effective manner of discovery; the dates for exchange of expected trial witnesses; the dates and sequence for disclosure of experts and written reports containing their opinions; and the deadline for completion of all discovery. The court shall also schedule the dates of pretrial conference and trial.

5. The court should not entertain discovery motions until counsel have met and conferred in a good faith effort to resolve discovery disputes and the movant has filed a detailed Certificate of Compliance.

6. The court must actively control the discovery process and should not hesitate to impose sanctions when appropriate.

7. Counsel should at all times seek to control unnecessary expense and delay.

8. When a party fails to comply with its disclosure obligations, the court has a duty to impose sanctions when appropriate.

9. The court should encourage counsel at all times to use alternative dispute resolution mechanisms to resolve all substantive issues in civil litigation.

39. Courthouse Construction
August 1998, Judicial Division (Report 126-98AM126)

RESOLVED, That the American Bar Association urges the Administration to support FY 1999 funding for federal court facility construction projects;

FURTHER RESOLVED, That the American Bar Association urges the appropriate committees of Congress, if necessary, to act on their own initiative to further the construction of federal court facility projects determined to be most urgent.

40. Courthouse Construction
August 1998, Judicial Division (Report 126-98AM126)

RESOLVED, That the American Bar Association urges the Administration to support FY 1999 funding for federal court facility construction projects;

FURTHER RESOLVED, That the American Bar Association urges the appropriate committees of Congress, if necessary, to act on their own initiative to further the construction of federal court facility projects determined to be most urgent.
REPORT

Pursuant to Report 400, adopted by the House of Delegates in 1996, the Association is annually required to review policies adopted by the House of Delegates that have been in existence ten years or more. See Report 400 attached as Appendix A. Those policies that are outdated, duplicative, inconsistent with current policy or no longer relevant are to be archived. The review process operates from the premise that any policy on the list will be archived unless there is a request to remove it from the archival list and retain it as current policy. Once archived, it may no longer be cited as current policy. An archived policy is not considered to be rescinded, but rather is retained by the Association for historical purposes only.

Several years ago, the Resolution and Impact Review Committee reviewed the current archiving procedure and determined that it was time to revisit policies that were originally considered for archiving but retained. To date, every policy that is at least ten years old has been considered for archiving once. In the first several years after the procedure was instituted, over 1000 policies were examined. Of those, about one-third were archived. In subsequent years, policies were examined when they became 10 years old. The vast majority of policies that were passed in the last twenty years have been retained at the request of the sponsoring entity, the Office of Governmental Affairs or a member of the House.

This year, the policies adopted in 1998 which were previously considered for archiving but retained were reviewed. The process of reviewing previously retained policies began in spring of 2012 and will continue annually. To accomplish this objective, the Division for Policy and Planning compiled an index of such policies set forth in either the ABA Policy and Procedures Handbook or the American Bar Association Legislative Issues list maintained by the Governmental Affairs Office. Some 42 policies were thus identified. Each entity, which had been the original sponsor, was sent a list of the policies it had sponsored. In cases where the original sponsoring entity was no longer in existence, the policies were sent to an appropriate successor entity. The 27 entities to which the policies were sent are listed in Appendix B.

Each entity was asked to identify which of the policies should be archived and which should be retained as current policy. In addition, each was requested to identify and include a recommended disposition for any other policies that had been generated which were not in the materials they received. Those retained as current policy through this process will be reviewed again in 10 years. Retained policies are listed in Appendix C.

Respectfully submitted,
Mary L. Smith, Secretary
American Bar Association
August 2018

Pursuant to Report 400, adopted by the House of Delegates in 1996, the Association is annually required to review policies adopted by the House of Delegates that have been in existence ten years or more. See Report 400 attached as Appendix A. Those policies that are outdated, duplicative, inconsistent with current policy or no longer relevant are to be archived. The review process operates from the premise that any policy on the list will be archived unless there is a request to remove it from the archival list and retain it as current policy. Once archived, it may no longer be cited as current policy. An archived policy is not considered to be rescinded, but rather is retained by the Association for historical purposes only.

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Respectfully submitted,
Mary L. Smith, Secretary
American Bar Association
August 2018
RESOLVED, That the American Bar Association adopts a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant. Such archived policies will be retained for historical purposes but shall not be considered current policy for the Association and shall not be expressed as such.

FURTHER RESOLVED, That the archiving shall be implemented as follows:

1. All policies adopted by the House of Delegates shall be reviewed, with the exception of uniform state laws, model codes, guidelines, standards, ABA Constitution and Bylaws, and House Rules of Procedures.

2. To phase in this process, the periodic mandated review will in the first year, 1997, address policies 20 years old or older; in the second year policies 15 years old or older; and in the third year and each year thereafter, policies 10 years old or older.

3. Prior to each Annual meeting, a list of affected policies will be compiled and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.

4. At each Annual Meeting, a recommendation will be submitted to archive certain policies and the House will vote on the recommendations.

5. Those policies which are not archived will be subject to review every ten years thereafter.

6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.

7. This archival process is not intended to affect the rights of any member of the House to propose amendments or rescission of any policies as presently permitted under House rules.

FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.

RESOLVED, That the American Bar Association adopts a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant. Such archived policies will be retained for historical purposes but shall not be considered current policy for the Association and shall not be expressed as such.

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FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.
The entities below reviewed and recommended disposition of the policies contained in the report:

**Sections and Divisions**
- Administrative Law and Regulatory Practice
- Business Law
- Criminal Justice
- Government and Public Sector Lawyers Division
- Intellectual Property Law
- International Law
- Judicial Division
- National Conference of State Trial Judges
- Law Student Division
- Labor and Employment Law
- Legal Education and Admission to the Bar
- Litigation
- Public Contract Law
- Tort Trial and Insurance Practice Section
- Young Lawyers Division

**Standing Committees**
- Client Protection
- Election Law
- Ethics and Professional Responsibility
- Legal Aid and Indigent Defendants
- Specialization
- Technology and Information Systems

**Commissions**
- Disability Rights
- Law and Aging

**State, Local and Territorial Bar Association**
- Bar Association of the District of Columbia
- King County Bar Association
- Los Angeles County Bar Association

**Affiliated Organizations**
- National Association of Women Lawyers

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APPENDIX C
Retained Policies

1. Vacant Federal Judicial Positions
   February 1998, King County Bar Association

2. Judges
   February 1998, Judicial Division

4. Board of Law Examiners
   February 1998, Section of Legal Education and Admissions to the Bar

5. Federal Judicial Independence
   February 1998, Judicial Division

7. Judicial Candidates
   February 1998, Commission on Disability Rights

8. EEOC
   February 1998, Section of Labor and Employment Law

9. World Trade Organization
   February 1998, Section of International Law

10. International Criminal Court
    February 1998, Section of International Law

11. Dickinson School of Law
    February 1998, Section of Legal Education and Admissions to the Bar

12. Chapman University School of Law
    February 1998, Legal Education and Admissions to the Bar

13. The District of Columbia School of Law be removed from ABA approved Law Schools List
    February 1998, Legal Education and Admissions to the Bar

14. District of Columbia School of Law granted provisional approval by the ABA
    February 1998, Legal Education and Admissions to the Bar

15. Filling Vacancies on the United States Sentencing Commission
    August 1998, Los Angeles County Bar Association

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   February 1998, King County Bar Association

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|    | August 1998, Bar Association of the District of Columbia |
| 17. | Gun Violence by Young Persons at School  
|    | Annual 1998, Los Angeles County Bar Association |
| 19. | Model Rules for Mediation of Client-Lawyer Disputes Client Protection  
|    | Annual 1998, Standing Committee on Client Protection |
| 20. | Professional Development and Justice System Improvement  
|    | Annual 1998, Government and Public Sector Lawyers Division |
| 21. | Health Care Plans  
|    | August 1998, Commission on Law and Aging |
| 22. | Compensation of Full-Time State Administrative Law Judges  
|    | Annual 1998, Section of Administrative Law and Regulatory Practice |
| 23. | Western State University College of Law  
|    | August 1998, Legal Education and Admissions to the Bar |
| 24. | Commissioner or Deputy Commissioner of Patents and Trademarks Vacancies  
|    | Annual 1998, Section of Intellectual Property Law |
| 25. | Guidelines for Litigation Conduct  
|    | August 1998, Section of Litigation |
| 26. | The American Bar Association Urges Employers to address work place violence  
|    | August 1998, National Association of Women Lawyers |
| 27. | Principles of Competition in Public Procurements  
|    | August 1998, Section of Public Contract Law |
| 28. | Jurisdictions Ensure that Defendants are Represented by Counsel  
|    | Annual 1998, Criminal Justice Section |
| 29. | Campaign Finance Principles  
|    | Annual 1998, Standing Committee on Election Law |
| 30. | Standards for Indigent Defense Systems  
|    | Annual 1998, Standing Committee on Legal Aid and Indigent Defendants |
| 32. | Amendment to Rule 8.4 of ABA Model Rule of Professional Conduct  
|    | Annual 1998, Standing Committee on Ethics and Professional Responsibility |
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33. Human Rights
   August 1998, Section of International Law

34. Confidentiality of Lawyer-Client Communications
   August 1998, Young Lawyers Division

35. Juror Privacy
   August 1998, Judicial Division

37. Auto Choice Reform Act of 1997
   August 1998, Tort Trial & Insurance Practice Section

38. Article 36 of the Vienna Convention
   Annual, 1998 Law Student Division

40. United States Ratification of the United Nations
   Annual 1998, Business Law Section

41. Export Controls
   August 1998, Section of International Law

42. Conduct by Lawyers in Campaign Contributions
   Annual 1998, Standing Committee on Election Law
GENERAL INFORMATION FORM

Submitting Entity: Secretary of the Association
Submitted By: Mary L. Smith

1. Summary of Resolution:
   In an ongoing effort to bring the Association's policies up to date, this resolution consists of the review of policies adopted in 1998 which were previously considered for archiving but retained. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA. The Secretary recommends that the policies set forth in Attachment 1 of the resolution be archived.

2. Approval by Submitting Entity:
   The policies that have been placed on the archival list were reviewed by the entities that originally submitted them. In cases in which the submitting entity is now defunct, a successor entity was given the policy to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

3. Has this or a similar resolution been submitted to the House or Board previously?
   Although the Association has from time to time culled its records, the policies on the archival list have not been subject to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

4. What existing Association policies are relevant to this resolution and how would they be affected?
   The archiving of any policy would have no affect on existing policies.

5. What urgency exists which requires action at this meeting of the House?
   Resolution 400 mandates the review of policies 10 years old or older.

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

GENERAL INFORMATION FORM

Submitting Entity: Secretary of the Association
Submitted By: Mary L. Smith

1. Summary of Resolution:
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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 and Procedures Handbook will be updated to reflect those policies that have been archived.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

The policies identified in the Resolution with Report have been circulated to 27 entities as noted in Appendix B, and also will be sent to the Government Affairs Office.

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution
This resolution archives Association policies adopted in 1998 which were previously considered for archiving but retained. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA.

2. Summary of the Issue Which the Resolution Addresses
The archiving project, mandated by the House of Delegates in 1996, will improve the usefulness of the catalogued Association positions on issues of public policy. Many of the Association’s positions were adopted decades ago and are no longer relevant or effective.

3. An Explanation of How the Proposed Policy will Address the Issue
The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

4. A Summary of Any Minority Views or Opposition Which Have Been Identified
None at this time.

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