Resolutions with Reports
to the House of Delegates
Resolutions with Reports
to the House of Delegates
RESOLUTIONS WITH REPORTS
TO THE HOUSE OF DELEGATES

Vancouver Convention Centre West
Level 1, Ballrooms B/C
Vancouver, British Columbia

February 5, 2018

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All sessions of the House of Delegates will be held on Monday, February 5, 2018, at the
Vancouver Convention Centre West, Level 1, Ballrooms B and C, in Vancouver, British
Columbia. It is anticipated that the House meeting will begin at 9:00 a.m., and will adjourn no
later than 5:30 p.m. when the House has completed its agenda.

The Final Calendar of the House of Delegates meeting will be placed on House members’
desks at the opening session on Monday morning, February 5. Sections, committees,
delegates, affiliated organizations and bar associations, which have submitted Resolutions
with Reports, oral information or late reports authorized by the Committee on Rules and
Calendar, will be calendared.

The index, which appears at the end of this book, will assist House members in finding reports
received by the November 15, 2017 filing deadline. Resolutions with Reports numbered 10A,
100 through 117 appear in this book. Informational Reports can be found on the ABA’s
website at http://www.americanbar.org/groups/leadership/house_of_delegates/2018-
vancouver-midyear-meeting.html (click on Informational Reports).

Any late Resolutions with Reports, those received after November 15, 2017, will be
considered by the House if the Committee on Rules and Calendar recommends a waiver of
the time requirement and the recommendation is approved by a two-thirds vote of the
delegates voting. Late Resolutions with Reports will be distributed at the opening session of
the House, along with any additional Resolutions with Reports submitted by state or local bar
associations.

The preliminary calendar of the House of Delegates meeting is as follows:
The Chair of the House of Delegates, 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 Resolutions with Reports of Sections, Committees and Other Entities
   10A Bar Association Resolutions
   100-117 Resolutions with Reports
   300 Late Resolutions with Reports

ADJOURNMENT
AMERICAN BAR ASSOCIATION
2017-2018
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Eighth District 2019 Andrew Joshua Markus, Miami, FL
Ninth District 2018 Joe B. Whisler, Kansas City, MO
Tenth District 2019 David S. Houghton, Omaha, NE
Eleventh District 2019 Hon. Leslie Miller, Tucson, AZ
Twelfth District 2020 Randall D. Noel, Memphis, TN
Thirteenth District 2019 Maryann Elizabeth Foley, Anchorage, AK
Fourteenth District 2018 John L. McDonnell, Jr., San Francisco, CA
Fifteenth District 2018 A. Vincent Buzard, Pittsford, NY
Sixteenth District 2018 Hon. William C. Carpenter, Jr., Wilmington, DE
Seventeenth District 2018 Alan Van Etten, Honolulu, HI
Eighteenth District 2019 Paula E. Boggs, Sammamish, WA
Nineteenth District 2020 David L. Brown, Des Moines, IA
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<td>Lorelie S. Masters</td>
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<td>Eileen A. Kato</td>
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<td>Hon. Ramona G. See</td>
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<td>Grace Meredith Parnell</td>
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<td>Bernard T. King</td>
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<td>Linda L. Randell</td>
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<td>Darcee S. Siegel</td>
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<td>Erica R. Grinde</td>
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REPORT OF THE
ABA PRESIDENT
TO THE
HOUSE OF DELEGATES

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

TO THE

HOUSE OF DELEGATES

To permit the presentation of current financial data, the written report of the Treasurer will be distributed at the time of the Midyear Meeting of the House of Delegates.
REPORT OF THE EXECUTIVE DIRECTOR
to the
HOUSE OF DELEGATES
(submitted November 30, 2017)

This report highlights American Bar Association activities from June 9, 2017 to November 30, 2017.

Introduction

2018 will mark the 140th anniversary of the American Bar Association. On August 21, 1878, 75 lawyers from 20 states and the District of Columbia convened the ABA’s first meeting in Saratoga Springs, New York. Since then, the ABA has played a leading role in the development of the legal profession and the advancement of the rule of law, both here in America and around the world.

While the ABA has remained steadfast in its promotion of justice and protection of the profession since that first meeting, the Association’s size and structure changed tremendously over time. The initial group of fewer than 100 members has grown to become one of the world’s largest professional organizations with more than 400,000 members. The first meeting set up seven ABA committees, including Legal Education, Judicial Administration, and Admissions to the Bar; today, our Association has more than 3,500 entities.

Despite the remarkable growth we’ve experienced, today the ABA faces serious challenges to recruit and retain dues-paying attorney members. Millennials are reluctant to join organizations without seeing tangible benefits to membership. Baby Boomer attorneys are retiring in substantial numbers. And the legal marketplace has become increasingly competitive, causing economic hardship for many lawyers who have questioned the ultimate value of ABA membership.

The unparalleled challenges we face require an unparalleled response. I expect my oral report to the House of Delegates at the Midyear Meeting in Vancouver to be devoted exclusively to the detailed presentation of a new membership model. If approved, that model will be among the most profound actions ever undertaken by our Association. ABA staff has collaborated closely with members to develop this promising initiative, which will enable us to adapt to current needs of the marketplace as we offer an enhanced and simpler membership proposition. This written report highlights many of the other issues, programs, and challenges facing the Association.
Membership

The ABA finished FY 2017 with a 2.4 percent increase in membership, to 412,505, which exceeded the previous year by nearly 10,000 members. Law students drove the growth, and for the first time ever, we surpassed 100,000 student members. Our market share of law students continues to rise, increasing from 15 percent two years ago to nearly 80 percent as of the end of FY 2017. Unfortunately, our lawyer membership continued its recent decline, falling by about 3 percent by the end of FY 2017 to just below 300,000 members.

When viewed over a 10-year period, our systemic membership challenges and successes become very apparent. From FY 2008 to FY 2017, our overall membership total has fluctuated around the 400,000 level. During this period, our lawyer membership declined by about 16 percent, which was offset by gains in student and associate members. A decade ago, lawyers made up 87 percent of ABA members and students were 11 percent; today lawyers comprise 71 percent of the Association, while a record high 24 percent were students at the end of FY 2017. The ABA’s recruitment and retention activities are focused on building on our exceptional progress with students and associates, while reversing the decline in lawyer members.

This year, the ABA has revised the Member Census to learn more about our members’ practice settings and size (and also to assure the accuracy of their contact information). In the past, the Association sent the Census along with membership cards to those who had paid their dues the previous month. The form was quite lengthy and the response rates were quite low -- less than 2 percent. The ABA discontinued the Census two years ago so we could develop a new approach and an improved form. Our Membership team has finalized a much shorter and simpler Member Census form, which we began distributing in November. It is easier to complete and will provide helpful information on our members’ needs. The new form focuses on four major goals: more accurate communication channels; more areas of interest on file; an enhanced understanding of members’ practice settings; and securing greater numbers of e-mailable members.

Tailored retention efforts have begun, ahead of the scheduled January 26 drop for non-payment of dues. Those efforts include value-centric messages via email, renewal email messaging highlighting the CLE in the City Webinar series, a direct mail piece showcasing member benefits, dues collection/renewal telemarketing both before and after the drop, along with emails focused specifically on the benefits of the ABA’s Sections, Divisions, and Forums.

At the end of FY 2017, ABA Group Billing stood at 74,048 members, a 1 percent increase over the prior year, and Group dues revenue for the fiscal year totaled $19,706,729. Our Full Firm program included 100 firms and 26,223 members at the
end of FY 2017, a 6.3 percent increase from the end of FY 2016, and Full Firm revenues were $5,247,513.

Our Membership staff is working with President Hilarie Bass on a series of Managing Partner Forums being held throughout the country. The first was held in Miami on October 17 at her firm’s office. Leaders from 14 National Law Journal (NLJ) 500 firms attended the forum, where President Bass discussed issues affecting the legal profession. As a follow-up to the Miami forum, one of the firms in attendance agreed to join our Full Firm Membership Program. Bilzin Sumberg has 84 attorneys, and as a result of enrolling as a Full Firm, we have added 28 new attorney members from the firm. A second Managing Partner Forum was held in Boston on November 7, with leaders from 11 NLJ 500 firms in attendance. Staff has identified additional strong prospects for Full Firm Membership and will work with President Bass to present them with proposals.

The ABA and Chicago Bar Association (CBA) are collaborating this year to offer a 50 percent discount to non-members who join the another’s association. Last year, 140 CBA members joined the ABA with this discounted offer, and four ABA members took advantage of the CBA’s discount offer to join their organization. We’re working to increase collaboration with local and state bar associations to help grow our memberships.

We have been working closely with ABA accredited law schools to enroll students into the Full School Enrollment Program, and to date, have successfully partnered with 103 schools. We will continue to work with member and campus leaders to secure more Full School enrollments. It is very important for our Sections, Divisions, and Forums to develop programs for students that showcase the value of membership, and we are giving increased emphasis to these efforts.

The ABA continues to achieve success with our Law Student Premium Program, which offers students a range of special benefits and substantial cost-savings for a $25 annual fee. For example, Premium members save $250 on the popular BARBRI bar review program. By partnering with such companies as BARBRI, West Academic, and Quimbee, the ABA has added substantial value to our efforts to support students’ success in law school. Currently, 20,656 students are enrolled in the Premium Membership. Since September 1, the ABA has been able to convert 9,754 members from free membership to Premium and we have brought in over 3,855 new ABA members at the Premium level.

The ABA Rep Rewards program is performing well. To date, out of the 204 ABA approved law schools, 197 have ABA student representatives on their campuses. The Law Student Division staff has reached out directly to law schools to ensure almost all of them have a designated ABA student representative, and we help them with strategies to effectively engage students.
ABA Email

The Association has enjoyed considerable success with our efforts to reduce the voluminous number of emails we send. At the end of FY 2017, the ABA was responsible for 170,624,677 emails, down from 286,147,170 the prior year, a drop of 40 percent—more than 115 million. Some specific examples of improved email practices in FY 2017 include:

- Reduced ABA Publishing emails by 70 percent from FY 2016
- Reduced ABA Journal emails by 35 percent from FY 2016
- Required all ABA email senders to complete an anti-spam webinar
- Required all mass emails (more than 150,000 recipients) to be specially authorized by the ABA’s Email Manager

This year we have also adopted new business practices to lessen the frequency at which groups send emails to the same recipients. Through multi-messaging, bundling, and the use of social media, the goal here is to limit member contacts by any individual entity to no more than once a week. This will help to overcome the bad reputation segments of the ABA have developed on email platforms (such as Gmail and Yahoo) which use algorithms that look at total volume, frequency, and user engagement. We estimate that currently, between 20 and 60 percent of ABA emails go directly into spam folders. The industry average is 10 percent. We will continue to work meticulously to reverse this trend.

Website Redesign

I’m pleased to report our extensive website redesign is on track for launch shortly after the Midyear Meeting in Vancouver, before the end of the first quarter in calendar year 2018. As of the date this Report was written, we have completed design work and content development, and our eCommerce platform is scheduled to be finalized by the end of December. We will then undertake a comprehensive testing and debugging process as we complete all new content in the system. Staff training for the new website began in late September with informational sessions in both our Chicago and DC offices, and the training is ongoing.

A special thanks to ABA members and staff who collaborated closely to enable us to develop a modern, streamlined website that meets the needs of our Association and our members. Among the features of the new website:

- Mobile-friendly with new contemporary design
- New search capabilities
- Enhanced tagging with Topic Pages to recirculate content
• Entity microsites with recommended best practice navigation and limited ability to customize for entity needs
• Faster, more intuitive eCommerce capabilities

ABA Insurance

ABA Insurance (http://www.abainsurance.com), our start-up program that has become a valuable member benefit, now offers significant savings on more than 20 different offerings. This year, we are working with our third-party administrator, USI Affinity, to focus insurance marketing on solo and small firms and increase collaboration with all ABA entities. USI is creating new campaigns to help us attract non-members to ABA membership through our insurance products.

Center for Innovation

Launched in September 2016, the ABA’s Center for Innovation seeks to encourage and develop innovations that improve the accessibility, effectiveness, and efficiency of legal services in the United States. We’re very pleased with what the Center has accomplished the short time it’s been operational:

• Collaborating on the creation of Hate Crime Help to direct hate crime victims to geographically relevant information and resources
• Launching a social entrepreneurship project initiative with the Legal Services Corporation (LSC) that will facilitate LSC grantees’ implementation of cutting-edge tools and services
• Designing a 21-century Miranda tool to help arrestees understand their rights
• Hosting and organizing national events and programs that spotlight cutting-edge legal services innovations

The Center has also implemented a Fellowship Program. The Fellows include experienced attorneys, recent law school graduates, and non-attorney legal professionals who spend time working on innovative legal services projects. Through the program, the Center seeks to help them develop the people, processes, and technology skills necessary to innovate the legal sector. The inaugural class of Fellows began their work on August 28, 2017 with an intense week-long “boot camp” in which several ABA leaders participated. Among other topics, the boot camp included sessions on how to use technology to deliver legal services in new ways; fundraising; branding; and advanced writing and speaking techniques. Following the boot camp, the Fellows began the research phase of their projects. In addition to conducting numerous interviews, they have been in the field observing courts, legal services organizations, and other entities important to their projects. ABA staff experts have made regular presentations to the group.
MCLE Accreditation

The ABA has the very best MCLE accreditation process, and we are now offering our expertise to other providers of CLE. We launched our MCLE Accreditation Service in the summer of 2017, and it is a very promising source of non-dues revenue. Much of the work of our MCLE team is now automated, allowing for greater efficiencies. Among other benefits, the upgraded system permits more timely access to information and provides electronically-supplied certificates.

The Accreditation Service has achieved very good results in its first few months, despite its limited release and very limited marketing. As of this writing, the Service has eight customers and has processed 18 programs with several thousand attendees. To date, the service has booked $50,300 in revenue for FY 2017 and FY 2018 and more than 25 proposals are being evaluated by prospective customers.

Chicago Headquarters Reorganization

We signed our renegotiated lease on the ABA’s Chicago Headquarters on August 16. We were able to leverage the Association’s lease of the lower levels at our prime riverfront location at 321 North Clark Street to obtain substantial savings. The Headquarters offices will undergo major renovations, as we will have a smaller footprint in the building under the new lease. We have begun the process of moving affected staff to their new locations. On November 20, construction began on the redesigned office space and common areas on the remaining ABA floors of the building. We will complete the moves and construction in March.

Diversity

Since 2011, the ABA staff has participated in a voluntary and anonymous Diversity and Inclusion Survey. We’ve asked the same questions every year, giving us a baseline to assess the areas where we’re making progress to enhance diversity and inclusion within the Association, and also to note areas in which we need to improve. This year, 655 ABA employees -- about 72 percent of staff -- participated in the survey. For the most part, staff believes the ABA has become a more diverse and inclusive workplace over the seven surveys. A few examples:

- In 2017, 71 percent of respondents agreed the ABA maintains a welcoming staff environment compared to 66 percent in 2011
- In 2017, 61 percent of respondents agreed the ABA hires a diverse workforce at all its levels, an increase from 46 percent in 2011
- In 2017, 55 percent of respondents agreed ABA retains a diverse workforce at all levels as compared to 42 percent in 2011.
While these trends are positive, we recognize the need to continue to focus efforts in this critical area. The ABA is committed to Goal III’s mission to “eliminate bias and enhance diversity” within the ABA, in the profession, and in society. We strive to make the ABA an even more diverse and welcoming organization as time goes on.

The Office of Diversity and Inclusion recently met with the Standing Committee on Publishing Oversight’s (SCOPO) Diversity Committee chair and staff to discuss strategies to enhance SCOPO’s diversity and inclusion efforts, including increasing the diversity of authors for ABA books and publications. Several ideas were identified, including adding fields to the new ABA Diverse Speakers Directory to allow diverse lawyers to provide information about their writing expertise and experience; hosting or facilitating outreach to leadership of the National Affinity Bar Associations; and soliciting/collecting Goal III demographic information from authors to track status and progress.

The Coalition on Racial and Ethnic Justice (COREJ) planned, organized, and fundraised for “Justice Hack New York” during the 2017 Annual Meeting on August 12 at Fordham University Law School. Approximately 145 participants attended the Hackathon. The Digital Justice Initiative Project seeks to use Hackathons to bring together communities of color, persons with disabilities, and the legal, law enforcement, and technology sectors to devise innovative technological solutions to address conflicts between communities of color, people with disabilities, and law enforcement. COREJ will issue a report with recommendations regarding the findings, solutions, and available apps that were created and designed during the Hackathons.

The Commission on Racial and Ethnic Diversity in the Profession finalized the Fall 2017 edition of its e-Newsletter -- “Innovator”. It focused on the Commission on the Diversity and Inclusion 360’s Resolution 113 and accompanying Model Diversity Survey. Former ABA President Paulette Brown was the featured columnist, and she addressed Resolution 113. As you may recall, the Resolution was passed by the House at the 2017 Annual Meeting and urges all providers of legal services to expand and create opportunities at all levels of responsibility for diverse attorneys and clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase to diverse attorneys.

On September 14, the Office of Diversity & Inclusion (ODI) participated on a panel entitled “Strengthening Diversity & Inclusion in the Sections” during the 2017 SOC Fall Leadership Meeting. Judge Ramona See coordinated the program where panelists spoke on how Sections, Divisions, and Forums can increase diversity and inclusion in their membership and leadership. The ODI also provided information on key diversity and inclusion resources to assist ABA entities. A one-pager describing these resources can be found under “Featured Resources” on the ABA Diversity and Inclusion Portal.
Free Legal Answers

ABA’s virtual legal advice clinic, Free Legal Answers, continues to expand its ability to help low-income individuals with their civil legal questions. As of October 31, 16,661 client questions had been submitted since launch of the website in August 2016, and 4,025 pro bono attorneys are registered to assist with civil legal matters. 38 states are now connected to the site and attorneys in those jurisdictions are actively providing responses to eligible clients.

In response to the legal needs of Hurricane Harvey and Irma victims, the Texas and Florida Free Legal Answers sites temporarily increased their client income/asset maximum to help more people impacted by the disasters. This resulted in more than 1,000 additional disaster-related questions submitted to the Texas site and nearly 650 additional questions to the Florida site through October 2017.

Help for Hurricane Victims

In addition to Free Legal Answers, many ABA members rallied with pro bono assistance to help the victims of Hurricanes Harvey, Irma, and Maria with legal assistance on such issues as landlord-tenant problems, insurance claims, Federal Emergency Management Agency (FEMA) claims, and consumer matters such as contractor fraud. Our Young Lawyers Division Disaster Legal Services (DLS) team has made remarkable contributions, working diligently on the recovery efforts for the disaster areas impacted by the hurricanes.

Andrew VanSingel, Coordinator for the DLS program, has provided exceptional leadership. He stepped outside of his role as Coordinator to visit several recovery centers in Texas and to volunteer and provide support to the survivors of Harvey.

DLS team members have worked hard to set up DLS hotlines and coordinate lawyer legal aid. The team’s goal is to ensure that all states have disaster plans in place and are prepared when the next emergencies strike.

Finances

Detailed information on Association finances is provided in the Treasurer’s Report. The following highlights some significant matters. Please note that as of this writing, the audit has not yet been finalized.

ABA’s Consolidated Results for FY 2017

In FY 2017, the ABA generated operating revenues of $207.5 million and incurred operating expenses of $215.2 million, which resulted in an operating deficit of $7.7 million. Deficits in General Operations ($6.7 million) and Sections ($2.9 million)
were slightly offset by a surplus in Grants of $1.8 million. General Operations revenue was $3.2 million short of budget due to shortfalls in dues ($2.9 million), advertising ($0.9 million), and royalties ($0.8 million). This unfavorability was partially offset by Board-approved increased reserve funding for operations of $1.6 million to fund the website redesign project. General Operations expense was $2.9 million unfavorable to budget as we incurred $4.1 million of unbudgeted expenses. The primary drivers of the unbudgeted expenses were the website redesign project, severance costs resulting from staff reductions necessary to achieve the tight balanced budget for FY 2018, and recognition of an employee sick leave obligation due to a change in Illinois law. Excluding these unbudgeted items, general operations actual expenses would be $1.2 million lower than budgeted expenses.

Despite the $7.7 million operating deficit, the ABA realized a positive change in net assets (income) of $17.1 million in FY 2017 due to a strong investment performance and a favorable adjustment to our pension liability.

The ABA earned $27.9 million of investment income in FY 2017, which greatly exceeded the budget by $14.9 million (and the prior year by $11 million). FY 2017 was a particularly strong year for investments, and most experts expect that returns will be much lower in upcoming years. Thus, the FY 2018 budget reflects difficult decisions we made to decrease our budgeted expenses by $11 million. This will reduce our reliance on spending from our investments [reserves].

The ABA’s balance sheet as of August 31, 2017 remains strong with $344.8 million in assets, including $296.4 million in investments, and equity of $172.1 million.

ABA Publishing

ABA Publishing had a very successful FY 2017. The preliminary (unaudited) end-of-year figures indicate it generated more than $4.3 million in revenues, up $428,000 (11 percent) from the final FY 2016 numbers. And profits for Publishing saw a significant improvement in FY 2017, at almost $1.7 million, up $473,000 (40 percent) compared to the prior year. Publishing released 98 books in FY 2017 and are planning for 110 to 115 books in FY 2018.

ABA Journal

The ABA Journal’s end-of-year budget figures for FY 2017 show actual general operations spending of $3,762,251, compared to the budgeted amount of $3,651,821. While this amounts to spending $110,430 over budget (a 3 percent variance), it is a significant improvement over FY 2016, when general operations support was $1,301,002 higher (total general operations spending last year was $5,049,896).
The Journal has begun to improve ad sales as well. For example, MM.LaFleur, a high-end women’s business clothing company, agreed to buy six full-page ads in the magazine alongside the Journal’s new “Making It Work” column in calendar year 2018.

Beginning with the August 2017 issue, the ABA Journal has a new feature. “Members Who Inspire” provides a monthly profile of an ABA member doing inspirational work, helping those in need. The “Members Who Inspire” project is a collaboration between the Journal and the ABA Membership staff. If you know of a legal professional whose work inspires others, please share their story by contacting inspire@abajournal.com.

Advocacy

The Governmental Affairs Office (GAO) promoted the Legal Aid Defender campaign at the Annual Meeting and enlisted members who had not previously signed up. GAO distributed promotional cards, which included a Defender badge sticker that attendees could add to their name badge to indicate their support of the LSC. Through those efforts, more than 500 additional Legal Aid Defenders signed up to send messages to their congressional representatives through the website. In total, the campaign has delivered over 20,000 Legal Aid Defender cards to the Congress to support funding for the LSC.

In an effort initiated and coordinated by GAO, 52 organizations that represent children's interests around the country sent an August 25 letter to the Senate and House Appropriations Committees urging Congress to adequately fund the LSC.

GAO prepared an update on LSC appropriations from President Bass that was sent to members of the Legal Aid Defenders program in an email on September 19. The ABA will continue to strongly push for robust LSC funding, which at this writing is still being debated in Congress. To find out the latest information on where funding stands, please visit the ABA’s LSC page at www.ambar.org/lsc.

On August 15, the ABA sent a letter to U.S. Attorney General Jeff Sessions concerning former military service members who had been suffering from an undiagnosed trauma injury at the time they had been discharged from the military under other than honorable conditions. Such undesirable discharges render those persons ineligible for VA health services for their service connected trauma. Attached to the letter was ABA House of Delegates Report 120, approved the day before, which identified steps the administration could take to provide special review of these cases through the exercise of clemency.

On September 8, GAO briefed negotiators at the Office of the U.S. Trade Representative, at their request, on legal services market-access issues in India in advance of an intersessional meeting of the U.S.-India Trade Policy Forum.
On September 25, GAO sent a letter to the Chairman and Ranking Member of the Senate Finance Committee expressing opposition to the Graham-Cassidy-Heller-Johnson proposal to “repeal and replace” the Affordable Care Act (Obamacare). Emphasizing the bill’s potential impact on vulnerable populations, the letter expressed concerns regarding the legislation’s adverse effect on Medicaid: it opposed changes in the Medicaid program that would weaken the current entitlement nature of the program and the shared legal obligation that the federal and state governments have to provide comprehensive benefits to all individuals who meet eligibility criteria.

On October 13, the National Creditors Bar Association (NARCA) presented the ABA with its prestigious Donald Kramer Award for “tirelessly working to preserve the independence of the legal profession and the judiciary along with the long-standing tradition of the governance of the practice of law by state supreme courts and the state bar associations.” In extending the award to the ABA, NARCA expressed special gratitude for the ABA’s ongoing efforts to help advance H.R. 1849, legislation that would reaffirm the authority of the courts, not the CFPB or debtor plaintiffs, to oversee and discipline creditor lawyers engaged in litigation activities on behalf of clients.

On October 18, bipartisan legislation was signed into law that supports efforts to better understand, prevent, and combat elder abuse -- P.L. 115-69 (S. 178), the Elder Abuse Prevention and Prosecution Act of 2017. The new law includes goals supported by the ABA to enhance the federal government’s response to elder abuse and financial exploitation of seniors. GAO worked with members of Congress to get the bill through the Congress.

In November, the GAO worked with the ABA Standing Committee on the Federal Judiciary and Senate Judiciary Committee to help lawmakers understand the basis for the four “Not Qualified” ratings given to federal judicial nominees.

Communications

Following the swearing in of President Bass at the Annual Meeting, the Communications and Media Relations Division (CMR) conducted personalized media pitches to reporters and issued an August 15 news release on her initiatives. These efforts resulted in almost a dozen interviews, including more than five hours of back-to-back interviews the day after the Annual Meeting ended. Coverage appeared in The Miami Herald, Tacoma Daily News, Law360, New York Law Journal, and Market Insiders, among several news outlets.

News on Bass’ presidency was among 25 news releases issued by CMR on Annual Meeting developments and activities, reaching 3,191 reporters at 2,008 news outlets nationwide. More than 50 reporters from outlets such as NBC News, CBS News, Reuters, and Above the Law registered for onsite media credentials, with New
York Law Journal, Law360, and Legal Talk Network providing pre-meeting coverage that promoted the meeting’s unique CLE in the City series.

An August 28 news release issued by CMR announced Bass’ new Legal Fact Check website, a non-partisan initiative that provides reliable information “separating legal fact from fiction.” Prepared and published weekly by CMR, Legal Fact Check entries cover issues such as speech in the workplace, regulation of firearms, mandatory evacuations in time of crisis, presidential executive orders, forced participation in the national anthem and other hot topics. In its first two months, Legal Fact Check earned more than 22,250 page views and 10,216 unique users. The site has generated stories in legal publications such as Minnesota Lawyer and the National Law Journal, along with mainstream outlets such as BuzzFeed, the Daily Herald, the Daily Journal Commerce, the Columbus Dispatch and Montana Associated Technology. Law Newz, an online legal website owned by journalist Dan Abrams, routinely reposts Legal Fact Check items, including posts on gun control and whether TV networks can lose their licenses based on their news reports.

CMR arranged for President Bass to talk about her initiatives in an October 14 Law360 podcast, in which she discussed ways to improve the bar, her plans to find out why bar exam failure rates are climbing, and in particular, her study of why female lawyers are leaving the profession in their 40s and 50s, at the height of their careers.

In November, CMR provided comprehensive support and promotion of the ABA’s “National Summit on Achieving Long-Term Careers for Women in Law” on November 7 and 8 at Harvard University. A CMR liaison to President Bass’ women’s initiative was dedicated to covering and promoting the summit, issuing a news release on November 3 to 421 reporters at 328 news outlets nationwide that attracted the attention of several reporters, including those from Law360 and The American Lawyer.

CMR staff traveled to Harvard University to provide onsite support and coverage of the National Summit event, including videotaping, tweeting updates, and producing news stories. CMR coverage of the plenary sessions was posted on the ABA News website and published in the December issue of the member newsletter, YourABA (approximately 275,000 recipients). It was also shared with members and the media via social media channels. CMR’s video manager videotaped many prominent summit speakers and participants to produce educational and promotional video products. Among them, CMR will be preparing a highlights video on the initiative for debut at the 2017 Midyear Meeting in Vancouver. CMR is also working closely with the members on other possible video products, including a CLE based on the women’s initiative.

In other CMR news, in recognition of the 45th anniversary of the passing of Title 9, CMR drafted and placed an op-ed on behalf of Immediate Past President Linda Klein in late June on the landmark anti-discrimination law. The piece ran in several news outlets nationwide, including The Philadelphia Inquirer, New York Newsday, The Herald
& News, the Las Vegas Sun, and Inside Sources, a content syndicator for 300 U.S. news outlets, reaching 25 million readers. In it, Klein highlights the law’s role in helping to increase the number of female lawyers in the United States, but notes that Title 9’s protections are still needed.

As hurricanes Harvey and Irma ravaged several U.S. states, CMR distributed news on relief provided by the Young Lawyers Division’s DLS as soon as FEMA authorized the assistance. An August 31 press release distributed by CMR alerted victims of the flooded regions of Louisiana and Texas to ABA legal aid, with numerous publications sharing news of the available assistance, including CNN, The Law Society Gazette, Palestine (Texas) Herald Press, Fort Bend (Texas) Star, and LegalNews.com, among them.

In September, CMR issued four other news releases on disaster relief, one preceding Hurricane Irma’s destruction of Florida and another following the storm’s wrath. Several local news outlets shared the information with affected citizens, including the Miami Herald, Cape-Coral Daily Breeze.com, The (Charleston, S.C.) Exponent Telegram, Tallahassee Democrat, and Daily Business Review, among others. News releases were also issued publicizing pro bono legal aid available to victims of Hurricane Maria in Puerto Rico.

CMR issued a news release in late September on an ABA amicus brief that asks the U.S. Supreme Court to uphold decisions by two federal appellate courts that rejected enforcement of the revised presidential executive order imposing a travel ban on persons from six Muslim-majority countries.

In October, CMR maintained communication with several media outlets on the latest developments on the Association’s lawsuit against the U.S. Department of Education for failing to honor commitments made through its Public Service Loan Forgiveness Program. Following word of a postponement of an October 6 U.S. District Court hearing, CMR conducted personal outreach to nearly two dozen news outlets, including the New York Times, Wall Street Journal, Inside Higher Ed, Politico, and Slate, which resulted in coverage in The Daily Record, Newstral, Forbes, and U.S. News & World Report.

Global Programs

The ABA Rule of Law Initiative (ROLI) has been informed by the U.S. Department of State’s Secretary’s Office on Global Women’s Initiatives that its proposal to lead a global consortium to advance women’s rights has been successful. This is the first time that ROLI has led a global consortium bid as the prime grant recipient. The ABA will head the Consortium, which will also include the U.S. Chamber of Commerce’s Center for International Private Enterprise, Search for Common Ground, and the
Grameen Foundation. ROLI also assembled commitments from more than 40 “resource partners” who will contribute to the program on an as-needed basis.

In Armenia, ROLI hosted six Syrian-Armenians in July at its Refugee Legal Assistance Center (RLAC) for a group discussion on social benefits; business-related state regulations; free medical assistance; job and housing opportunities; and financial support opportunities for displaced people. Two of the group’s participants, a husband and wife, are disabled and were living in a hut devoid of minimal hygienic conditions in Armenia after fleeing the war in Syria. Later in July, the RLAC staff found a free housing opportunity for the couple in a region outside of the Armenian capital.

In Tanzania, ROLI co-convened a high level judicial symposium on August 7 in Arusha on the subject of “Judicial Independence -- A Foundation for Combatting International and Transnational Crimes” with the Wayamo Foundation. The symposium featured Justice Sonia Sotomayor, who engaged in an opening conversation with ROLI’s Board Chair Margaret McKeown, and then participated on the first panel of the symposium on Judicial independence and ethics in the fight against transnational crime alongside the acting Chief Justice of Tanzania, the former Chief Justice of Tanzania, the Deputy Chief Justice of Uganda, a Judge of the Supreme Court of Rwanda, and the Chief Justice of Zanzibar. Former ABA President Paulette Brown gave opening remarks. The symposium was followed on August 8 by a judicial retreat at which participants could delve more deeply into the topics of the first day’s panel discussions.

On August 9, Dr. Susan Brems, Mission Director for the United States Agency for International Development for the Philippines, visited the Cebu City Hall of Justice to view a demonstration of an e-Court. ROLI has now implemented eCourt in nine cities throughout the Philippines, relieving congested dockets and streamlining access to the court system in some of the most burdened trial courts in the country. The innovations demonstrated during Dr. Brems’ visit included the public information kiosk, which grants public access to case information at each eCourt-enabled courthouse, and eCourt’s customizable dashboard feature, which assists executive judges in daily management and decision making by displaying critical information updated in real-time.

ROLI organized the fourth Asia-Pacific Economic Cooperation (APEC) Pathfinder Dialogue during the third Senior Officials Meeting in Ho Chi Minh City, Vietnam on August 19 and 20 to discuss critical efforts to combat corruption and associated illegal trafficking in timber and wildlife. Over 100 participants attended the conference, representing APEC member economies; timber and wildlife trafficking non-government organizations (NGOs); and major international organizations such as the UN Office on Drugs and Crime (UNODC), the Organization for Economic Co-operation and Development, the Asia/Pacific Group on Money Laundering, and the World Bank.

In Egypt, ROLI implemented a training session in August for 270 new judges as part of a month-long induction program. Topics delivered to smaller groups of 25
judges included instruction on file organization, judicial deliberation, and decision writing. Nine Egyptian judges, including two women, have been trained and coached by ROLI over the past year and were responsible for designing the three courses, choosing instructional techniques, and organizing course content and activities.

The Center for Human Rights’ Justice Defenders Program convened more than 30 pro bono attorneys in September to support efforts to select judges for a special court that will preside over war crimes trials as a part of the peace accord in Colombia. The attorneys reviewed public records on more than 100 candidates and provided this information to the committee charged with selecting the judges. The information highlighted a number of judges who were alleged to have been involved in corruption or human rights abuses. The research informed the committee’s interviews of the candidates. The majority of judges ultimately selected by the committee had been identified by the pro bono team as well qualified candidates.

In the Democratic Republic of the Congo (DRC), ROLI was invited to participate in working sessions of the General Assembly of the High Council of Magistrates, the federal government body charged with guaranteeing the independence of judges and the judiciary from executive power in the DRC. The General Assembly convenes from October 19 to 26 in the capital of Kinshasa, where they have held discussions on whether to mandate the use of the judicial case database in federal courts and tribunals, and have invited ROLI to participate in committee work, particularly in planning, information and data management. This action is a result of numerous high-level meetings and advocacy between ROLI, the Department of State Bureau of International Narcotics and Law Enforcement, the Office of Global Women’s Issues, and the Permanent Secretary of the High Council over the use of an electronic database capable of tracking the performance of judges at the national and provincial levels.

ROLI hosted an LGBT legal advocacy training in Taiwan on September 1 to 3 for 12 lawyers, law school professors, and grassroots advocates from Mainland China. The training strengthened participants’ understanding of issues at the forefront of LGBT legal advocacy in the region and built ties between Taiwan and Mainland China-based advocates through experience-sharing and joint strategizing on future work.

On September 20, ROLI entered into a Memorandum of Understanding with Tajikistan’s State Agency “Legal Aid Center” (SALAC), which operates under the Ministry of Justice. This Memorandum will allow ROLI and SALAC to cooperate in the development and implementation of a referral mechanism for a Case Management System ROLI developed in 2013. The addition of this referral mechanism is intended to ensure defendants who need representation can obtain representation as soon as possible, reducing the delay between when they encounter the legal system and when they receive counsel, and improving protection of due process rights in Tajikistan.
In Turkey, ROLI held 23 legal information sessions for Syrian refugees in Sanliurfa and Ankara in September and responding to a total of 369 requests for legal assistance.

On October 3, Secretary of State Rex Tillerson responded to a letter sent September 14 by President Bass, explaining that he shares her desire to support the efforts of strengthening democracy, human rights, and governance. Tillerson reassured the ABA of his commitment to upholding values through US foreign policy, but noted a proposed $1 billion (40 percent) cut in US democracy, rule of law, and human rights programming for FY 2018.

The above efforts to support the rule of law and human rights around the world were supported by $40 million in grant funding last fiscal year. The first month of our new fiscal year, September 2017, saw these programs garner $18.6 million in new grant funding.

Professional Services

During the 2017 Annual Meeting, the Civil Rights and Social Justice Section held its annual fundraiser, the Thurgood Marshall Dinner, which was attended by 250 people, to honor Award recipient Judge Robert Katzmann, Chief Judge of the U.S. Court of Appeals for the Second Circuit since 2013. At the time of his appointment to the federal bench in 1999, he was the Walsh Professor of Government, Professor of Law, and Professor of Public Policy at Georgetown University; a Fellow of the Governmental Studies Program of the Brookings Institution; and president of the Governance Institute.

This past summer, the Death Penalty Due Process Review Project participated in or hosted three educational events around the country, with more than 200 people in attendance. Staff spoke on a panel at the Kentucky Bar Association convention to discuss its work; hosted a CLE panel discussion on severe mental illness and the death penalty in Boise, Idaho; and presented at the National Alliance on Mental Illness’ National Convention in Washington, DC.

The Business Law Section selected 19 individuals in August to participate in the 2017 Business Law Fellows Program. The Fellows Program supports the involvement of young lawyers, lawyers of color, and lawyers with disabilities in the work of the Section. This year’s class of Fellows was selected from a pool of 78 applicants, the highest number of applicants in recent years. The Fellows Program provides special leadership opportunities and mentorships to participants ensuring their long-term engagement in the Business Law Section.

The Standing Committee on Law and National Security has created a new podcast series, “National Security Law Today.” Each episode features an interview with a national security law expert, conducted by members of the Committee. The first
year's theme is national security and private practice, and the podcast focuses on the laws and regulations that impact practitioners and their clients.

The Health Law Section presented J. A. “Tony” Patterson with a Lifetime Achievement Award at the ABA Annual Meeting in New York on August 11. Mr. Patterson, an ABA member since 1973, has served in over 70 leadership roles within the Section, including as Chair from 2004 to 2005, and most recently as a Section Delegate to the House of Delegates for the past nine years. In 2012, Tony was instrumental in successfully transitioning the ABA’s Standing Committee on Substance Use Disorders Group, where it is now active and vibrant part of the Section’s operations. Additionally, Tony served as SOC Chair from 2005 to 2006.

The Health Law Section’s Governing Council created a Special Committee on Health and Well-Being to address discussion ensued regarding the need and demand for health and well-being initiatives within the ABA and across the legal profession. The mission of the Committee is to promote healthy living by providing education and peer-to-peer support and resources to attorneys and law students; by serving as a resource to the Section and the greater ABA on health and well-being issues; and by coordinating and collaborating with internal and external resources.

The Judicial Division’s (JD) Fighting Implicit Bias Committee presented its new book *Enhancing Justice, Reducing Bias*, at the Annual Meeting on August 12. In addition to discussing the book, Committee co-chairs Judge Bernice Donald and Ms. Sarah Redfield spoke to all JD members about future implicit bias training that will be offered for judges, lawyers, and court administrators.

The Section of Litigation’s newly-created Task Force on Mental Health and Wellness, a multi-year initiative, recently met with the Chair and staff of the Commission on Lawyers Assistance Programs (CoLAP) to discuss how the Section can support the Commission’s efforts and spread the word about all of the resources available through CoLAP. As the first part of its plan for the year, the Section is including an article on mental health and wellness in its monthly e-newsletters, quarterly committee newsletters, and the Chair’s column in *Litigation* Journal and displaying prominent links on its website to CoLAP materials.

On September 25, the ABA Center on Children and the Law learned that it was awarded a federal grant to provide $105,000 (plus travel) annually for its work with courts across the country on matters involving children whose parents are battling drug addiction. The new grant work began September 30 and continues for three years. Also in September, the Center received a new grant from the Redlich Horwitz Foundation to assist the New York State Office of Children and Family Services improve kinship laws and practices statewide. This $40,000 grant will focus on kinship foster home licensing, training for agency staff and kinship caregivers, and system improvement.
The Standing Committee on Election Law co-sponsored a symposium on September 27 on the 25th Amendment with Fordham University School of Law, entitled “Continuity in the Presidency: Gaps and Solutions, Building on the Legacy of the Twenty-Fifth Amendment.” The program was the last of a three-part series from a collaboration of the Bipartisan Policy Center, the Standing Committee, and Fordham University School of Law celebrating the fiftieth anniversary of the Twenty-Fifth Amendment and the critical role of the Association in the drafting, adoption, and ratification of the Amendment.

The Commission on Immigration’s South Texas Pro Bono Asylum Representation Project (ProBAR) won a dependency order in October using state court predicate order templates that they revised with the assistance of the staff at Children’s Immigration Law Academy (CILA). The client was J.P.C., a 17-year-old from Ecuador. J.P.C. disclosed that when she was four years old, her father began making money by forcing her to perform sexual acts in front of others. This abuse lasted six years; when she tried to resist, he threatened to pay someone to kill her and threatened to kill her himself.

In another recent success, ProBAR received a dependency order grant and an asylum grant before the Houston Asylum Office for a child who had fled severe threats from the MS-13 gang in El Salvador. His mother had cooperated with police on the investigation of the murder of the child’s father; the client also had fled abuse committed by his family.

In October, the Section of International Property Law transmitted comments to the U.S. Trade Representative regarding its decision to open a 301 investigation over IP practices in China at the request of the White House. Section 301 of the U.S. Trade Act of 1974 authorizes Presidents to take all appropriate action, including retaliation, to obtain the removal of any act, policy, or practice of a foreign government that violates an international trade agreement or is unjustified, unreasonable, or discriminatory, and that burdens or restricts U.S. commerce. Section Chair Scott Partridge provided oral testimony on the subject to the USTR at a public hearing on October 10.

The Standing Committee on Disaster Response and Preparedness worked with several member entities in September and October to coordinate the ABA response to recent natural disasters. The Committee created a website that lists local, government, NGO, and legal aid resources, and launched a Twitter feed, @ABAResilience, to share information and alerts. The Committee worked with the Office of the President and the Fund for Justice and Education on a fundraising plea to assist the Association in providing direct legal services by highlighting the work of DLS. It also collaborated with the Center for Professional Development (CPD) to make available for free, two CLE webinars focused on how to represent disaster survivors.
Governance and Public Services

As part of the Annual Meeting Showcase CLE program, the Division for Public Education hosted its yearly “On the Docket” CLE on the US Supreme Court. This year’s discussion focused on the recently completed Supreme Court term, the start of Justice Gorsuch’s tenure on the bench, and the upcoming headlines for the 2017-18 term. The panel was moderated by Kimberly Atkins of the Boston Herald and featured Supreme Court scholars and litigators.

The Division for Public Education was also a partner in the “Democracy at a Crossroads: Innovative Civic Learning Now! National Summit,” which was held on September 21 in Washington DC. It was convened by a group of major funders (Carnegie Corporation of New York, the Robert R. McCormick Foundation, and the William and Flora Hewlett Foundation) who are concerned about the state of civic learning and understanding in the United States. The Summit aimed to “raise awareness about this issue and showcase solutions to make the case that resources are needed to expand proven practices.” Featured speakers included Associate Justice Sonia Sotomayor and Judy Woodruff from the PBS NewsHour.

In October, Center for Professional Responsibility Director Tracy Kepler participated in the 2017 International Conference of Legal Regulators, where she moderated a panel relating to attorney well-being issues. Along with panelists from Canada, Singapore, Hong Kong and the U.S., she led a discussion on some of the highlights of the Report of the National Task Force on Attorney Well-Being and discussed global regulatory efforts and objectives centered on increasing the well-being of legal professionals. Also in October, Ms. Kepler moderated the ABA Free CLE Program entitled “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change” that drew approximately 1,000 attendees.

In the wake of Hurricane Maria, the Office of Diversity & Inclusion Center initiated numerous efforts to help the victims in Puerto Rico. In partnership with the Young Lawyers Division (YLD) and Louisiana Civil Justice Center, helped to develop, launch, and promote ABA DLS’ Volunteer Attorney Intake Form. The intake form, available in both English and Spanish, identifies attorneys nationwide that have the requisite expertise and are willing to provide pro-bono legal information or services to support the ABA/FEMA disaster hotline for victims of Hurricane Maria. So far, over 100 attorneys nationwide have signed up to provide services. The Center also assisted the Puerto Rico Bar Association to raise awareness and
charitable contributions to help 61 law students whose legal education and livelihood in Puerto Rico have been severely affected by Hurricane Maria.

The 2017-2018 bar year marks the 10th anniversary of the Commission on Sexual Orientation and Gender Identity (SOGI). As a tribute to this important milestone, SOGI recently published a special edition of its newsletter, The Equalizer. The newsletter includes a collection of inspiring essays from past and present SOGI Commissioners, liaisons, and special friends who talk about their personal experiences with SOGI.

Conclusion

Jack Welch, the former CEO of General Electric, once famously said, “Change before you have to.” While the ABA today is achieving great success growing our overall membership and attracting law students, the status quo is not working in the critical areas of recruiting and retaining dues paying lawyer members. We must act now to reverse this trend.

I look forward to speaking with you in Vancouver about our new membership model that will greatly improve our efforts to attract and keep dues-paying ABA attorney members. This initiative will impact every aspect of the ABA, and it will position the Association for meaningful growth well into the future.

This year is a historic moment for our Association. Just as those 75 attorneys who met in 1878 paved the way for the ABA’s remarkable success over the following 140 years, today we can continue that success and the ABA will remain a strong and vital organization for our members, the profession, and our society.

I look forward to seeing you in Vancouver. 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 2017 Annual Meeting. Scope has continued to fulfill its constitutional mandate as a Committee of the House of Delegates, and the only one elected by it. It has carried forward its review of the structure, function and activities of Association committees and commissions to evaluate the effectiveness of their functioning and determine if overlapping functions exist.

Scope held its last meeting Saturday, October 28, 2017 in Chicago, Illinois. Scope will meet again in conjunction with the ABA’s Midyear Meeting on Saturday, February 3, 2018, in Vancouver, Canada.

**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:**

**Constitution and Bylaws, Standing Committee on**

*ABA Rule of Law Initiative (“ROLI”) and ROLI’s five regional councils* - Scope commended ROLI and its five regional councils for doing good work.

*Annual Meeting Program Planning, Special Committee on* - Scope commended the Special Committee on Annual Meeting Program Planning for doing good work.

*Audit, Standing Committee on* - Scope agreed the Standing Committee on Audit is a committee created by the ABA House of Delegates, therefore, Scope will continue to review the Standing Committee on Audit on a regular and routine basis, every three years.

*Meetings and Travel, Standing Committee on* - Scope commended the Standing Committee on Meetings and Travel for doing excellent work.

**Recommendations still pending:**

Standing Committee on Membership and the Standing Committee on Technology and Information Systems.
Scope’s 2018 Midyear Agenda will include:
StC on Armed Forces Law; StC on Legal Assistance for Military Personnel; StC on Law and National Security; StC on Federal Judiciary; StC on American Judicial System; and Task Force on Gatekeeper Regulation and the Profession | Follow-up: StC on International Trade in Legal Services; Forum on Communications Law; and Forum on Entertainment and Sports Industries.

Respectfully Submitted,

Thomas M. Fitzpatrick, Chair
Amelia Helen Boss
W. Andrew Gowder, Jr.
Jennifer Busby
José C. Feliciano
Michael G. Bergmann, Chair, SOC
Illene Knable Gotts, ex-officio
Hon. Ramona G. See, ex-officio

/ai

Dated: December, 2017
RESOLVED, That the American Bar Association encourages law firms to develop initiatives to provide women lawyers with opportunities to gain trial and courtroom experience;

FURTHER RESOLVED, That the American Bar Association encourages members of the judiciary to take steps to ensure that women lawyers have equal opportunities to participate in the courtroom;

FURTHER RESOLVED, That the American Bar Association encourages corporate clients to work with outside counsel to ensure that women lawyers have equal opportunities to participate in all aspects of litigation;

FURTHER RESOLVED, That the American Bar Association encourages corporate counsel, together with outside counsel, to work with alternative dispute resolution providers and professionals to encourage the selection of women lawyers as neutrals.
REPORT

I. Introduction

During the last two decades, much has been written and discussed about whether women attorneys appear in court with the frequency expected given their numbers in the legal profession. The Commercial and Federal Litigation Section of the New York State Bar Association is a preeminent bar group focused on complex commercial state and federal litigation. The Section counts among its former chairs a substantial number of prominent women litigators from both upstate and downstate, prosecutor and an attorney in private practice, a former President of the New York State Bar Association who is recognized as one of New York’s top female commercial litigators and also serves as a mediator and arbitrator of commercial disputes, a former federal and state prosecutor who now is a partner in a large global law firm, an in-house counsel at a large non-profit corporation, and senior partners in large and mid-size private law firms located both upstate and downstate. With the full support and commitment of the Section’s leadership, these women alumnae Section chairs met and formed an ad hoc task force devoted to the issue of women of the apparent dearth of women who serve as arbitrators and mediators in complex commercial and international arbitrations and mediations (collectively referred to herein as Alternative Dispute Resolution (“ADR”)).

The task force sought to ascertain whether there was, in fact, a disparity in the number of women attorneys versus male attorneys who appear in speaking roles in federal and state courts throughout New York. Toward that end, the task force devised and distributed a survey to state and federal judges throughout the State and then compiled the survey results. As discussed below, based on the survey results, the task force found continued disparity and gender imbalance in the courtroom. This report first details recent studies and research on the issue of gender disparity in the legal profession, then discusses how the court survey was conducted, including methodology and findings, and concludes with recommendations for addressing the disparity and ensuring that women attorneys obtain their rightful equal place in the courtroom. This report further details the task force’s findings with respect to the gender gap in the ADR context.

Even before the Report was adopted by the New York State Bar Association on November 4, 2017, it received resounding approval and support from both Bench and Bar nationwide.2 Articles praising the Report and discussing its findings have appeared in

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2 For example Judge Jack Weinstein of the Eastern District Federal Court has issued a Court rule urging a more substantive role for women attorneys on cases he is hearing. “A Judge Wants A Bigger Role for Female Lawyers. So He Made a Rule,” New York Times, August 23, 2017; Chief Judge Dora L. Irizarry of the Eastern District is in the process of amending her rules in a similar fashion, and Judge Henry J. Nowak of the Erie County Supreme Court implemented rules in his courtroom designed to allow multiple attorneys to argue different points in cases he hears. “Rule Changes Underway in Eastern District to Support
II. Survey: Methodology and Finding

The task force’s survey began with the creation of two questionnaires drafted by the task force. The first questionnaire was directed to federal and state judges throughout New York. This questionnaire was designed to be an observational study that asked judges to record the presence of speaking counsel by gender in all matters in their courtrooms occurring between approximately September 1, 2016 and December 31, 2016. The second questionnaire was directed to various ADR providers asking them to record by gender both the appearance of counsel in each proceeding and the gender of the neutral conducting the proceeding.

The study surveyed proceedings in New York State at each level of court—trial, intermediate, and court of last resort—in both state and federal courts. Approximately 2,800 questionnaires were completed and returned and included New York’s Court of Appeals, all four Appellate Divisions, and Commercial Divisions in Supreme Courts in counties from Suffolk, Onondaga and Erie. The United States Court of Appeals for the Second Circuit compiled publicly available statistics, and survey responses were provided by nine Southern District Judges (including the Chief Judge) and Magistrate Judges and District and Magistrate Judges from the Western and Northern Districts of New York.

The results of the survey are striking:

- Women attorneys represented just 25.2% of the attorneys appearing in commercial and criminal cases in courtrooms across New York.
- Women attorneys accounted for 24.9% of lead counsel roles and 27.6% of additional counsel roles.
- The most striking disparity in women’s participation appeared in complex commercial cases: women’s representation as lead counsel shrank from 31.6% in one-party cases to 26.4% in two-party cases to 24.8% in three-to-four-party cases and to 19.5% in cases involving five or more parties. In short, the more complex the case, the less likely that a woman appeared as lead counsel.
- The percentage of women attorneys appearing in court was nearly identical at the trial level (24.7%) and at the appellate level (25.2%).

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4 Survey results in chart format broken down by Court are included in Appendix B of the full report, available at http://www.nysba.org/WomensTaskForceReport/.
The statistics are slightly worse downstate (24.8%) than upstate (26.2%).

- In New York federal courts, women attorneys made up 24.4% of all attorneys who appeared in court, with 23.1% holding the position of lead counsel. In New York State courts, women made up 26.9% of attorneys appearing in court and 26.8% of attorneys in the position of lead counsel.

- One bright spot is public interest law (including criminal matters), where women lawyers accounted for 38.2% of lead counsel and 30.9% of attorneys overall.

- However, in private practice (including both civil and criminal matters), women lawyers only accounted for 19.4% of lead counsel.

In sum, the low percentage of women attorneys appearing in a speaking role in courts was found at every level and in every type of court: upstate and downstate, federal and state, trial and appellate, criminal and civil, ex parte applications and multi-party matters. Set forth below is the breakout in all courtrooms—state, federal, regional, and civil/criminal:

A. Women Litigators in New York State Courts

The view from the New York Court of Appeals is particularly interesting. The statistics collected from that Court showed real progress—perhaps as a result of female leadership of that court, now headed by Chief Judge Janet DiFiore and past Chief Judge Judith S. Kaye, as well as the fact that the Court has had a majority of women judges for more than ten years. Of a total of 137 attorneys appearing in that Court, female attorneys made up 39.4%. This percentage held whether the women were lead or second chair counsels. In cases in which at least one party was represented by a public sector office, women attorneys were in the majority at 51.3%. Of the appearances in civil cases, 30% were by women attorneys. The figure in criminal cases was even higher—women attorneys made up 46.8% of all attorneys appearing in those cases.

Similarly, women attorneys in the public sector were well represented in the Appellate Divisions, approaching the 50% mark in the Second Department. The picture was not as strong in the upstate Appellate Divisions, where, even in cases involving a public entity, women were less well represented (32.6% in the Third Department and 35.3% in the Fourth Department). Women in the private sector in Third Department

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5 The task force recognizes that the statistics reported herein may have been affected by which Judges agreed to participate in the survey and other selection bias inherent in any such type of survey. Thus, it is possible that there is a wider gap between the numbers of women versus men who have speaking roles in courtrooms throughout New York State than the gap demonstrated by the task force’s study.
cases fared worst of all, where they represented 18% of attorneys in the lead and only 12.5% of attorneys in any capacity versus 36.18% of private sector attorneys in the First Department (for civil cases).

While not studied in every court, the First Department further broke down its statistics for commercial cases and the results are not encouraging. Of the 148 civil cases heard by the First Department during the survey period for which a woman argued or was lead counsel, only 22 of those cases were commercial disputes, which means that women attorneys argued or were lead counsel in only 5.37% of commercial appeals compared to 36.18% for all civil appeals. Such disparity suggests that women are not appearing as lead counsel for commercial cases, which often involve high stakes business-related issues and large dollar amounts.

B. Women Litigators in Federal Courts in New York

Women are not as well represented in the United States Court of Appeals for the Second Circuit as they are in the New York Court of Appeals. Of the 568 attorneys appearing before the Second Circuit during the survey period, 20.6% were female—again, this number held regardless of whether the women were in the lead or in supporting roles.

The Southern District of New York’s percentages largely mirrored the sample overall, with women representing 26.1% of the 1627 attorneys appearing in the courtrooms of judges who participated in the survey—24.7% in the role of lead counsel.

The figures from the Western District of New York fell somewhat below those from the Southern District of New York, again mirroring the slightly lower percentages of women attorneys’ participation upstate in state courts as well: 22.9% of the attorneys appearing in the participating Western District of New York cases were women, and 20.8% of the lead attorneys were women.

C. Women Litigators: Criminal & Civil; Private and Public

As has been noted in other areas, women attorneys are better represented among lawyers in criminal cases (30.9%) than in civil cases (23.2%), regardless of trial or appellate court or state or federal court. Similarly, women made up 39.6% of the attorneys representing public entities—such as the state or federal government but just 18.5% of lawyers representing private parties in civil litigation.

All these survey findings point to the same conclusion: women attorneys in speaking roles in court account for just about a quarter of counsel who appear in state and federal courts in New York. The lack of women attorneys with speaking roles in court is widespread across different types of cases, varying locations, and at all levels of courts.6

6 The survey did not include family or housing courts. Accordingly, the percentage of women in speaking
D. Women in Alternative Dispute Resolution

The view from the world of ADR is slightly more favorable to women, although more progress is needed. Two leading ADR providers gathered statistics on the proceedings conducted by their neutrals. In a sample size of 589 cases, women were selected as arbitrators 26.8% of the time and selected as mediators about half the time (50.2%). In a small sample size of two cases, women provided 50% of the neutral analyses but they were not chosen as court referees in either of those two cases.7

III. Going Forward: Suggested Solutions

The first step in correcting a problem is to identify it. To do so, as noted by this report and the ALM Intelligence study referenced above in its "Gender Diversity Best Practices Checklist”—the metrics component—firms need data.8 Suggesting solutions, such as insisting within law firms that women have significant roles on trial teams or empowering women attorneys to seek out advancement opportunities for themselves, is easy to do. Implementing these solutions is more challenging.9

A. Women's Initiatives

Many law firms have started Women’s Initiatives designed to provide women attorneys with the tools they need to cultivate and obtain opportunities for themselves and to place themselves in a position within their firms to gain trial and courtroom experience.

One suggestion is that leaders in law firms—whether male or female—take on two different roles. The first is to mentor women attorneys with an emphasis on the mentor discussing various ways in which the woman attorney can gain courtroom experience and eventually become a leader in the firm. The second is to provide “hands on” roles who appear in those courts may be higher, especially in family court as that area of the law tends to have a greater percentage of women practitioners. See Vivia Chen, Do Women Really Choose the Pink Ghetto?: Are women opting for those lower-paying practices or is there an invisible hand that steers them there?, The American Lawyer (Apr. 26, 2017) http://www.americanlawyer.com/id=1202784558726. 7 A 2014 Study indicated that for cases with between one and 10 million dollars at issue, 82% of neutrals and 89% of arbitrators were men. “Gender Difference in Dispute Resolution Practice Report or the ABA Section of Dispute Resolution Practice Snapshot Survey(Jan. 2014)”. A 2017 article examining gender difference in dispute resolution practice put it “the more high-stakes the case, the lower the odds that a woman would be involved.” Noah J. Hanft, Making Diversity Happen in ADR: No More Lip Service. 257 N.Y.L.J. 56 (Mar. 20, 2017)


9 A summary of the suggestions contained in the report are attached hereto as Appendix C. Many of the suggestions for law firms contained in this report may be more applicable to large firms than small or mid-size firms but hopefully are sufficiently broad based to provide guidance for all law firms.
experience to the women attorneys at the firm by assigning them to work with a partner who will not only see that they go to court, but that they also participate in the courtroom proceedings. Women attorneys should have the opportunity early in their careers to conduct a deposition—not just prepare the outline for a partner. The same is true of defending a deposition.

It is important that more experienced attorneys help women attorneys learn how to put themselves in a position to obtain courtroom opportunities. This can be accomplished, at least in part, in two ways. First, women attorneys from within and outside the firm should be recruited to speak to female attorneys and explain how the woman attorney should put herself in a position to obtain opportunities to appear in court. Second, women from the business world should also be invited to speak at Women’s Initiative meetings and explain how they have achieved success in their worlds and how they obtained opportunities.

B. Formal Programs Focused on Lead Roles in Court and Discovery

Another suggestion is that law firms establish a formal program through which management or heads of litigation departments seek out junior women associates on a quarterly or semi-annual basis and provide them with the opportunity to participate in a program that enables them to obtain the courtroom and pre-trial experiences outlined above. The establishment of a formal program sends an important signal within a firm that management is committed to providing women with substantive courtroom experience early in their careers.

Management and firm leaders should be encouraged to identify, hire, and retain women attorneys within their firms. Needless to say, promoting women to department heads and firm management is one way to achieve these goals. Women are now significantly underrepresented in both capacities.10

C. Efforts to Provide Other Speaking Opportunities for Women

In addition to law firms assigning women litigators to internal and external speaking opportunities, such as educational programs in the litigation department or speaking at a client continuing legal education program, firms should encourage involvement with bar associations and other civic or industry groups that regularly provide speaking opportunities.11

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11 It is noteworthy that, as of January 1, 2017, women comprise nearly 36% of the New York State Bar Association’s membership but comprise only 24% of the Commercial and Federal Litigation Section’s membership.
D. Sponsorship

Although law firms talk a lot about the importance of mentoring and how to make busy partners better at it, they spend very little time discussing the importance of, and need for, sponsors:

Mentors are counselors who give career advice and provide suggestions on how to navigate certain situations. Sponsors can do everything that mentors do but also have the stature and gravitas to affect whether associates make partner. They wield their influence to further junior lawyers' careers by calling in favors, bring attention to the associates' successes and help them cultivate important relationships with other influential lawyers and clients—all of which are absolutely essential in law firms. Every sponsor can be a mentor, but not every mentor can be a sponsor.

As Sylvia Ann Hewlett, founding president of the Center for Talent Innovation (formerly Center for Work-Life Policy), explained in a 2011 Harvard Business Review article "sponsors may advise or steer [their sponsorees] but their chief role is to develop [them] as leader[s]"\(^\text{12}\) and "'use[] chips on behalf of protégés' and 'advocate for promotions.'"\(^\text{13}\)

E. Efforts by the Judiciary

Members of the judiciary also must be committed to ensuring that women attorneys have equal opportunities to participate in the courtroom. When a judge notices that a woman lawyer who has prepared the papers and is most familiar with the case is not arguing the motion, that judge should consider addressing questions to the woman.

All judges, regardless of gender, should be encouraged to appoint more women as lead counsel in class actions, and as special masters, referees, receivers, or mediators. Some judges have insisted that they will not appoint a firm to a plaintiffs' management committee unless there is at least one woman on the team. Other judges have issued orders, referred to earlier in this report, that if a woman, minority, or junior associate is likely to argue a motion, the court may be more likely to grant a request for oral argument of that motion. Judges should be encouraged to amend their individual rules to encourage attorneys to take advantage of these courtroom opportunities. All judges should be encouraged to promote and support women in obtaining speaking and leadership roles in the courtroom.


F. Efforts by Clients

Clients also can combat the gender disparity in courtrooms. Insistence on diverse litigation teams is a growing trend across corporate America. Why should corporate clients push for diverse trial teams? Because it is to their advantage to do so. After all, their employees and their customers are likely to be half female.

Additionally, the context surrounding a trial—including the venue, case type, and courtroom environment—can affect how jurors perceive attorneys and ultimately influence the jury's verdict. Consciously or not, jurors assess attorney "[p]ersonality, attractiveness, emotionality, and presentation style" when deciding whether they like the attorney, will take him or her seriously, or can relate to his or her persona and arguments. Because women stereotypically convey different attributes than men, a woman attorney actively involved in a trial may win over a juror who was unable to connect with male attorneys on the same litigation team. Many corporate clients often directly state that they expect their matters will be handled by both men and women.

For example, in 2017, the General Counsel for HP, Inc. implemented a policy requiring "at least one diverse firm relationship partner, regularly engaged with HP on billing and staffing issues" or "at least one woman and one racially/ethnically diverse attorney, each performing or managing at least 10% of the billable hours worked on HP matters." The policy reserves for HP the right to withhold up to ten percent of all amounts invoiced to firms failing to meet these diverse staffing requirements.

G. Alternative Dispute Resolution Context

The dialogue that has begun amongst ADR providers and professionals involved in the ADR process is encouraging. One important step that has been undertaken is the Equal Representation in Arbitration pledge—attested to by a broad group of ADR stakeholders, including counsel, arbitrators, corporate representatives, academics, and others—to encourage the development and selection of qualified female arbitrators. This pledge outlines simple measures including having a fair representation of women on lists of potential arbitrators and tribunal chairs.

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15 Id. at 5.
16 Id.
18 Id.
20 Id.
IV. Conclusion

Unfortunately, the gender gap in the courtroom and in ADR has persisted even decades after women comprised half of law school graduates. The federal and state courts in New York are not exempt from this phenomenon. There is much more that law firms, corporate counsel, and judges can do to help close the gap.

The active dialogue that continues today is a promising step in the right direction. It is the task force’s hope that this dialogue—and the efforts of all stakeholders in the legal process—will help change the quantitative and qualitative role of women lawyers.

Respectfully submitted,

Sharon Stern Gerstman
President, New York State Bar Association
February 2018
1. **Summary of Resolution.**

   The resolution encourages law firms, members of the judiciary, corporate clients, and alternative dispute resolution providers to provide women lawyers with opportunities to gain trial experience, participate in the courtroom and all aspects of litigation, and be selected as neutrals.

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?**

   February 1995: Oppose bias and discrimination based on race and gender that prevent multicultural women from gaining full and fair participation in the legal profession, and actively support efforts to eradicate such bias and discrimination.

   88A121: Recognize that persistence of overt and subtle barriers denies women the opportunity to achieve full integration and equal participation in the work, responsibilities and rewards of the legal profession; affirm the fundamental principle that there is no place in the profession for barriers that prevent the full integration and equal participation of women in all aspects of the legal profession; and call upon members of the legal profession to eliminate such barriers.

   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 law firms, the judiciary, corporate counsel, and ADR providers.

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

   None.

9. **Disclosure of Interest.**

   N/A

10. **Referrals.**

    Business Law Section  
    Commission on Women in the Profession  
    Conference of Chief Justices  
    Judicial Division  
    Law Student Division  
    National Association of Bar Executives  
    National Conference of Bar Presidents  
    National Judicial Conference  
    Section of Dispute Resolution  
    Section of Litigation  
    Solo, Small Firm and General Practice Division  
    Young Lawyers Division

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

The resolution encourages law firms, members of the judiciary, corporate clients, and alternative dispute resolution providers to provide women lawyers with opportunities to gain trial experience, participate in the courtroom and all aspects of litigation, and be selected as neutrals.

2. Summary of the issue which the Resolution addresses.

Even after several decades in which women comprise approximately 50% of law school graduates, there is a serious gender gap among lawyers in the courtroom and in ADR settings.

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

This policy is needed for the ABA to undertake efforts to encourage law firms, the judiciary, clients, and ADR providers to address gender disparity in the courtroom and in ADR settings.

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.
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 February 2018 to Standard 106 (Separate Locations and Branch Campuses) of
the ABA Standards and Rules of Procedure for Approval of Law Schools.
American Bar Association
Section of Legal Education and Admissions to the Bar
Revised Standards for Approval of Law Schools
February 2018

Standard 106. SEPARATE LOCATIONS AND BRANCH CAMPUSES

(a) A law school that offers a separate location shall provide:

(1) Full-time faculty adequate to support the curriculum offered at the separate location and who are reasonably accessible to students at the separate location;

(2) Library resources and staff that are adequate to support the curriculum offered at the separate location and that are reasonably accessible to the student body at the separate location;

(3) Academic advising, career services and other student support services that are adequate to support the student body at the separate location and that are reasonably equivalent to such services offered to similarly situated students at the law school’s main location;

(4) Access to co-curricular activities and other educational benefits adequate to support the student body at the separate location;

(5) Physical facilities and technological capacities that are adequate to support the curriculum and the student body at the separate location.

(b) In addition to the requirements of section (a), a branch campus must:

(1) Establish a reliable plan that demonstrates that the branch campus has achieved substantial compliance with the Standards and is reasonably likely to achieve full compliance with each of the Standards within three years of the effective date of acquiescence as required by Rule 30;

(2) Comply with instructional requirements and responsibilities as required by Standard 403(a) and Standard 404(a); and

(3) Offer reasonably comparable opportunities for access to the law school’s program of legal education, courses taught by full-time faculty, student services, co-curricular programs, and other educational benefits as required by Standard 311.

(c) A law school is not eligible to establish a separate location until at least four years after the law school is granted initial full approval.
Interpretation 106-1

A law school with more than one location may have one dean for all locations.
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*.

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 August 11, 2017. A public hearing was held on September 28, 2017. The Council received no written comments on the proposed change and no one testified at the public hearing. The Council approved the amendments at its meeting on November 3-4, 2017.

The revision seeks to resolve an inconsistency between Standard 106(b)(1) and Rule 30(b)(1) regarding acquiescence and branch campuses.

Standard 106(b) addresses the requirements with which a law school must meet if the law school operates a branch campus. Standard 106(b)(1) states that a branch campus must:

1. Establish a reliable plan that demonstrates that the branch campus is reasonably likely to be in substantial compliance with each of the Standards within three years of the effective date of acquiescence as required by Rule 30;

Rule 30(b)(1) states that the reliable plan in connection with the establishment of a branch campus 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 and is reasonably likely to achieve full compliance with each of the Standards within three years of the effective date of acquiescence;

The language in Standard 106(b)(1) and Rule 30(b)(1), which apply to the same situation, is inconsistent. The former requires only “substantial compliance” within three years, rather than “substantial compliance at the time of acquiescence and full compliance within three years.” This inconsistency was identified in the Council’s ongoing review of the Standards and Rules.

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The Council determined that Rule 30(b)(1) states the appropriate requirements and has consistently reviewed any applications for a branch campus in accordance with the requirements of Rule 30.

Accordingly, the proposed revision matches the language of Standard 106(b)(1) to the corresponding language in Rule 30(b)(1).

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
February 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 February 2018 to Standard 106 (Separate Locations and Branch Campuses) 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 August 11, 2017. A public hearing was held on September 28, 2017. The Council approved the amendments at its meeting on November 3-4, 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?

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 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)

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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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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 February 2018 to Standard 106 (Separate Locations and Branch Campuses) of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

2. Summary of the Issue that the Resolution Addresses

The language in Standard 106(b)(1) and Rule 30(b)(1), which apply to the same situation, is inconsistent. The former requires only “substantial compliance” within three years, rather than “substantial compliance at the time of acquiescence and full compliance within three years.” This inconsistency was identified in the Council’s ongoing review of the Standards and Rules, in accordance with Internal Operating Practice 8.

The Council determined that Rule 30(b)(1) states the appropriate requirements and has consistently reviewed any applications for a branch campus in accordance with the requirements of Rule 30. Accordingly, the proposed revision matches the language of Standard 106(b)(1) to the corresponding language in Rule 30(b)(1).

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 September 28, 2017.
RESOLVED, That the American Bar Association urges federal, state, territorial and tribal courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege by courts for confidential communications between a client and a patent agent reasonably necessary and incidental to certain limited activities authorized by the Patent Act, 35 U.S.C. § 2(b)(2)(D), and U.S. Patent & Trademark Office regulations, 37 C.F.R. § 11.5(b)(1).
REPORT

I. Introduction

This Resolution urges federal, state, territorial, and tribal courts and legislative bodies to adopt rules or enact legislation to establish a narrow evidentiary privilege applicable by courts only to clients of patent agents who are registered with the U.S. Patent & Trademark Office (PTO), and limited to confidential communications between a client and a patent agent necessary and incidental to certain patent application-related activities authorized by the Patent Act and regulated by the PTO, including the drafting, filing, and prosecution of a patent application. The Resolution is modeled after and closely related to Resolution 106 that passed the House of Delegates in August 2016. Resolution 106 urges tribunals and legislative bodies to establish an evidentiary privilege for lawyer referral services and demonstrates that the ABA recognizes the need for extending evidentiary privileges when justified.1

In 35 U.S.C. § 2(b)(2)(D), Congress authorized the PTO to allow both patent agents and lawyers to represent inventors and other patent applicants before the agency, subject to certain requirements. In accordance with 37 C.F.R. § 11.7(b)(1), patent agents and attorneys must not only submit an application demonstrating that they are of good moral character and have the legal and scientific qualifications necessary to prosecute patent applications, they must also pass a lengthy bar-style examination.2 Patent agents are not only subject to stringent authorization procedures to practice before the PTO, but that they are also regulated3 and held accountable for misconduct when representing their clients.4

37 C.F.R. § 11.5(b)(1) enumerates a list of limited activities that, once authorized, patent attorneys and patent agents registered to prosecute patent applications before the USPTO may

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1 House of Delegates Resolution 106, adopted by the House of Delegates at the 2016 Annual Meeting, states: “RESOLVED, That the American Bar Association urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege for lawyer referral services and their clients (‘LRS clients’) for confidential communications between an LRS client and a lawyer referral service, when an LRS client consults a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer.” Resolution 16A106; Cf., Resolution 498BOG adopted by the Executive Committee of the Board of Governors in March 1989, which opposes unjustified extension of the attorney-client privilege to accountants. 2 The test is a rigorous one, as is evidenced by the fact that even with the assistance of preparatory bar courses, the pass rate for the PTO bar examination has ranged between only 43% and 60% since 2004. https://www.uspto.gov/learning-and-resources/patent-and-trademark-practitioners/registration-exam-results-and-statistics.html 3 The recent PTO regulation of patent agents, effective December 7, 2017, includes identifying a privilege applicable in PTO proceedings with respect to communications between applicants and their patent agents. [37 C.F.R § 42.57]. The new PTO privilege is entirely consistent with the language and purpose of this resolution. Moreover, the PTO lacks authority to create or limit a privilege that would be applicable in court. In re Queen’s University at Kingston, 820 F.3d 1287, 1302. (Fed. Cir. 2016). This resolution addresses the patent agent privilege applicable in court, 4 35 U.S.C. § 32 (“The Director may…suspend or exclude…from further practice before the Patent and Trademark Office, any person, agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who does not comply with the regulations established under this section 2(b)(2)(D)…”); 37 C.F.R. 11.20 (Disciplinary sanctions; Transfer to disability inactive status); In re George Reardon (USPTO D12-19) (patent agent excluded for misappropriation of non-profit organization’s funds).
undertake. Such authorized activities include, but are not limited to, consulting with inventors as part of the processes required for drafting a patent application, disclosing material prior art, drafting an amendment or reply to a communication from the Office, drafting a petition, or drafting an appeal to the Patent Trial and Appeal Board, and more. In the course of this relationship, the inventor typically and necessarily discloses a great deal of confidential and proprietary information to the patent agent.

Unfortunately, it can be difficult for individual inventors to find law firms that are willing to represent them in preparing and prosecuting patent applications at costs they can afford. Some patent lawyers have little or no interest in directly representing individual inventors, and some patent firms have policies against it. Other firms are willing to represent individual inventors and address cost concerns by using patent agents to serve those cash strapped clients at a greatly reduced rate, but in many instances individual inventors and others must directly employ patent agents to help them with their patent applications. Thus, patent agents are necessary for those applicants who cannot find a lawyer willing to represent them or those applicants who can only afford representation at a significantly reduced rate. Indeed, the Federal Circuit has recognized “the very purpose of Congress’s design: namely, to afford clients the freedom to choose between an attorney and a patent agent for representation before the Patent Office.” Queen’s University, 820 F.3d at 1298.

Shielding communications between inventors and patent agents is necessary to enable inventors and other patent applicants to continue to use patent agents to file and prosecute patent applications before the PTO while enabling the inventor to share all information necessary and without fear that their confidential information will be disclosed. Without this evidentiary privilege, clients are more likely to withhold critical information, including relevant prior art that if disclosed to the PTO would prevent the PTO from issuing a broader patent than to which the inventor is entitled. This Resolution therefore urges the ABA to adopt a limited evidentiary based client privilege—similar to the evidentiary privilege that under Resolution 106 the ABA urges all tribunals to adopt for communications between lawyer referral services and their clients—except in this case limited to communications between the client and the patent agent related to the prosecution of patent applications before the PTO. This evidentiary privilege, which is strictly limited in scope to the statutory and regulatory authorization provided by the PTO for patent agents, should provide that a person or entity who consults a patent agent for the purpose of prosecuting a patent application before the PTO may refuse to disclose the substance of that consultation and may prevent the patent agent from disclosing that information as well. The evidentiary privilege would belong to the patent agent’s client, and the client would have the authority to waive the privilege. In addition, each jurisdiction may wish to apply to this evidentiary privilege certain of the recognized exceptions to the attorney-client privilege, including, for example: a) the crime/fraud exception (see, e.g., Cal. Evid. Code § 956 (crime/fraud exception to the attorney-client privilege); Cal. Evid. Code § 968(a) (crime/fraud exception to the lawyer referral service-client privilege)); b) the fiduciary exception (see, e.g., Restatement (Second) of Trusts § 173, cmt. b; Garner v. Wolfinbarger, 430, F.2d 1093 (5th Cir. 1970), but note that a number of states do not recognize this exception); and/or c) any overriding public policy exceptions.

II. Patent Agents Have Been Authorized to Represent Inventors Before the PTO for More than 150 Years

The use of patent agents to prepare and prosecute patent applications is not new. In Sperry v. State of Florida, 373 U.S. 379 (1963), the Supreme Court found that the authority to prosecute patent applications was conferred on patent agents by federal law. Id. at 385 (citing 1952 Patent Act (35 U.S.C. § 2(b)(2)(D)). In that opinion, the Supreme Court observed that in 1952, Congress expressly authorized the PTO Commissioner to promulgate regulations confirming earlier-defined requirements for patent agents to prosecute applications before the Patent Office. Id. at 390-96.

But even before that, as explained in the Federal Circuit’s decision in In re Queen’s University at Kingston, 820 F.3d 1287, 1298. (Fed. Cir. 2016), the PTO’s acknowledgement of patent agents to prosecute patent applications traces back to 1861 when Congress first provided that the Commissioner of Patents may refuse to recognize any person as a patent agent for particular conduct. Later, the 1869 Rules provided a requirement for “intelligence and good moral character.” Id. at 1296-1298. In 1899, to avoid an emerging problem of deceptive advertising by some patent agents, the Commissioner required registration of all of those who practice before it. Then, in 1922, the patent statute was amended to expressly authorize the Commissioner to prescribe regulations for the recognition of both agents and attorneys, “to provide for the creation of a patent bar, and to require a higher standard of qualifications for registry.” Id. at 1297.

III. The PTO Determines the Suitability of All Patent Attorneys and Patent Agents

Only those deemed by the PTO qualified to prosecute patent applications are officially “registered” by the PTO and can legally hold themselves out as Congressionally authorized and PTO approved patent agents.6 In Queen’s University, the Federal Circuit noted that like their attorney counterparts, patent agents must meet minimum qualifications to be authorized to practice before the PTO, including passing an extensive examination on patent laws and PTO regulations and demonstrating a sufficient technical or scientific background. Id. at 1300. Patent agents are also subject to the same ethical code as attorneys registered to practice before the PTO. While acknowledging that patent agents do not have the ethical obligations imposed on attorneys under state bar requirements, the Court noted that “the Patent Office has promulgated the ‘USPTO Rules of Professional Conduct,’ which conforms to the ABA’s Model Rules of Professional Conduct. See, 37 C.F.R. Section 11.100 et seq.” Id. at 1301. Those patent agents failing to maintain the level of professionalism required by the PTO rules, may be subject to revocation of their PTO registration and thereby prohibited from further practicing before the PTO.

6 37 CFR § 11.5 (Register of attorneys and agents in patent matters.) “A register of attorneys and agents is kept in the Office on which are entered the names of all individuals recognized as entitled to represent applicants having prospective or immediate business before the Office in the preparation and prosecution of patent applications. Registration in the Office under the provisions of this Part shall entitle the individuals so registered to practice before the Office only in patent matters.”
IV. Patent Agent Services: Patent Prosecution Before the PTO

A patent confers on the patentee valuable property rights including “the right to exclude others from making, using, offering for sale, or selling” the invention in the United States or importing the invention into the United States. 35 U.S.C. §§ 154, 271. Absent patent protection, products may be reverse engineered and their unique aspects copied freely. In § 2(b)(2)(D), Congress authorized the PTO to allow agents and attorneys to assist inventors to secure a patent. Patent agents work with inventors and companies to draft, file, and prosecute patent applications with the hope that the PTO will award the invention a patent. In addition to providing an important service to the public by offering patent prosecution services that might not otherwise be available to them, patent agents provide an important service for attorneys by often allowing attorneys to focus on representation of clients that file more complex or multiple patent applications in the same technology area, to avoid potential client conflicts and malpractice claims, or when serving in a supporting role by providing patent prosecution services to their clients at a reduced rate. Open communication between the inventor and his or her patent agent are necessary for patent agents to effectively draft, file, and prosecute patent applications on the inventor’s behalf.

The patent application drafting and prosecution process begins when the inventor contacts the patent agent, usually by phone, or increasingly by email or over the Internet, to express interest in filing a patent application with the PTO covering their invention. The inventor discloses often confidential information regarding the invention—including how it is made, works, and is used, when it was first used publicly or described in a publication, how similar products are made, work, and are used, who uses similar technologies, prior art that must be disclosed to the examiner, and much more. For the agent to draft a proper patent application, it is essential that the inventor communicate fully and freely with the patent agent.

The patent agent uses that information to draft a patent application which the inventor typically reviews before the patent agent submits the application to the PTO. Until that information is publicly disclosed, the information describing the invention will remain protected as a trade secret. But if an inventor decides to file a patent application, the information contained in the patent application will be disclosed to the public in the form of a published patent application and any rights in the trade secrets will be surrendered. Based on consultations with his or her patent agent, the inventor may choose to include less than all of the information he or she has shared with their patent agent in the patent application. Also, patent applicants and their representatives are under a duty to disclose to the PTO all information known to them that appears to establish the unpatentability of their invention.7

7 “A patent by its very nature is affected with a public interest. The public interest is best served, and the most effective patent examination occurs when, at the time an application is being examined, the Office is aware of and evaluates the teachings of all information material to patentability. Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability as defined in this section...” 37 CFR 1.56 (a) (Duty to disclose information material to patentability).
Applications for patent are examined by a patent examiner to determine if the applicants are entitled to a patent. The back-and-forth negotiations between an inventor and a patent examiner begin when the examiner first reviews the patent application to see if the claims are patentable. If not, the examiner will reject the application claims and the patent agent will typically consult with the inventor to draft a response, which may take the form of an amendment to the claims or a recitation of arguments challenging the examiner’s position. The relationship and consultations between the inventor and patent agent continues as additional actions are required of the inventor by the PTO in an effort to secure the patent, which may include drafting additional replies to the examiner, drafting a petition, drafting an appeal to the Patent Trial and Appeal Board, and more. The unbridled flow of information between the inventor and patent agent remains essential throughout this process.

In the course of all of these interactions, confidential information regarding the invention—including how it is made, works, and is used, any sales or disclosures of the invention, how the technology cited by the examiner is made, works, and is used, relevant prior art—is provided by the inventor to the patent agent as needed. Without this detailed client information, the patent agent could not draft or file the inventor’s patent application, respond to the examiner’s arguments or meet their obligation to disclose material information to the PTO.

V. The Problem and the Solution

As the Federal Circuit appreciated in Queen’s University, an inventor client has a reasonable expectation that all communications relating to preparing, filing, and prosecuting a patent application will be kept privileged. Id. at 1298. To hold otherwise, the Court acknowledged “would frustrate the very purpose of Congress’s design: namely, to afford clients the freedom to choose between an attorney and a patent agent for representation before the Patent Office.” Id. The lack of an evidentiary privilege for the benefit of the inventor client would hinder communications between patent agents and their clients, “undermining the real choice Congress and the Commissioner have concluded clients should have between hiring patent attorneys and hiring non-attorney patent agents.” Id. at 1300. But, consistent with any reasonable expectations of the inventor, application of the evidentiary privilege must be limited to the specific activities for which the patent agent is authorized by the Patent Act and PTO to engage on behalf of an inventor. Id. at 1301. “Communications that are not reasonably necessary and incident to the prosecution of patents before the Patent Office fall outside the scope of the patent-agent privilege.” Id.

What makes patent agents valuable to society and to practicing patent attorneys is their availability to individual inventors either because law firms are unwilling to represent them or because law firms and attorneys are unwilling to provide patent application services at a price individual inventors or small and mid-sized entities can afford. Many law firms, including small firms, have little or no interest in directly representing individual inventors and some openly discourage such inquires by individual inventors. Other law firms have policies against

8 “Oppedahl Patent Law Firm LLC does not encourage inquiries by individual inventors. Of the many individual inventors that our attorneys have served over the years, only a handful have ever made enough money
representing individual inventors because they believe that individual inventors will create problems for patent lawyers, the malpractice risk is often greater, that their work takes more time and effort, and the ability to pay is usually less than for a corporation. Thus, patent agents are necessary for those applicants who cannot find a patent lawyer willing to represent them or who can only afford to pay for services at a significantly reduced rate, and who are too overwhelmed by the esoteric and notably complicated patent application process to represent themselves.

By enacting 35 U.S.C. § 2(b)(2)(D), Congress not only authorized attorneys who demonstrate a level of skill and professionalism to prosecute patent applications before the PTO but in that statute Congress also expressly authorized patent agents to prosecute patent applications on behalf of inventors if they too can establish a level of professionalism and skill as defined by the PTO. Relying on the Sperry Court’s characterization of patent agent activities, coupled with the clear intent of Congress to establish a “dual track for patent prosecution by either patent attorneys or non-attorney patent agents,” in Queen’s University the Federal Circuit correctly acknowledged a “professional status” of patent agents that justifies a recognition of the evidentiary privilege when the communications were necessary and incidental to prosecution of the patent application before the PTO. Id. at 1300.

Notwithstanding that 35 U.S.C. § 2(b)(2)(D) unambiguously establishes that patent agents are professionals authorized to prosecute patent applications on behalf of others, and that the majority opinion in Queen’s University holds that this evidentiary privilege applies, uncertainty surrounding the existence of this evidentiary privilege remains. This uncertainty from their inventions even to cover what we charged them. This does not mean the inventions were not good ones -- indeed we have seen some very clever and promising inventions from individual inventor clients, and we have obtained some patents for individual inventors of which we are very proud from a professional point of view. There is much in life, however, that depends on luck and being in the right place at the right time, with inventions as with anything else. For every deserving invention that makes money for its inventor, there are probably ninety-nine other very deserving inventions that happen not to fulfill their promise.” Information for individual inventors, Oppedahl Patent Law Firm, LLC http://www.oppedahl.com/individual/.

9 “Individual inventors who are not yet versed in the rules of patent law create problems for patent prosecutors. The work generally takes more time and effort, the malpractice risk is often greater, and the ability to pay is usually less. A number of law firms now have policies against representing individuals (except for the very wealthy).” Individual Inventors: Who Will Represent You Now? Dennis Crouch June 21, 2007 https://patentlyo.com/patent/2007/06/individual-inve.html .

10 The dissenting judge in Queen’s University argued strongly against the majority’s establishment of an evidentiary privilege, disagreeing with the majority’s finding of a public interest or real need to overcome the presumption against creation of a new privilege. For example, where the dissent was satisfied that a client’s communications to its patent agent could be protected by the attorney client privilege if the patent agent is working under the supervision of an attorney, Id. at 1305, the majority found the patent agent privilege is needed and serves public ends because lack of such a privilege would hinder communications between applicants and patent agents and undermine the real choice between hiring lawyers and patent agents that Congress intended to afford clients, Id. at 1300. The majority found that the “Supreme Court’s characterization of the activity in Sperry coupled with the clear intent of Congress to enable the Office to establish a dual track for patent prosecution by either patent attorneys or non-attorney patent agents confers a professional status on patent agents that justifies our recognition of the patent-agent privilege.” Id.at 1300.

11 In addition to the dissenting opinion in Queen’s University, not long after the Federal Circuit handed down that opinion, in In re Silver, 247 S.W. 3d 644 (Tex. 2016), the Texas Court of Appeals affirmed a lower court’s holding that communications between an inventor and a patent agent were not protected because no Texas statute or rule recognizes an evidentiary privilege for client communications with a patent agent. Id. at 647. While the Texas court
threatens individual inventors and small companies who have come to rely on patent agents to obtain patents and prefer to continue to work with patent agents and those for whom a patent agent may be their only option. The lack of an evidentiary privilege strictly limited to the narrow authority provided by the PTO regulations threatens the open communication necessary for patent agents to effectively draft, file, and prosecute patent applications on behalf of their inventor clients, thereby jeopardizing the quality of the patent application, reducing the likelihood the inventor will obtain a patent, and the ultimate value of a patent should one issue. Clients who cannot afford a patent attorney to advise them may have every expectation that their communications with their patent agent will be protected, and run the greatest risk of disclosing information they would have withheld from their patent agent had they known their communications would not be protected.

Respectfully submitted,

Scott F. Partridge, Chair
Section of Intellectual Property Law
February 2018

Koji Fukumura, Chair
Section of Litigation
February 2018

distinguished Queen’s University on the grounds that the Texas case did not involve issues of federal patent law but involved a claim for breach of contract under Texas law, the case nevertheless casts doubt on the existence of a client-patent agent evidentiary privilege. Id. at 646.
1. **Summary of Resolution**

The Resolution calls for the Association to adopt policy urging courts and legislative bodies to adopt rules or enact legislation to establish a narrow evidentiary privilege applicable by courts only to clients of patent agents who are registered with the U.S. Patent & Trademark Office (PTO), and limited to confidential communications between a client and a patent agent necessary and incidental to certain patent application-related activities authorized by the Patent Act and regulated by the PTO. An important purpose is to address uncertainty surrounding application of this evidentiary privilege in litigation and to establish a narrow evidentiary privilege necessary to enable inventors and other patent applicants to share with their patent agent all information necessary to file and prosecute patent applications before the PTO without fear that their confidential information will be disclosed. The Resolution also addresses a concern that, absent assurance of this evidentiary privilege, clients are more likely to withhold critical information, including relevant prior art that if disclosed to the PTO would prevent the PTO from issuing a broader patent than to which the inventor is entitled.

2. **Approval by Submitting Entity**

The Section of Intellectual Property Law Council approved the Resolution on September 26, 2017. The Section of Litigation Council approved co-sponsorship of the Resolution on November 10, 2017.

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?**

   The Resolution is modeled after and closely related to resolution 106 that passed the House of Delegates in August 2016, which urges tribunals and legislative bodies to establish an evidentiary privilege for lawyer referral services. The Resolution differs in object and substance to the privilege addressed in resolution 498BOG adopted by the Executive Committee of the Board of Governors in March 1989, which opposes extension of the attorney-client privilege to accountants.
5. **If this is a late report, what urgency exists which requires action at this meeting of the House?**

N/A

6. **Status of Legislation**

None.

7. **Plans for implementation of the policy if adopted by the House of Delegates**

The policy will provide Association support for legislation or an Association *amicus* brief in any case addressing the issue.

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 regarding this recommendation.

10. **Referrals**

Drafts of the Resolution and Report were distributed and discussed among the Section of Intellectual Property Law, Section of Litigation, Standing Committee on Professional Discipline, and Standing Committee on Ethics and Professional Responsibility. That process resulted in comments and changes reflected and incorporated in the submitted Resolution and Report. 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.

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution calls for the Association to adopt policy urging courts and legislative bodies to adopt rules or enact legislation to establish a narrow evidentiary privilege applicable by courts only to clients of patent agents who are registered with the U.S. Patent & Trademark Office (PTO), and limited to confidential communications between a client and a patent agent necessary and incidental to certain patent application-related activities authorized by the Patent Act and regulated by the PTO.

2. Summary of the Issue that the Resolution Addresses

Congress authorized the PTO to allow both patent agents and lawyers to represent inventors and other patent applicants before the agency, subject to certain requirements. In order to gain authorization, both patent agents and attorneys must submit to the PTO an application demonstrating that they are of good moral character and have the legal and scientiﬁc qualiﬁcations necessary to prosecute patent applications, they must also pass a lengthy bar-style examination. Once authorized, patent attorneys and patent agents registered to prosecute patent applications before the PTO may undertake on behalf of their inventor and applicant clients certain patent application-related activities set forth in PTO regulations. Shielding communications between those clients and their patent agents is necessary to enable inventors and other patent applicants to use patent agents to file and prosecute patent applications before the PTO while enabling the inventor to share all information necessary and without fear that their conﬁdential information will be disclosed. Uncertainty surrounding the evidentiary privilege remains -- notwithstanding longstanding statutory authority establishing that patent agents are professionals authorized to prosecute patent applications on behalf of others, the PTO’s authorization and regulation of patent agents, and the Federal Circuit’s majority decision in In re Queen’s University at Kingston, 820 F.3d 1287, 1298. (Fed. Cir. 2016) holding that an evidentiary privilege applies to client communications with patent agents.

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

The Resolution addresses this uncertainty by urging establishment of an evidentiary privilege that is strictly limited in scope to the statutory and regulatory authorization provided by the PTO for patent agents, which evidentiary privilege should provide assurance that a person or entity who consults a patent agent for the purpose of prosecuting a patent application before the PTO may refuse to disclose the substance of that consultation and may prevent the patent agent from disclosing that information as well. This evidentiary privilege would belong to the client, the client would have the authority to waive the privilege, and, if recognized in the jurisdiction, exceptions to the attorney-client privilege would apply.
4. **Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**

We are aware of no ABA minority view or opposition. This Resolution is consistent with the Federal Circuit’s majority decision in *Queen’s University*. The minority view of one dissenting judge finds an insufficient showing of the public interest or real need required to overcome the presumption against creation of a new privilege.
RESOLVED, That the American Bar Association supports efforts in Congress and the federal courts to allow the filing of a copyright infringement action, where the deposit, application, and fee required for registration of copyrights at issue have been delivered in proper form to the Copyright Office.
I. Introduction

This Resolution supports efforts in the federal courts and Congress to allow the filing of a civil action for infringement of copyrights once a proper application for registration of a copyright has been delivered to the Copyright Office. There is currently a split in the circuits regarding interpretation of Section 411 of the Copyright Act, 17 U.S.C. §411, with respect to whether the filing of an application for registration with the Copyright Office is sufficient for the copyright owner to file an infringement suit, or whether a copyright owner must wait until the Copyright Office completes examination of the registration application before the copyright owner may file suit. A definitive rule is needed to eliminate both the existing incentives for parties to forum shop based on whether a circuit interprets the statute to offer the more favorable rule on the prerequisites for filing a copyright infringement complaint and the current uncertainty in the circuits that have not yet established a rule for interpretation of Section 411. The Resolution would provide Association support for legislation or an Association amicus brief in any case addressing the issue.1

A definitive rule would remove the cloud of uncertainty and potential additional cost or delay under which copyright owners, accused infringers, and lawyers advising these clients currently operate. Allowing copyright owners to file suit upon delivery of a proper application to the Copyright Office (i.e., the deposit, completed application, and fee required for registration) avoids unnecessary delay in litigation and the potential loss of rights to which the copyright owner might otherwise be entitled had she been permitted to bring her case without waiting for the Copyright Office to take action, including: i) a case being dismissed for failure to comply with the statute of limitations, ii) potential forfeiting of the plaintiff’s right to an immediate temporary restraining order or to preliminary injunctive relief, or iii) lost damages. The application approach addresses inequities that arise under the registration approach, without impairing the important goal of maintaining a robust national register of copyrights.

The current confusion involves a debate over statutory construction of the claim processing rule in Section 411(a).2 “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression,” without the need for registration with the Copyright Office.3 Although registration is voluntary under the Copyright Act, Congress created several incentives for a copyright owner to apply for registration of copyrights, one of

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1 A petition for certiorari was recently submitted to the Supreme Court on appeal of the Eleventh Circuit decision discussed in this report. Fourth Estate Public Benefit Corp. v. Wall-Street.com, 17-571 (11th Cir). The question presented squarely addresses the subject of this Resolution. As of December 6, 2017, the Court has not acted on the petition.

2 In Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010), after distinguishing between jurisdictional conditions and claims processing rules, the Court held with respect to the former “Section 411(a)’s registration requirement is a precondition to filing a claim that does not restrict a federal court’s subject-matter jurisdiction,” Id. at 154, and the Court declined to address the latter, which is subject of this resolution: namely, whether 411(a) should be interpreted to require registration as a precondition to suit.

101B

which is the right to enforce copyrights in an infringement action. Section 411(a) provides that, with some exceptions,

“no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.” It also provides that “where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.”

The courts have split in their interpretation of this statutory language. Some courts favor a “registration approach” that requires a copyright owner to apply and then wait to obtain a certificate of registration (or a refusal to issue one) from the Copyright Office prior to instituting an action. Other courts have found the statute ambiguous and, thus, attempting to effectuate Congress’ intent, favor an “application approach” that requires only that the deposit, application, and fee required for registration be submitted to the Copyright Office prior to instituting an action.

Once an application is submitted, the Copyright Office will examine the application for form and substance. The examination will determine whether “the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of [the Copyright Act] have been met.” After completing examination, the Copyright Office will either issue a certificate of registration (if all requirements are met) or refuse registration and notify the applicant in writing of the reasons for refusal. During examination, the applicant may be asked to provide additional information or materials. As of December 6, 2017, the Copyright Office reports that the duration of the examination process varies – the Office stated that the “process [for examination of] an application varies, depending on the number of applications the Office is receiving and clearing at the time of submission and the extent of questions associated with the application” and estimates processing time for e-filed applications at 6–8 months and for paper-filed applications at 8–10 months. These are current averages, however; some applications take much longer. Processing times have been as long as two years in the past decade. Thus, the examination process contributes to the delay, additional burden and uncertainty of the “registration approach.”

By urging adoption of the “application approach,” this Resolution supports efforts in the federal courts and Congress to establish a uniform approach and ameliorate the prejudice caused by requiring holders of copyrights in United States works to wait until the U.S. Copyright Office has granted or refused a copyright application before bringing a civil action for infringement of

5 Id.
6 Id. at §410(a) and (b).
7 https://www.copyright.gov/help/faq/faq-register.html. An applicant may request “special handling” and pay an additional fee to expedite processing. See infra fn. 31.
8 https://www.copyright.gov/rulemaking/deposit-acct/comments/gls.pdf. Applicant status inquiries will not be answered by the Copyright Office unless the maximum posted processing time has been exceeded.
those copyrights, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form.

II. Differences in Interpretation Leads to a Circuit Split

Interpretation of Section 411 differs between four circuits with an interpretation establishing the registration approach, two circuits establishing the application approach, and five circuits that have not ruled on the meaning of the word “registration” in the statute and the district courts within those circuits are split.

The Third, Seventh, Tenth, and Eleventh Circuits, have adopted the registration approach, requiring that a copyright holder must wait to receive a certificate from the Copyright Office or for the Copyright Office to refuse registration before they can file suit.9 As recently explained by the Eleventh Circuit, the basis for this interpretation is that, under a strict reading of the statute, the “Copyright Act defines registration as a process that requires action by both the copyright owner and the Copyright Office.”10 Those roles are as follows:

A copyright owner must first deposit a copy of the material with the Copyright Office, file an application, and pay a fee. The Register of Copyrights then examines the material and determines whether “the material deposited constitutes copyrightable subject matter.” If the material is copyrightable “the Register shall register the claim and issue to the applicant a certificate of registration.” If “the material deposited does not constitute copyrightable subject matter ..., the Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal.”11

Thus, under the registration approach, “registration occurs only after examination of an application.”12

By contrast, the Fifth and Ninth Circuits have adopted an application approach to Section 411.13 According to the Ninth Circuit, the statute’s text is ambiguous because it does not contain a definition of the word “registration” and “[o]ther sections of the Act . . . cast doubt on [the registration approach’s] interpretation.”14 Specifically, Section 408 “blurs the line between application and registration and favors the application approach,” because it states that “[t]he

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9 See, e.g., Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC, 856 F.3d 1338 (11th Cir. 2017); Dawes-Lloyd v. Publish America, LLLP, 441 Fed.Appx 956, 957 (3d Cir. 2011) (per curiam) (non-precedential, plaintiff could not establish prima facie case because it did not hold “registered” copyright); Gaiman v. McFarlane, 360 F.3d 644, 655 (7th Cir. 2004) (requiring that “an application to register must be filed, and either granted or refused, before suit can be brought”); La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1202-05 (10th Cir. 2005) abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 175 (2010).
10 Fourth Estate, 856 F.3d at 1341.
11 Id. (citations omitted).
12 Id.
13 See, e.g., Cosmetic Ideas, Inc. v. IAC/Interactive Corp., 606 F.3d 612 (9th Cir. 2010), cert. denied, 2010 WL 4811301 (U.S. 2010); Apple Barrel Prods. v. Beard, 730 F.2d 384, 386-387 (5th Cir. 1984) (“One need only prove payment of the required fee, deposit of the work in question, and receipt by the Copyright Office of a registration application.”).
14 Cosmetic Ideas, 606 F.3d at 616–17.
owner of copyright or of any exclusive right in the work may obtain registration ... by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified." Similarly, Section 410(d) "could be read as supporting either the application or registration approach," because it provides that the effective date of registration is the "day on which an application, deposit, and fee" are delivered to the Copyright Office.

Because the courts using the application approach find the statute unclear, they look beyond the text of the statute to its purpose and conclude that the "application approach better fulfills Congress’s purpose of providing broad copyright protection while maintaining a robust federal register." The reasons for this conclusion include the following:

- "[T]he application approach avoids unnecessary delay in copyright infringement litigation, which could permit an infringing party to continue to profit from its wrongful acts," without "impairing the central goal of copyright registration" (i.e., maintaining a robust national register of copyrights”).
- "[U]nder the registration approach, a plaintiff who applied for registration towards the end of the three-year period could see the statute of limitations expire during the time it took the Copyright Office to act on the application."

The First, Second, Fourth, Sixth and Eighth Circuits have yet to rule on the meaning of

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15 Id. at 617 (quoting 17 U.S.C. § 408(a)).
16 Id.
17 Id. at 619.
18 Id. at 619–20.
19 Id. at 620.
20 Latin Am. Music Co. Inc. v. Media Power Grp., Inc., 705 F.3d 34, n.11 (1st Cir. 2013) (“We do not weigh in on the issue because, as the district court noted, LAMCO failed even to show that it had submitted all the necessary application materials for registration.”).
21 A Star Grp., Inc. v. Manitoba Hydro, 621 F. App’x 681, 683 (2d Cir. 2015) (not deciding whether a "pending application for registration satisfies the Act’s requirement that a work be registered before a related infringement suit is filed); Psihoyos v. John Wiley & Sons, Inc., 748 F. 3d 120, 125 (2d Cir. 2014) (although “the Federal Courts of Appeals are divided over whether a pending application satisfies [Section] 411(a)'s requirement of copyright registration as a precondition to instituting an infringement action,” the Second Circuit has declined to “resolve the dispute or otherwise embroil [itself] in this circuit split”).
22 A 1978 Fourth Circuit decision held that “the 1976 Amendments [to the Copyright Act] eliminate any need to secure registration as a prerequisite to an infringement suit and authorize suit for infringement, despite the Register’s denial, so long as the Register is notified. Eltra Corp. v. Ringer, 579 F.2d 294, 296 n. 4 (4th Cir. 1978). However, the district courts within the Fourth Circuit are split. Compare Patrick Collins, Inc. v. Gillispie, 2012 WL 440888, at *2 (D. Md. Feb. 9, 2012) ("[M]ere application for a copyright does not qualify as either registration or preregistration") with Icomebazar, L.L.C. v. Am. Online, Inc., 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004) (adopting application approach).
24 TVI, Inc. v. INFOSoft Techs., Inc., No. 4:06 Civ. 697, 2006 WL 2850356, at *3 (E.D. Mo. Sept. 29, 2006) (“The Eighth Circuit has not interpreted the meaning of registration.”).
the word “registration” in the statute, and district courts within those circuits are split as well.

III. Having a Definitive Rule Is Paramount and the Equities Weigh in Favor of the Application Rule

A uniform approach in the circuits for instituting copyright litigation is important because Section 411 is the first issue that litigants and their counsel must consider in a copyright case. Moreover, the lack of uniformity makes it difficult for copyright owners and accused infringers to anticipate when a suit might be filed, and their lawyers to advise their clients on when to file. A definitive rule is also needed to discourage forum shopping based on which circuit applies the more favorable rule. The application approach addresses inequities that arise under the registration approach, such as the risk of an owner who applies late in the statute of limitations period losing the right to enforce the copyrights in an infringement action because of the time taken to review the application, without impairing the important goals of encouraging applications for registration and maintaining a robust national register of copyrights.

Statute of Limitations. The statute of limitations for copyright infringement runs from three years after a claim has accrued.25 Accrual is deemed to have occurred when an infringement is discovered by the copyright owner or other interested party bringing the claim (e.g., exclusive licensee).26 The Supreme Court, however, recently clarified that a copyright owner can recover damages for only the three-year period leading up to suit.27 The application approach avoids the prejudicial result of delays at the Copyright Office causing a copyright case to be dismissed under the statute of limitations, or a copyright owner losing out on damages to which she otherwise would be entitled had she been permitted to bring her case without waiting for action by the Copyright Office.

Early Injunctive Relief. If a registration is required prior to commencement of suit, and even a short delay occurs at the Copyright Office, a copyright owner may forfeit the right to an immediate temporary restraining order or preliminary injunctive relief. For example, when an infringing television advertisement will cause irreparable harm if allowed to air in four days, or a shipment of infringing videos will be sold or moved out of the jurisdiction in three days if not seized and impounded, or software code is released on the Internet for all to download, and then immediate action is necessary.

Consistency with the Berne Convention. The Berne Convention for the Protection of Literary and Artistic Works, of which the United States is a signatory, provides that the “enjoyment and the exercise of these [copy]rights shall not be subject to any formality,” such as use of copyright notices or registration.28 The Berne Convention, however, allows member

27 See id at 1973 (“[A] successful [copyright] plaintiff can gain retrospective relief only three years back from the time of suit. No recovery may be had for infringement in earlier years. Profits made in those years remain the defendant’s to keep.”); see also, Wu v. John Wiley & Sons, Inc., No. 1:14 Civ. 6764, 2015 WL 5254885, at *4–7 (S.D.N.Y. Sept. 10, 2015) (affirming discovery rule, but limiting plaintiff to damages incurred in three years preceding filing of suit).
28 Berne Convention Art. 5(2).
countries to disadvantage works created in their own countries, as long as foreign works are protected consistent with the Convention. As a result, in the United States, whereas United States works must be registered with the Copyright Office as a precondition to filing an infringement suit, there is no such requirement for foreign works. In other words, the United States disadvantages owners of United States works in comparison to owners of foreign works. The application approach reduces the burden of this registration formality, and lessens discrimination against the owners of copyrights in United States works.

Expediting a Copyright Application Still May Result in Undue Delay. Under the Copyright Office’s standard registration processes, a certificate of registration generally will issue between six and ten months after an application is submitted. Applicants, however, may request “special handling” to expedite their application if they pay an addition $800 (compared to the standard $55 fee). Yet, while the Copyright Office attempts to process applications within five working days, that timing is not guaranteed. For example, if the Copyright Office needs additional information from an applicant or has questions about the application, it can take additional days or even weeks.

Moreover, while a special handling fee may be small compared to the attorneys’ fees and other costs a copyright claimant is likely to incur in pursuing copyright claims in federal court, the fee could still discourage individuals, non-profits, pro se parties and other claimants with limited resources from timely pursuing claims. Further, whereas claimants with limited resources have some hope of recovering their attorneys’ fees and costs incurred pursuing their claims should they prevail, they have no hope of recovering a steep special handling fee in litigation. And those that file lawsuits in the hopes of reaching an early settlement with a defendant seek to do so without incurring undue additional expense.

IV. Proper Case Management May Provide Opportunities for Courts to Benefit from the Copyright Office’s Views While Following the Application Rule

As discussed above, there are a myriad of benefits to the application approach. The primary benefit of the registration approach over the application approach is that, when a suit is commenced, the registration approach ensures that courts and litigants have the opinion of the Copyright Office of whether or not the material at issue is copyrightable. This can be helpful in deciding early motions to dismiss or motions for judgment on the pleadings. One way to help ameliorate that concern would be for district courts to use their inherent powers of case management by allowing cases to be filed under the application approach but then delaying non-time sensitive issues until the Copyright Office has an opportunity to act on the copyright owner’s application. In any case, any benefit from having the views of the Copyright Office

29 Berne Convention Art. 5(1).
33 It, however, should be noted that statutory damages and attorney’s fees only would be available if the registration is made prior to the infringement (unlikely under these circumstances), or within three months of publication. See 17 U.S.C. § 412.
when a suit is commenced is likely to have little impact as a copyright owner whose registration has been refused can still bring a copyright lawsuit, and courts make an independent evaluation of copyrightability without deference to the Copyright Office’s views.

V. Conclusion

For these reasons, it is important to the enforcement and development of U.S. copyright law for courts to apply a definitive, uniform rule when determining whether a case can proceed if an application, deposit, and fee have been filed, but a certificate of copyright registration is not yet issued or denied.

Respectfully submitted,

Scott F. Partridge, Chair
Section of Intellectual Property Law
February 2018

1. Summary of Resolution

The Resolution calls for the Association to adopt policy urging the federal courts and Congress to allow the filing of a civil action for infringement of copyrights once a proper application for registration of a copyright has been delivered to the Copyright Office. There is currently a split in the circuits regarding interpretation of Section 411 of the Copyright Act with respect to whether the filing of an application for registration with the Copyright Office is sufficient for the copyright owner to file an infringement suit, or whether a copyright owner must wait until the Copyright Office completes examination of the registration application before the copyright owner may file suit. This Resolution supports adoption of a definitive, uniform rule thereby removing a cloud of uncertainty under which copyright owners, accused infringers, and lawyers advising these clients currently operate. A uniform rule would also eliminate existing incentives for parties to forum shop based on which circuit offers the more favorable rule on the prerequisites for filing a copyright infringement complaint.

2. Approval by Submitting Entity

The Section of Intellectual Property Law Council approved the Resolution on October 31, 2017.

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?

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

None.
7. Plans for implementation of the policy if adopted by the House of Delegates

The policy will provide Association support for legislation or an Association *amicus* brief in any case addressing the issue.

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

None.

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 Person (prior to meeting)

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The Resolution calls for the Association to adopt policy supporting the federal courts and Congress to allow the filing of a civil action for infringement of copyrights once a proper application for registration of a copyright has been delivered to the Copyright Office.

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

   There is currently a split in the circuits with respect to interpretation of Section 411 of the Copyright Act, so that filing of an application for registration with the Copyright Office is sufficient for the copyright owner to initiate an infringement suit in some circuits (the application approach), while a copyright owner must wait until the Copyright Office completes examination of the registration application before the copyright owner may initiate suit in other circuits (the registration approach). The split between circuits that have adopted one or the other approach creates an incentive for parties to forum shop for a court that follows the more favorable rule. Other circuits have not yet established a rule for interpretation of Section 411, resulting in additional uncertainty for copyright owners, accused infringers, and lawyers advising these clients. The consequences for copyright owners include the risk of an owner who applies late in the statute of limitations period losing the right to enforce the copyrights in an infringement action because of the time taken by the Copyright Office to review the application, the risk of delay or forfeit of the right to an immediate temporary restraining order or preliminary injunctive relief, and the risk of losing out on damages to which the owner would be entitled if suit could be initiated without waiting for the Copyright Office to take action.

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

   The Resolution addresses the circuit split and current uncertainty by supporting establishment of a definitive, uniform rule, which would allow the copyright owner’s initiation of a civil action for infringement of copyrights once the owner has delivered to the Copyright Office a proper application for registration. The policy established through this Resolution will provide Association support for legislation or an Association amicus brief in any case addressing the issue.

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

   We are aware of no ABA minority view or opposition. Five circuits (First, Second, Fourth, Sixth and Eighth Circuits) have not yet established a rule for interpretation of Section 411 and district courts within those circuits are split. This Resolution is consistent with the approach taken by the Fifth and Ninth Circuits, which have adopted the application rule. The Third, Seventh, Tenth, and Eleventh Circuits, have adopted the registration approach.
RESOLVED, That the American Bar Association approves the following programs: Indiana University Purdue University Indianapolis, Paralegal Studies Program, Indianapolis, IN; and Tidewater Community College, Paralegal Studies Program, Virginia Beach, VA;

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal education programs: University of Alaska Anchorage, Legal Studies Program, Anchorage, AK; John F. Kennedy University, Legal Studies Program, Pleasant Hill, CA; Miramar College, Paralegal Program, San Diego, CA; MTI College, Paralegal Studies Program, Sacramento, CA; Arapahoe Community College, Paralegal Program, Littleton, CO; Wilmington University, Legal Studies Program, New Castle, DE; Athens Technical College, Paralegal Studies Program, Athens, GA; Loyola University, Institute for Paralegal Studies, Chicago, IL; Bowling Green Community College of Western Kentucky University, Paralegal Studies Program, Bowling Green, KY; Herzing University, Legal Assistant/Paralegal and Legal Studies Programs, Kenner, LA; Montclair State University, Paralegal Studies Programs, Montclair, NJ; Edmonds Community College, Paralegal Program, Lynnwood, WA; and Western Technical College, Paralegal Program, LaCrosse, WI;

FURTHER RESOLVED, That the American Bar Association withdraws the approval of Northwestern College, Paralegal Studies Program, Chicago, IL; Central New Mexico Community College, Paralegal Program, Albuquerque, NM; Technical Career Institute, Paralegal Studies Program New York, NY; American National University, Paralegal Studies Program, Dayton, OH; and Brightwood College, Paralegal Studies Program, Dallas, TX, at the requests of the institutions; and
FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the August 2018 Annual 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; Pima Community College, Paralegal Program, Tucson, AZ; College of the Canyons, Paralegal Studies Program, Santa Clarita, CA; 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; South University, Paralegal and Legal Studies Programs, Royal Palm Beach, FL; Herzing University, Paralegal Studies Program, Atlanta, GA; South University, Paralegal and Legal Studies Programs, Savannah, GA; College of DuPage, Paralegal Program, Glen Ellyn, IL; Illinois State University, Legal Studies Program, Normal, IL; Wilbur Wright College, Paralegal Studies Program, Chicago, IL; Southern Illinois University Carbondale, Paralegal Studies Program, Carbondale, IL; Sullivan University, Institute for Paralegal Studies, Lexington, KY; Elms College, Legal Studies Program, Chicopee, MA; Middlesex Community College, Paralegal Studies Program, Bedford, MA; Grand Valley State University, Legal Studies Program, Grand Rapids, MI; 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; Fayetteville Technical Community College, Paralegal Technology Program, Fayetteville, NC; Columbus State Community College, Paralegal Studies Program, Columbus, OH; Edison State Community College, Paralegal Studies Program, Piqua, OH; Rose State College, Paralegal Studies Program, Midwest City, OK; Pioneer Pacific College, Paralegal Studies Program, Wilsonville, OR; 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; South University Columbia, Paralegal and Legal Studies Programs, Columbia, SC; National American University, Paralegal Studies Program, Sioux Falls, SD; Brightwood College, General Practice Paralegal Certificate Program and Paralegal Studies Associate Degree Program, Nashville, TN; University of Tennessee Chattanooga, Paralegal Studies Program, Chattanooga, TN, and Salt Lake Community College, Paralegal Studies Program, Salt Lake City, UT.
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.
Indiana University Purdue University Indianapolis, IN, Paralegal Studies Program, Indianapolis, IN
Indiana University Purdue University Indianapolis is a four-year university accredited by the Higher Learning Commission. The university offers a Bachelor of Arts Degree and a Certificate in Paralegal Studies.

Tidewater Community College, Paralegal Studies Program, Virginia Beach, VA
Tidewater Community College is a two-year community college accredited by the Southern Association of Colleges and Schools Commission on Colleges. The college offers an Associate of Applied Science Degree, a Certificate in Legal Assistant, a Certificate in Career Studies, General Practice Paralegal and a Certificate in Career Studies, Litigation Paralegal.

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

University of Alaska Anchorage, Legal Studies Program, Anchorage, AK
University of Alaska Anchorage is a four-year university accredited by the Northwest Commission on Colleges and Schools. The university offers an Associate of Applied Science Degree, a Bachelor of Arts Degree, a Minor in Legal Studies, a post-baccalaureate Certificate in Paralegal Studies, a Certificate in Paralegal Studies, and a Certificate in Legal Nurse Consulting.

John F. Kennedy University, Legal Studies Program, Pleasant Hill, CA
John F. Kennedy University is a four-year university accredited by the Western Association of Schools and Colleges. The university offers a Bachelor of Arts Degree and a Certificate in Legal Studies.

Miramar College, Paralegal Program, San Diego, CA
Miramar College is a two-year college accredited by the Western Association of Schools and Colleges. The college offers an Associate of Science Degree and a Certificate in Paralegal Studies.

MTI College, Paralegal Studies Program, Sacramento, CA
MTI College is a two-year college accredited by the Western Association of Schools and Colleges. The college offers an Associate of Arts Degree in Paralegal Studies.

Arapahoe Community College, Paralegal Program, Littleton, CO
Arapahoe Community College is a two-year community college accredited by the Higher Learning Commission. The college offers an Associate of Applied Science Degree and a Certificate in Paralegal Studies.

Wilmington University, Legal Studies Program, New Castle, DE
Wilmington University is a four-year university accredited by the Middle States Commission on Higher Education. The university offers a Bachelor of Science Degree and a Certificate in Legal Studies.
Athens Technical College, Paralegal Studies Program, Athens, GA
Athens Technical College is a two-year technical college accredited by the Southern Association of Colleges and Schools Commission on Colleges. The college offers an Associate of Applied Science Degree in Paralegal Studies.

Loyola University, Institute for Paralegal Studies, Chicago, IL
Loyola University is a four-year university accredited by the Higher Learning Commission. The university offers Bachelor of Arts Degrees in Paralegal Studies, Management, Applied Studies, Applied Criminal Justice Leadership, Applied Psychology, Information Technology, and Applied Communications, and Certificates in Paralegal Studies, Corporate Practice, Litigation Practice, and Corporate and Litigation Practice.

Bowling Green Community College of Western Kentucky University, Paralegal Studies Program, Bowling Green, KY
Bowling Green Community College is a two-year community college accredited by the Southern Association of Colleges and Schools Commission on Colleges. The college offers an Associate of Arts Degree in Paralegal Studies.

Herzing University, Legal Assistant/Paralegal and Legal Studies Programs, Kenner, LA
Herzing University is a four-year university accredited by the Higher Learning Commission. The university offers an Associate of Science Degree and a Bachelor of Science Degree in Legal Studies.

Montclair State University, Paralegal Studies Program, Montclair, NJ
Montclair State University is a four-year university accredited by the Middle States Commission on Higher Education. The university offers a Bachelor of Arts Degree, a Bachelor of Arts Degree with a Minor in Paralegal Studies, and a Certificate in Paralegal Studies.

Edmonds Community College, Paralegal Program, Lynnwood, WA
Edmonds Community College is a two-year community College accredited by the Northwest Commission on Colleges and Schools. The college offers an Associate of Technical Arts Degree, a Medical Paralegal Certificate and a Certificate in Paralegal Studies.

Western Technical College, Paralegal Program, LaCrosse, WI
Western Technical College is a two-year technical college accredited by the Western Association of Schools and Colleges. The college offers an Associate of Applied Science Degree in Paralegal Studies.

Applications for reapproval have been filed by the following schools and are currently being evaluated. Until the evaluation process has been completed, the Committee recommends that the term of approval for each program be extended until the 2018 Annual Meeting of the American Bar Association House of Delegates.
Faulkner University, Legal Studies Program, Montgomery, AL;
South University, Paralegal and Legal Studies Programs, Montgomery, AL;
Pima Community College, Paralegal Program, Tucson, AZ;
College of the Canyons, Paralegal Studies Program, Santa Clarita, CA;
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;
South University, Paralegal and Legal Studies Programs, Royal Palm Beach, FL;
Herzing University, Paralegal Studies Program Atlanta, GA;
South University, Paralegal and Legal Studies Programs, Savannah, GA;
College of DuPage, Paralegal Program, Glen Ellyn, IL;
Illinois State University, Legal Studies Program, Normal, IL;
Wilbur Wright College, Paralegal Studies Program, Chicago, IL;
Southern Illinois University Carbondale, Paralegal Studies Program, Carbondale, IL;
Sullivan University, Institute for Paralegal Studies, Lexington, KY;
Elms College, Legal Studies Program, Chicopee, MA;
Middlesex Community College, Paralegal Studies Program, Bedford, MA;
Grand Valley State University, Legal Studies Program, Grand Rapids, MI;
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;
Fayetteville Technical Community College, Paralegal Technology Program,
Fayetteville, NC;
Columbus State Community College, Paralegal Studies Program, Columbus, OH;
Edison State Community College, Paralegal Studies Program, Piqua, OH;
Rose State College, Paralegal Studies Program, Midwest City, OK;
Pioneer Pacific College, Paralegal Studies Program, Wilsonville, OR;
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;
South University Columbia, Paralegal and Legal Studies Programs, Columbia, SC;
National American University, Paralegal Studies Program, Sioux Falls, SD;
Brightwood College, General Practice Paralegal Certificate Program and Paralegal
Studies Associate Degree Program, Nashville, TN;
University of Tennessee Chattanooga, Paralegal Studies Program, Chattanooga, TN, and
Salt Lake Community College, Paralegal Studies Program, Salt Lake City, UT.

Respectfully submitted,
Lynn Crossett, Chair
Standing Committee on Paralegals
February 2018
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Paralegals

Submitted By: Lynn Crossett, Chair

1. Summary of Resolution(s).

This Resolution recommends that the House of Delegates grants approval to two programs, grants reapproval to thirteen paralegal education programs, withdraws the approval of five programs at the request of the institutions, and extends the term of approval to several paralegal education programs.

2. Approval by Submitting Entity.

November 28, 2017

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

This resolution has not been previously submitted.

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

This resolution supports the Guidelines for the Approval of Paralegal Education Programs, as adopted by the House of Delegates.

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

N/A.

6. Status of Legislation. (If applicable.)

N/A

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

Approved programs are notified of the action of the House of Delegates by the Standing Committee on Paralegals. The programs are monitored for compliance during the approval term by the Standing Committee.

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

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

N/A

10. **Referrals.**

None

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

Peggy C. Wallace  
Staff Counsel Standing Committee on Paralegals  
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E-Mail: peggy.wallace@americanbar.org

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

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Cell: (512) 749-7348  
E-Mail: lynncrossett@txstate.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution

   Grants approval to two programs, grants reapproval to thirteen programs, withdraws the approval of five programs, and extends the term of approval of thirty-six programs.

2. Summary of the issue which the Resolution Addresses

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

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

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

4. Summary of Minority Views

   None.
RESOLVED, That the American Bar Association accredits the Privacy Law program of the International Association of Privacy Professionals for a five-year term as a designated specialty certification program for lawyers.
Background and Synopsis of the 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 impose a blanket prohibition on a truthful communication by a lawyer that he or she is certified as a specialist by a *bona fide* organization. Following the *Peel* decision, legal specialty groups began developing programs to certify attorneys as specialists.

An August 1992, House resolution (1992-AM-128) revised Model Rule of Professional Conduct 7.4(d). It now provides: “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.” 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. 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 accredited as *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, 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 Specialization Committee 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. This is 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 Specialization Committee has reviewed, and hereby recommends the approval of, an application

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1 Those accreditation requirements are set out as an Appendix to this Report.
submitted by the International Association of Privacy Professionals ("IAPP") for accreditation of its Privacy Law Specialist certification program. The Specialization Committee has determined that the IAPP is a *bona fide* organization and that its lawyer specialty certification program meets all of the Association’s Standards.

**Organization Description**

According to the Standing Committee on Specialization’s Governing Rules ("Rules"), applicants for specialty certification accreditation are reviewed to determine whether their "organizational features, operational methods and certification standards comply with the requirements of the Standards."

The Specialization Committee therefore undertook to review the IAPP’s organizational structure and viability as well as its organizational features and operational methods for certifying attorneys as specialists. Among the factors the Specialization Committee considered, consistent with Rule 6-4.2, were the IAPP’s governing structure and supporting documents, its financial viability, and biographical information regarding the IAPP’s governing board and senior staff. Rule 6-4.2 (a-d).

The IAPP has been organized under IRS Rule 501(c)(6) as a not-for-profit professional membership association since 2000. It currently has nearly 30,000 members in approximately 90 countries worldwide. The IAPP estimates that 30-40 percent of these members are attorneys. A section of the IAPP, known as the Privacy Bar Section, was recently formed to address the unique needs of the growing number of attorney members in the IAPP.

The IAPP is financially viable as demonstrated by its financial statements. It employs over 100 full time employees. It has a Board of Directors comprised of attorneys, chief legal counsel, chief privacy officers, and former regulators. Board members include lead in-house counsel and privacy officers at organizations including Google, Bank of America, Intel, LinkedIn, Mastercard, GE Digital, Naspers, Northrop Grumman, DHL, and Promontory. The IAPP’s Chief Executive Officer and President, its Vice President for Research and Education, and its Research Director are also attorneys.

In February 2016, the IAPP submitted a Notice of Intent to apply for accreditation of its Privacy Law Specialist certification program.

The Specialization Committee has determined that the IAPP is a *bona fide* organization with the capacity to administer a lawyer specialization program.

**Program Description**

The IAPP offers several privacy certifications. The longest-standing and most popular is the Certified Information Privacy Professional (CIPP). As the field and the IAPP have developed, and as privacy and data protection law have grown globally, the IAPP has offered a variety of certifications including CIPP/United States (CIPP/US), CIPP/ U.S. Government (CIPP/G), CIPP/Canada (CIPP/C), CIPP/Europe (CIPP/E), and CIPP/Asia (CIPP/A). The IAPP also offers a
certification in the technology associated with privacy practice, known as the Certified Information Privacy Technologist (CIPT) certification, and a certification associated with creating and monitoring a privacy program as an in-house privacy professional or on behalf of an institutional client (the Certified Information Technology Manager or CIPM certification). Each certification requires passage of an examination and maintenance of continuing education over time.

The IAPP has awarded many attorneys with the CIPP/US and other certifications for several years, although the exam is available to non-attorneys as well. The IAPP sought and in 2015 obtained accreditation for four of its certifications from the American National Standards Institute (ANSI), including the ones required for Association accreditation. ANSI accreditation demonstrates that the IAPP’s exams and its procedures for awarding certification meet the highly rigorous standards set forth in ISO/IEC 17024:2012.

When the IAPP applied for accreditation from the Association, it created a program designed to match the Standards for Accreditation of Specialty Programs for Lawyers. The IAPP’s initial application materials set forth a program requiring attorneys seeking Privacy Law Specialist certification to: (a) successfully pass the CIPP/US exam; and (b) successfully pass either the CIPM or the CIPT exam. The Bodies of Knowledge for each of these exams are attached to this Report. These exams were sent for review to Professor Dennis Hirsch, who is Professor of Law and Director of the Program on Data and Governance at The Ohio State University Moritz College of Law. Professor Hirsch is widely published in the fields of privacy and cybersecurity law, including European data protection law and comparative information privacy law. He holds degrees from Columbia University and Yale Law School. Prof. Hirsch provided the Specialization Committee with a favorable review of the exams.

None of the required exams contains a section covering ethics and professional responsibility, however, which the Specialization Committee noted as a deficiency in the IAPP’s application. The IAPP thereafter created an exam specifically covering ethics and professional responsibility issues to be administered exclusively to attorneys seeking the Privacy Law Specialist certification. Prof. Hirsch provided a favorable review of that exam.

The IAPP’s Privacy Law Specialist certification program requires, consistent with the accreditation Standards, that attorneys submit evidence of at least 36 hours of participation in qualified continuing legal education in the field of Privacy Law for the 3-year period preceding the application. Qualified CLE programs include those offered by Association sections and task forces. Applicants must also submit at least five but no more than eight peer references attesting to the applicant’s qualifications and involvement in the practice of privacy law. “Peers” include other attorneys, clients, regulators, or judges who can personally attest to the applicant’s qualifications. Applicants must also demonstrate current and ongoing “substantial involvement” in the practice of Privacy Law.

Prior Versions of this Resolution, and Amendment by Addition of a Credential Definition, and Greater Precision in Credential Identification

The Specialization Committee submitted resolutions recommending accreditation of the IAPP program to the House at both the 2017 Midyear Meeting and 2017 Annual Meeting. Both
times the Resolution generated vigorous inquiry, and encountered opposition. The Specialization Committee withdrew both resolutions, and promised interested entities the opportunity to convey the concerns generating their opposition if it should consider submitting a further resolution recommending accreditation.

At an October 28, 2017, business meeting of the Specialization Committee, the Committee received written comments from the Council of the Section of Science and Technology Law (“SciTech”) regarding the application of the IAPP, and led an oral discussion of those comments from committee members and interested visitors to the meeting. Those visitors were Steven Cernak and Paula Martucci, members of the House of Delegates from the Section of Antitrust Law; Thomas Smedinghoff, a member of the ABA Cybersecurity Legal Task Force; Lucy Thomson, past Chair of the Section of Science and Technology Law and its current Liaison to the Cybersecurity Legal Task Force; Kirk Nahra, a member of the Section of Health Law; and Rita Heimes and Douglas Forman, officers of the IAPP.

SciTech’s lead query was whether or not the fact that the IAPP’s members included nonlawyers disqualified it as a certifying organization because Section 4.01 of the Standards, SciTech asserted, requires that an organization “be primarily focused on lawyers.” Ms. Howard pointed out that Section 4.01 of the Standards does not require an organization to have “primary focus on lawyers” but only that an organization “is dedicated to the identification of lawyers who possess an enhanced level of skill and expertise.” Committee Chair Barbara Howard pointed out that the Specialization Committee could not deny recommendation of accreditation to the IAPP based on Section 4.01 because of its “focus,” because that is not an area of inquiry contemplated by the Standards.

Ms. Howard reminded those attending that the authority delegated solely to the Specialization Committee from the House regarding applications for accreditation is to “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.” Standards, ¶7.01(D). (Emphasis added.)

She thus remarked that some of the other comments that the Committee had received, while obviously serious and worthy of the IAPP’s consideration, nevertheless did not describe departures from the express requirements of the Standards, and so could not in good faith be invoked by the Committee as a reason to deny its recommendation for accreditation.

In this category were the comments, e.g., that the IAPP’s membership was comprised of lawyers and non-lawyers (though only licensed lawyers will be certified in the proposed program); that the IAPP proposed to offer the certification conditional on applicants’ passing an examination regime that did not include certain examinations sought by some of SciTech’s membership (e.g., IAPP’s examinations in European privacy law and Asian privacy law); that the IAPP would not offer certification simply on the condition of passage of its examination in U.S. Privacy law and the examination on legal ethics; and that a “task force” be assembled to consider the IAPP’s program, rather than be considered by the Committee alone.
Ms. Heimes and Mr. Forman remarked that the fact that the IAPP offers multiple examinations for professionals with varied backgrounds of legal experience, and that demand among U.S. lawyers was not as great for some examinations as others, dictated the IAPP’s decision to propose certification examinations in select areas. Ms. Heimes remarked that in creating the proposed program, the IAPP had made such choices in light of the ABA Standards, and trusting that, as long as the choices did not transgress express requirements of the Standards, those choices could not be supplanted by other preferences suggested by other ABA entities and members.

Nevertheless, all participants in the meeting did agree that a definition of the practice area understandable to potential consumers who might rely on the certification credential is an express requirement of the Standards, and that the description the IAPP has offered of what comprises “substantial involvement” in the practice may not have that requirement of the Standards. Consequently, the IAPP has proposed, and the Specialization Committee has approved, the addition of the following definition to be included in all descriptions of the program:

A Privacy Law Specialist advises clients regarding the legal issues raised by the collection, storage, sharing, monetization, security, disposal, and permissible uses of information about individuals, businesses, and organizations.

In the course of the discussion, Ms. Thomson suggested, too, that if the IAPP persisted in limiting the bases of the certification only to certain examination areas, the holders of the credentials ought to be required to explicitly identify what those areas are in holding out the credential to consumers. The IAPP has agreed that such a requirement would more precisely describe each certification and will require each certified lawyer to identify in holding out the credential whether the basis is as a Certified Information Professional/Management (CIPM), or Certified Information Professional/Technology (CIPT).

**Definition of “substantial involvement in the practice of Privacy Law”**

In addition to the definition of “Privacy Law Specialist” tendered by the IAPP in November, 2017, the program has always included a definition of “substantial involvement” in the practice that further circumscribes the availability of the credential. According to that definition of “substantial involvement”:

Applicant must demonstrate (in a manner that does not reveal confidential and privileged information) that Applicant has been actively engaged in the practice of privacy law either as a transactional lawyer, in privacy program management, privacy litigation or regulatory practice, or a combination of these. Active engagement in information security law will also be considered provided Applicant demonstrates its connection to and role in the privacy specialization.

Applicant must demonstrate that Applicant has both quantitative and qualitative substantial involvement in the field. In particular, Applicant must declare and demonstrate through narrative description and through support letters that at least one-quarter (25%) of Applicant’s full-time practice in each of the prior three years has been devoted to the practice of privacy law. In the narrative description, Applicant must provide specific
examples of his or her engagement with the following types of privacy law practice activities:

For outside counsel and in-house lawyers with principally a transactional practice, at least 15% of Applicant’s full time practice must include:

- Preparation and review of privacy notices compliant with state, federal and/or international laws and regulations, and reflective of an organization’s privacy practices, and privacy and security policy development, including development of information handling, sharing, storage, training, and security policies and programs (at least 5% of a full-time law practice);
- Contract development, negotiation, and compliance, which may include review of vendor, purchase, procurement, or acquisition contracts as well as drafting and negotiation of contracts for inclusion of privacy and security provisions (at least 5% of full time law practice); and
- Privacy advice in compliance with state and federal laws, including legal advice on privacy by design in product design or services (at least 5% of full-time law practice).

Some elements of the 25% minimum may also include:

- Conducting Privacy Impact Assessments and providing advice in connection with them;
- Risk assessment with regard to use and potential misuse of personally identifiable information, and corresponding legal advice to clients and organizational leadership;
- Counseling on cross-border data transfers, and other compliance with international privacy laws pertaining to data transfer (such as drafting Binding Corporate Rules, standard contractual contacts, certifying to US-EU Safe Harbor/Privacy Shield, and the like);
- Counseling on cybersecurity issues, breach preparedness, and breach remediation;
- Legislative or regulatory public policy engagement, which may include drafting of position papers or opinions, and interaction with legislative or regulatory bodies, which develop laws or regulate privacy practices;
- Advice about cyber insurance and negotiating cyber insurance policies.

For attorneys primarily engaged in data breach response, adversarial proceedings and/or litigation, at least 20% of Applicant’s full time practice must include:

- Internal breach investigation and evaluation, involving managing internal investigations of data breaches and evaluating risks for mitigation and policy development, as well as engaging and overseeing the work of forensic teams, preparing breach notification letters, and working with regulators (at least 10% of full time law practice);
- Litigation of data protection and data breach matters in state, federal, international, and administrative tribunals (at least 5% of full time law practice); and
• Regulatory investigations and defense, including federal, state, or international filings of regulatory inquiries or responses to regulatory inquiries of privacy and data protection practices (at least 5% of full time law practice).

Some elements of the 25% minimum may also include:
• Privacy tort litigation such as litigation of consumer protection / privacy statutes that provide a private right of action (federal and state), including without limitation rights of publicity, rights against publication of false information, intrusion on seclusion, or public disclosure of private facts; and
• Advice about cyber insurance and negotiating cyber insurance policies.

In sum, the IAPP’s Privacy Law Specialist certification program meets the Standards for Accreditation of Specialty Certification Programs for Lawyers by requiring that an applicant:

1. Be an attorney admitted in good standing in at least one U.S. state.
3. Hold one of the following: current CIPM® or CIPT® certification.
4. Pass an IAPP examination on professional responsibility in the practice of Privacy Law.
5. Demonstrate current and ongoing “substantial involvement” in the practice of Privacy Law.
6. Submit evidence of at least 36 hours of participation in qualified continuing legal education in the field of Privacy Law for the 3-year period preceding the application date.
7. Provide at least 5 but no more than 8 peer references attesting to applicant’s qualifications and “substantial involvement” in the practice of Privacy Law. “Peers” are other attorneys, clients, regulators, or judges who can personally attest to applicant’s qualifications.

Accreditation and Evaluation Procedures for the Privacy Law Application

In evaluating the application, the Specialization 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 Specialization Committee required that the following accompany all reaccreditation applications:

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

ii. Biographical summaries of members of the governing board, senior staff and members of advisory panels, certification committees, 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 Specialization Committee confirms that the IAPP’s application contained the requisite materials and met the requisite standards.

Accreditation Application and Examination Review Panelists

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

Shontrai DeVaughn Irving (Hammond, Indiana), Chair, Privacy Law Application Review Panel. Mr. Irving is a member of the Standing Committee on Specialization. He teaches Business Law at Purdue University’s Calumet’s School of Business.

The Hon. Melissa May (Indianapolis, Indiana), Member, Privacy Law Application Review Panel. Judge May sits on the Fourth District of the State of Indiana’s Court of Appeals in Indianapolis. She is also the Special Adviser to the Standing Committee on Specialization.

Wendy Weiss (Trenton, New Jersey), Member, Privacy Law Application Review Panel. Ms. Weiss is Court Executive at the New Jersey Supreme Court Board on Attorney Certification.

Examination Reviewer: Prof. Dennis Hirsch (Columbus, Ohio), Mr. Hirsch is Professor of Law and Director of the Program on Data and Governance at The Ohio State University Moritz College of Law.

Respectfully submitted,

Barbara Howard, Chair
Standing Committee on Specialization
February 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. 

(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 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. 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 without requiring those lawyers to take and pass the examination. Such written request to the Standing Committee shall include the names and addresses of the lawyers, and shall expressly state that they have created and graded, or will grade, the initial version of the examination required under this paragraph, and that they otherwise meet the certification requirements described in ¶4.06(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.

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

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

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

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

4.09 Revocation of Certification -- The Applicant shall maintain a procedure for revocation of certification. The procedures shall require a certified lawyer to report his or her disbarment or suspension from the practice of law in any jurisdiction to the certifying organization.
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Standing Committee on Specialization

Submitted By: Barbara Howard, Chair

1. Summary of Resolution(s).

   The Resolution grants accreditation to the Privacy Law certification program of the International Association of Privacy Professionals for a 5-year term.

2. Approval by Submitting Entity.

   At its meeting on October 28, 2017, the Standing Committee on Specialization considered the application of the International Association of Privacy Professionals for accreditation and took comment from interested entities. By vote communicated via email on November 13, 2017, it voted to submit a resolution to the House of Delegates for consideration at the 2018 Midyear Meeting.

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

   Yes. A similar resolution was submitted and withdrawn at the 2017 Midyear Meeting and at the 2017 Annual Meeting.

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.**

As required by the Standards, this Resolution has been referred for comment to interested entities of the Association:

- The Section of Science and Technology Law;
- the Section of Labor and Employment Law;
- the Litigation Section;
- the Business Law Section;
- the International Law Section;
- the Health Law Section;
- the Communications Law Section;
- the Tort Trial and Insurance Practice Section;
- and the Cybersecurity Legal Task Force;
- the Health Law Section;
- the Antitrust Law Section;

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

<table>
<thead>
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<th>Barbara Howard</th>
<th>Martin Whittaker</th>
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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.)

<table>
<thead>
<tr>
<th>Barbara Howard</th>
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<tbody>
<tr>
<td>Chair, Standing Committee on Specialization</td>
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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

The Resolution will grant accreditation to the Privacy Law certification program of the International Association of Privacy Professionals.

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 review programs that seek accreditation from the House of Delegates to insure that they meet Standards promulgated by the House of Delegates.

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

The recommendation addresses the issue by describing the process by which the Standing Committee has examined the program proposed by the International Association of Privacy Professionals and arrived at the conclusion that it meets the ABA Standards for Specialty Certification Programs for Lawyers.

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

There are no minority views. No opposition to this Resolution has been communicated.

The Section of Science and Technology Law had communicated opposition to prior versions of this resolution, principally because of the composition of the membership of the sponsoring organization, and the inadequacy of the definitions of “Privacy Law” in the program materials. But those reasons for prior opposition have been discussed with interested entities (see pages 4 and 5 of the accompanying Report), and as of the date of the submission of this Resolution and Report no formal opposition to this Resolution has been communicated to the Specialization Committee.
AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON SPECIALIZATION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association reaccredits the Elder Law program of the National Elder Law Foundation for an additional five-year term as a designated specialty certification program for lawyers; and

FURTHER RESOLVED, That the American Bar Association extends the period of accreditation of the Medical Malpractice program and the Legal Malpractice program of the American Board of Professional Liability Attorneys, until the adjournment of the meeting of the House of Delegates in August 2018.
Background and Synopsis of the Recommendations

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

The adoption of the Standards in February, 1993, followed an August, 1992, House resolution requesting that the Association develop standards for accrediting private organizations that certify lawyers as specialists, and that the Association establish and maintain a mechanism to accredit organizations that meet those standards. The 1992 resolution affirmed that a national accreditation mechanism administered by the Association according to uniform standards would be an efficient and effective means of dealing with a multiplicity of organizations that are offering, or planning to offer, certification programs. At the 1999 Annual Meeting, the House extended the initial period of accreditation approved in the Standards from three to five years. In addition, the House lengthened the period of reaccreditation from every third year to every fifth year.

The Standing Committee on Specialization currently has pending applications for reaccreditation from three programs: (1) the Elder Law program of the National Elder Law Foundation (NELF); and (2) Legal Professional Liability and (3) Medical Professional Liability program of the American Board of Professional Liability Attorneys (ABPLA).

The Standing Committee has reviewed NELF’s application for the Elder Law program, and here recommends reaccreditation of that program for an additional five-year term.

The Standing Committee has received the ABPLA’s applications for reaccreditation of its Legal and Medical Professional Liability programs and has duly appointed application review panels to formulate recommendations for or against reaccreditation. Those panels have not yet, however, reviewed the applications and arrived at a recommendation. Because the five-year anniversary of the ABPLA’s programs’ last reaccreditation will occur in February, 2018, during the Midyear Meeting, the Standing Committee is here recommending an extension of those programs’ periods of accreditation until the House of Delegates next convenes at the 2018 Annual Meeting.

Applicant for Reaccreditation

Applicant Organization: National Elder Law Foundation

Specialty Area: Elder Law

A non-profit entity, the National Elder Law Foundation was formed in 1993 for purposes of developing and improving the professional competence of lawyers in the area of elder law.
The National Elder Law Foundation’s certification standards are designed to improve the quality of the elder law bar and encourage elder law practitioners to strive toward excellence and recognize those attorneys who are experts in the elder law field. Certification by the National Elder Law Foundation serves the public by providing a mechanism by which referring attorneys and the public can identify attorneys who specialize in elder law.

Elder Law Program: Reaccreditation and Evaluation Procedures

In evaluating any program for reaccreditation, the Standing Committee follows the procedures it adopted on March 2, 1993, as amended thereafter from time to time. NELF timely filed an application for reaccreditation with the Standing Committee under those procedures. The application was accompanied by payment of a reaccreditation fee for the specialty certification program for which the applicant sought reaccreditation.

In order to insure that each of the programs continues to comply with ABA Standards, the Standing 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 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 Standing Committee an examination reviewer.

The Accreditation Review Panel, appointed by the Standing Committee, consisted of a chair and three 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 Accreditation Review Panel members are listed below:

Accreditation Review Panel

Shontrae Devaughn Irving, Chair. Mr. Irving is a member of the Standing Committee on Specialization. He is a professor of business law at Purdue University Northwest in Hammond, Indiana, and is a former Deputy Prosecutor for Lake County, Indiana.

Steven Lesser. Mr. Lesser is a member of the Standing Committee on Specialization. He is a shareholder of Becker & Poliakoff in Fort Lauderdale, Florida, and Chair of its Construction Law and Litigation practice group. He is a certified specialist in Construction Law by the State Bar of Florida.

Ann Brooks. Ms. Brooks is a partner in the Brooks Law Firm in Oklahoma City, Oklahoma. She is an officer of the American College of Board Certified Attorneys, and is a former member of the ABA Standing Committee on Specialization.

Examination Reviewer

William Sias (Los Angeles, California) Mr. Sias is deputy counsel to the County of Los Angeles, California, in its Probate Department. His practice is devoted to probate matters, including conservatorships and guardianships, and he is a certified specialist in Estate Planning, Trust and Probate Law by the State Bar of California.

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 a confidential basis. Based upon this review, the Accreditation Review Panel concluded that the applicant’s program continues to comply with the ABA Standards.

By unanimous vote at its October 28, 2017, business meeting in Chicago, the Standing Committee on Specialization accepted the Panel’s recommendation, and the Committee recommends to the House of Delegates that it reaccredit NELF’s Elder Law certification program for an additional five-year term.

Applicant for Reaccreditation

Applicant Organization: American Board of Professional Liability Attorneys

Specialty Area: Medical Professional Liability
               Legal Professional Liability
ABPLA’s Certification Programs in Medical and Legal Professional Liability Law

The ABPLA’s certification programs in Legal Professional Liability and Medical Professional Liability were first accredited by the House in 1995, and each has been reaccredited four times since then.

The ABPLA submitted applications for reaccreditation in the fall of 2018, and the Standing Committee on Specialization has appointed accreditation review panels to process each application. The panels have not yet completed review and assessment of the applications, however.

The five-year anniversary of the last re-accreditation of ABPLA’s programs by the Association occurs in February, 2018. So, in order to avoid a formal lapse in that accreditation under the Standards, the Standing Committee recommends to the House of Delegates that the period of accreditation be extended until the end of the Association’s next general meeting, the Annual Meeting in August, 2018, before which meeting the Standing Committee will have completed its review of the pending ABPLA application.

Respectfully submitted,

Barbara Howard, Chair
Standing Committee on Specialization
February 2018
APPENDIX

(Excerpted provisions of the Standards for Accreditation of Specialty Certification Programs For Lawyers)
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.
103B

(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 Recommendations**

The recommendation requests that the American Bar Association grant reaccreditation to the Elder Law program of the National Elder Law Foundation. This program has 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. The recommendation also requests that the House extend the period of accreditation for the Medical Professional Liability and Legal Professional Liability specialist certification programs of the American Board of Professional Liability Attorneys so that the Standing Committee on Specialization may process pending applications for reaccreditation of those programs.

2. **Approval by Submitting Entity**

At its meeting on October 28, 2017, the Standing Committee on Specialization voted unanimously that it submit this recommendation to the House of Delegates for consideration at the 2018 Mid-Year 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 Mid-Year Meetings.

4. **What existing Association policies are relevant to this recommendation 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 the task of evaluating organizations that apply to the Association for accreditation.
5. What urgency exists which requires action at this meeting of the House?

To comply timely and effectively with the House resolutions cited above.

Prompt action is necessary in order to prevent ABA accreditation of the programs under consideration from lapsing and to continue to assist the states in regulating private certifying organizations.

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.

9. Disclosure of Interest

None

10. Referrals

None

11. Contact Person (Prior to the Meeting)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

That the American Bar Association grant reaccreditation to the Elder Law certification program of the National Elder Law Foundation. This program has been reviewed under procedures adopted by the Standing Committee on Specialization in accordance with the Standards for the Accreditation of Specialty Certification Programs for Lawyers, adopted by the House of Delegates in February 1993. Also, that the American Bar Association extend the existing period of accreditation for the Medical Professional Liability and Legal Professional Liability specialist certification programs of the American Board of Professional Liability Attorneys so that the Standing Committee on Specialization may process pending applications for reaccreditation of those programs.

2. Summary of the Issue 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. Explanation of How Proposed Policy Position Will Address Issue

The recommendation addresses the issue by describing the process by which the Standing Committee has examined the program administered by the National Elder Law Foundation and arrived at the conclusion that it continues to meet the ABA Standards for Specialty Certification Programs for Lawyers, and by describing the current status of the programs administered by the American Board of Professional Liability Attorneys and the need for further processing of their applications for reaccreditation.

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

The Standing Committee on Specialization approved the proposed recommendation unanimously. No opposition has been identified.
RESOLVED, That the American Bar Association urges Congress and the Social Security Administration to strengthen the safeguards and protections for all individuals receiving benefits via the representative payee program, including, but not limited to, appropriate eligibility determinations, improved monitoring and training of payees, access to accounting for beneficiaries, and the appointment of an interim payee when a payee is removed.
This proposed resolution extends the reach of the ABA’s existing policies regarding the Social Security Administration’s (SSA) representative payee program. As limited by its 2002 and 2013 policies, the ABA can only comment on organizational payees, coordination between courts and government agencies, and a few additional topics delineated in the 2002 resolution.1 With these current constraints, the ABA cannot address timely and important topics, including monitoring and training of individual representative payees and additional safeguards and protections for beneficiaries.

SSA has the authority to appoint a representative payee to manage the benefits of a beneficiary whom the agency deems cannot do so independently.2 As the custodian of what is often an individual’s sole income, a representative payee is responsible for protecting the beneficiary’s assets and preserving self-determination over finances to the greatest extent possible.3 The appointment of a representative payee for a beneficiary may be sufficient to address concerns regarding potential financial loss and exploitation, eliminating the need for a court-appointed guardian and maintaining some independent decision-making.

Appropriate safeguards and protections within the representative payee program are crucial to protecting the income of millions of Americans. As the number of elderly Americans and those with disabilities increases, the demand for representative payees will only grow larger.4 This expansive program must be properly administered and effectively monitored to prevent misuse and exploitation.

This report provides background information; explains the difference between organizational and individual payees; reviews concerns with current safeguards and protections for beneficiaries that may warrant future ABA comment (improved training

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2 Other federal government agencies, such as the Veteran’s Administration and Office of Personnel Management, have fiduciary or representative payee programs that affect a smaller number of individuals, but are still significant. These programs may share some of the same issues as SSA’s, and warrant specific review.
3 See SSA Program Operations Manual System (POMS) GN 00502.001.
for payees; more robust monitoring practices; the need for expedient appointment of interim payees); and discusses the lack of relevant ABA policy.

Background

SSA’s Representative Payee Program. Approximately six million representative payees manage benefits for eight million beneficiaries. SSA can appoint a representative payee to manage Old Age Survivor and Disability Insurance (OASDI), Social Security Disability Insurance (SSDI), or Supplemental Social Security Income (SSI) benefits upon a determination that a beneficiary cannot manage those benefits and a representative payee would best serve the recipient’s interests. The representative payee must use the SSA funds to provide for the recipient’s needs, including food, housing, and medical care, allocate spending money to the recipient, and save and/or invest remaining funds in trust for the beneficiary. Direct payment of funds to third-party payees creates potential for misuse - conversion of payment by the payee for use other than the beneficiary’s use and benefit.

Individual and Organizational Payees. SSA’s order of preference for representative payees is: court-appointed guardians, relatives, friends, or other appropriate individuals. Around 85 percent of all representative payees are family members, primarily spouses. If an individual payee is not available, SSA will appoint an organization that serves as payee in a professional capacity.

An individual payee does not directly collect a fee for serving in that capacity. However, those serving in a professional capacity, such as court-appointed guardians and certified fiduciaries, may charge their professional fee for the time served as a representative payee. If the professional is an attorney, it is not appropriate to charge an attorney’s rate for representative payee services.

An organizational payee must be a state or local government agency, or a non-profit entity or financial institution that is bonded and licensed in its home state, regularly serves at least five beneficiaries, and is not a creditor of the beneficiary. Examples

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7 20 C.F.R §§ 416.640(a), 416.645.
9 Supra note 6 § 416.621.
10 SSA OIG, supra note 4.
11 20 C.F.R. § 416.621
13 20 C.F.R. § 416.640(a).
include state Veterans’ Administration hospitals, state psychiatric institutions, social services agencies, and state agencies serving people with developmental disabilities. An organizational payee may collect a “fee for service” from the beneficiary’s monthly SSA benefits. SSA regulations limit this fee to a certain percentage of the beneficiary’s payment.\(^{14}\)

While SSA prefers to appoint individual over organizational payees, properly trained organizational payees may be more appropriate for certain high-risk populations and less likely than individual payees to commit abuse and neglect. In 2007, the National Research Council of the National Academies released a comprehensive report on SSA’s representative payee program, recommending that fee-for-service payees, as licensed professionals, may be a better match for at-risk beneficiaries - people with mental illness, alcohol or substance abuse problems, severe disabilities, and those who are homeless.\(^{15}\)

However, organizational payees, with multiple clients, have the potential to commit widespread fraud and abuse. A recent report from SSA’s Office of Inspector General (OIG) showed SSA has failed to adequately address the misuse of funds by organizational and high volume individual representative payees. Even when SSA discovers misuse, the agency seldom recovers lost benefits from the payee or restores the benefits to the recipient. In some circumstances, SSA has allowed the representative payee to continue to serve even after discovering fraudulent activity.\(^{16}\)

The potential for organizational payees to commit horrific abuse and neglect gained national attention after the discovery in 2009 that Henry’s Turkey Service, an organizational representative payee that employed adult men with disabilities, had been exploiting its beneficiaries and forcing them to live in inhumane conditions for decades.\(^{17}\) In response, SSA contracted the National Disability Rights Network (NDRN), the national membership and technical assistance/training provider for the federally funded and mandated Protection & Advocacy System (P&A), to work with P&As to monitor selected organizational representative payees.\(^{18}\) Recently, SSA declined to renew NDRN’s contract and instead hired a for-profit company to conduct reviews.

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\(^{14}\) Id. § 416.640(a).


\(^{16}\) SSA OIG, supra note 4.

\(^{17}\) Barry, Dan, *The Boys in the Bunkhouse*, N.Y. TIMES, Mar. 9, 2014.

Safeguards and Protections

It is critical that SSA’s Representative Payee program has effective practices for ensuring that (1) payees are appointed for individuals who truly need assistance, and (2) payees manage beneficiaries’ benefits with the dual goals of protecting funds and supporting self-determination. These practices include:

Appropriate Eligibility Determination. SSA should transfer an individual’s control over public benefits only when it is truly necessary. In 2016, the Social Security Advisory Board concluded that SSA’s determination process is insufficient for a decision that curtails a beneficiary’s right to exercise self-determination with regards to benefits: “Despite hundreds of pages of policy and regulations, the way SSA determines whether a representative payee is needed is arbitrary.”19

Failings of the current determination process include: lack of input from the beneficiary or a representative; SSA field offices, already overworked, bear the burden of reviewing applications and determining whether to appoint a payee; and there is no mandatory competency or due process hearing prior to assigning a payee. Furthermore, once a payee is appointed, SSA is only then required by regulation to notify the beneficiary with the name of the appointed representative payee and information about the beneficiary’s right to appeal the appointment. The Social Security Advisory Board recommended requiring, prior to appointment, a competency hearing, or at a minimum, a review of medical certification that addresses the specific issue of capability to manage benefits.20

Monitoring. Monitoring of representative payees is quite limited from the initial selection process to regular evaluation of payee actions. SSA field office staff are required to interview all payee applicants in person. These face-to-face interviews do not always occur, and some organizations are exempt from the requirement.21 The only vetting of prospective payees occurs when individuals apply through SSA’s Electronic Representative Payee System (eRPS), and SSA employees ask questions to assess the applicant’s suitability.22

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19 Social Security Advisory Board (SSAB), The Social Security Representative Payee Program and Adult SSI Recipients at 1 (2016), http://www.ssab.gov/Portals/0/OUR_WORK/SSI/20STATEMENTS--BRIEFS/2016_SSI_Statement.pdf. See also Wynn, supra note 17, at 4-5 for recommendations on reforming the capability determination process.
20 SSAB, supra note 18 at 5.
21 National Research Council, supra note 14 at 25.
22 See National Research Council, supra note 14, at Chapters 4 and 5, for an in-depth discussion of “Defining and Discovering Misuse” and “New Approaches to Detect Misuse.”
Once appointed, payees must file an annual accounting report with SSA. This form is SSA’s primary tool for discovering misuse. Yet SSA does not have a method for systematically evaluating the form, and payees can easily provide inaccurate information without fear of recrimination.

SSA’s failure to appropriately monitor “organized care providers” allows for conflicts of interest. An “individual” payee who serves up to fourteen beneficiaries and is affiliated with an organization that serves the beneficiary in a fee-for-service capacity is not only the disburser of SSA benefits, but also the provider of services. For example, a group home operator may serve as a payee for ten residents. The operator collects a fee for each resident, which comes out of each resident’s Social Security benefits – a clear conflict of interest for the representative payee. The 2007 National Research Council study recommended that SSA define and treat individual payees who serves multiple, unrelated beneficiaries and are also the owner, administrator, or provider of a room-and-board facility as organizational payees.

Training. The 2007 National Research Council study concluded that SSA “does little to help payees perform the required functions and best serve their beneficiaries and the program,” and recommended SSA provide comprehensive and formal training for payees. It is essential that payees understand their duties and responsibilities, including how to keep records, deposit benefits into separate accounts, and save money. The study’s concerns and recommendations remain current. Representative payees, particularly non-professional individual payees, are often not fully aware of their responsibilities as a payee.

SSA has taken some steps to provide guidance, including a guide for individual payees and a webinar. SSA has also published a judicial training guide. Recognizing the need for education of the growing population of “financial caregivers,” the Consumer

24 National Research, supra note 14, at 10.
25 Id. at 95.
26 Id. at 96.
27 Id. at 9.
28 Wynn, supra note 17 at 9.
Financial Protection Bureau published a guide exclusively for family and friends serving as representative payees.32

Possible additional guidance strategies and materials could include: staff or volunteers charged with educating federal fiduciaries, toll-free telephone numbers for payees seeking assistance from SSA, broadly distributed plain language brochures containing examples and explanations, online guidance to complete the annual accounting forms, samples of completed forms, improved and additional fact sheets, videos and web applications. All materials should be available in multiple languages other than English.33

Failure to Provide an Accounting to Beneficiaries. While payees must submit an accounting to SSA, beneficiaries are not entitled to receive an accounting from their payees or SSA. Beneficiaries should have access to an accounting online or at a minimum on a regular basis in writing.

Interim Payee. Currently, if a payee is removed from service, there is no institutional mechanism for ensuring SSA benefits will continue until a new payee is appointed. In fact, a recipient may not receive benefits for months while waiting for approval of a new payee. SSA could provide an interim payee to avoid a freeze in benefits.

ABA Policy

Current ABA policy does not address the need for safeguards and protections of beneficiaries of individual payees. The 2002 Policy urges SSA to support and enact legislation to strengthen safeguards and protections of beneficiaries receiving funds from organizational payees, including the following safeguards and protections that would also apply to individual payees: “Replacement by SSA of any benefits misappropriated or misused by an organizational representative payee if not otherwise reimbursed…and authority for SSA to impose a civil monetary penalty against organizational representative payees which misuse, convert, or misappropriate payments for Beneficiaries received while acting in a representative payee capacity.”34

The policy makes additional important recommendations for improved organizational

34 See infra note 1, ABA 2002 Policy at paragraph (a).
payee practices, but it is over ten years old and does not address training or monitoring for payees.

The ABA’s 2013 policy addresses only one practice meant to safeguard and protect beneficiaries’ funds; the need for coordination between SSA’s representative payee program and state/territorial courts to share information about payee fraud and abuse.\textsuperscript{35}

Conclusion

The proposed resolution will expand the scope of the potential for ABA to comment on SSA’s representative payee program, which affects the financial well-being of millions of Americans.

Respectfully submitted,

Hon. Patricia Banks 
Chair, Commission on Law & Aging 
February 2018

Robert T. Gonzales 
Chair, Commission on Disability Rights 
February 2018

\textsuperscript{35} See \textit{infra} note 1, 2013 ABA Policy.
GENERAL INFORMATION FORM

Submitting Entity: The Commission on Law and Aging

Submitted By: Hon. Patricia Banks, Chair, Commission on Law and Aging

1. **Summary of Resolution(s).** This resolution calls on Congress and the Social Security Administration (SSA) to strengthen the safeguards and protections for all beneficiaries – both individual and organizational - of SSA's representative payee program. SSA may designate a representative payee to receive and spend benefits on behalf of a beneficiary if the agency deems that beneficiary cannot independently manage funds.

2. **Approval by Submitting Entity.** Approved by Commission on Law and Aging on April 21, 2017.

3. **Has this or a similar resolution been submitted to the House or Board previously?** Similar resolutions were passed in 2002 and 2013. The 2002 resolution urges stronger protections and safeguards for beneficiaries of organizational payees. The 2013 resolution addressed the need for greater coordination between SSA’s representative payee program and state/territorial courts to share information about payee fraud and abuse.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** This Resolution is relevant to the above mentioned 2002 and 2013 policies because it would expand the scope of the ABA’s ability to comment on SSA’s representative payee program. Currently the ABA can only comment on matters relating to organizational payees and coordination between SSA and state/territorial courts.

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 Commission on Law & Aging to comment on SSA’s representative payee program when new members of Congress propose new relevant legislation. It may also be relevant to the Commission’s WINGS (Working Interdisciplinary Networks of Guardians) project, which involves an

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SSA liaison for every WINGS group to answer questions and address concerns about specific representative payees.

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

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

10. **Referrals.**
    - 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
    - Section of Administrative Law and Regulatory Practice
    - Section of Dispute Resolution
    - Section of Family Law
    - Section of Real Property, Probate and Trust law
    - Section of State and Local Government Law
    - Senior Lawyers Division
    - Standing Committee on Legal Aid and Indigent Defendants
    - Standing Committee on Pro Bono and Public Service
    - Standing Committee on the Delivery of Legal Services
    - The Judicial Division
    - 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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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.*

    Hon. Patricia Banks, Chair  
    Commission on Law and Aging  
    312-968-0016  
    p0017b@sbcglobal.net
1. **Summary of the Resolution**

This resolution calls on Congress and the Social Security Administration (SSA) to strengthen the safeguards and protections for all beneficiaries – both individual and organizational - of SSA’s representative payee program.

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

Millions of Americans participate in SSA’s representative payee program. With a growing population of individuals who are elderly and/or have a disability, the need for representative payees will only increase. The program needs heightened protections and better training and oversight of payees. Transferring control over these funds, often someone’s sole income, is a serious limitation of that person’s autonomy and should only be carried out if truly necessary. It also creates the opportunity for misuse and financial exploitation. Many entities, including SSA’s Office of Inspector General, the Social Security Advisory Board, and the National Research Council of the National Academies, have called attention to SSA’s failure to sufficiently regulate representative payees and ensure beneficiaries receive their funds and are as involved in spending their benefits.

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

The policy position will allow the ABA to comment on many more aspects of SSA’s representative payee program. Currently, the ABA can only comment on matters pertaining to organizational representative payees – fee for service entities that serve in a professional capacity - even though the majority of payees are individual family members, friends, guardians or service providers. Moreover, ABA policy is limited to a discussion about the need for coordination between SSA’s representative payee program and state/territorial courts. There are many more topics that warrant comment, including appropriate eligibility determinations, better monitoring and training of payees, and improved interim payee practices to ensure recipients do not lose funds.

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

None as of this writing.
RESOLVED, That the American Bar Association supports the goal of reducing mental health and substance use disorders and improving the well-being of lawyers, judges and law students; and

FURTHER RESOLVED, That the American Bar Association urges all federal, state, local, territorial, and tribal courts, bar associations, lawyer regulatory entities, institutions of legal education, lawyer assistance programs, professional liability carriers, law firms, and other entities employing lawyers to consider the recommendations set out in the report, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, by the National Task Force on Lawyer Well-Being.
The American Bar Association has been instrumental in developing recent research examining aspects of well-being among law students and lawyers. This research has quantified an alarming rate of alcohol and other substance use and mental health concerns, coupled with deficient help-seeking behaviors. These studies have been 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 presents a series of recommendations directed at a variety of stakeholders within the justice system. The recommendations are designed to be transformative when implemented. They are designed to shift the culture of the legal profession to one that is focused on well-being. They are designed to strengthen the legal profession in a way that assures the public has a justice system that is competent, fair and just. This resolution calls upon those stakeholders to consider the Task Force recommendations.

The Research

In 2014, the ABA Board of Governors selected a coalition of ABA entities to receive an award from its Enterprise Fund to research law student well-being. The coalition included the Commission on Lawyer Assistance Programs, the Solo, Small Firm and General Practice Division, the Young Lawyers Division, the Law Students Division and the Commission on Disability Rights. The Dave Nee Foundation also joined the project and provided research and additional financial support. Associate Dean David B. Jaffe, American University Washington College of Law, Professor Jerry M. Organ, University of St. Thomas Law School, and Dr. Katherine M. Bender, Dave Nee Foundation, led the research design, implementation and analysis, with input from representatives of the Enterprise Fund coalition.

The Survey of Law Student Well-Being was designed to measure alcohol use, drug use, and mental health issues among law students. Fifteen law schools were selected to participate, representing a diverse range of settings and structures, e.g. urban/rural, small/large, geographic dispersion. Over 3,300 law students took part in the survey, which examined alcohol use, substance use, mental health issues and help-seeking behaviors.

The results showed that more than one out of four law students reported binge drinking within the prior two weeks of the survey. One out of seven students reported they had used prescription drugs without a prescription in the prior year. The incidence of marijuana and cocaine use had increased substantially since similar research was done in 1991, with the use of cocaine doubling.

When examining mental health issues, the survey showed that more than one out of six students screened for depression and nearly one out of four screened for anxiety.
Perhaps the most concerning aspects of this research involves the limitations reported for help-seeking behaviors. Of the 42 percent of respondents who indicated they needed help for mental health issues, only about half of them actually received counseling. Students showed a reluctance to turn to a dean of students or a state lawyer assistance program and indicated they were concerned about threats to bar admissions, academic standing and job prospects.

In 2015, the ABA Commission on Lawyer Assistance Programs joined with the Hazelden Betty Ford Center to survey lawyers for alcohol use, substance use, and mental health issues, as well as help-seeking behaviors. Bar associations from 16 states assisted with the research, resulting in survey responses from 12,825 licensed and employed lawyers.

The findings indicated that more than one-fifth of the respondents scored at a level consistent with problematic drinking. This was nearly twice that of a similar study of a highly-educated workforce. Over a fourth of the respondents reported some level of depression, with nearly half indicating that they had experience depression at some point in their careers. Similarly, about a fifth of respondents reported suffering from anxiety, with more than six out of ten having done so at some period of their careers. More than one out of ten respondents reported suicidal thoughts at some point while practicing law. Even more significant, 0.7 percent of respondents indicated at least one prior suicide attempt. While this is a very small percentage, if it were extrapolated over the 1.3 million lawyers in the U.S., that would lead us to conclude that 9,100 lawyers have attempted suicide.

Similar to the results found for law students, lawyers are reluctant to seek help. They are concerned that available measures are not sufficiently private and confidential and worried that others will learn of their circumstances.

The National Task Force on Lawyer Well-Being

Prior to the undertaking of the research, the Commission on Lawyer Assistance Programs, the National Organization of Bar Counsel, and the Association of Professional Responsibility Lawyers had collaborated on projects involving conditional admission of new lawyers in recovery and age-related cognitive impairment, among other issues. Upon the release of the survey results, these entities recognized the need to collaborate on the development of programs and policies that would reverse the course of lawyer impairment.

In the summer of 2016, representatives from these groups were joined by those from six other entities both within and outside of the ABA to create the National Task Force on Lawyer Well-Being. The ABA Standing Committee on Professionalism, the ABA Center for Professional Responsibility, the ABA Young Lawyers Division, the ABA Law Practice Division Attorney Wellbeing Committee, the National Conference of Chief Justices, and the National Conference of Bar Examiners joined the three founding entities to form the Task Force.
Between August 2016 and August 2017, the Task Force analyzed aspects of the research, explored additional resources and conducted widespread outreach in its effort to promulgate its report and recommendations for changes designed to create a sound and sustainable profession.

In its analysis of the research, the Task Force stated:

The two studies… reveal that too many lawyers and law students experience chronic stress and high rates of depression and substance use. These findings are incompatible with a sustainable legal profession, and they raise troubling implications for many lawyers’ basic competence. This research suggests that the current state of lawyers’ health cannot support a profession dedicated to client service and dependent on the public trust.

Preliminary to and in support of its recommendations, the Task Force stated:

The legal profession is already struggling. Our profession confronts a dwindling market share as the public turns to more accessible, affordable alternative legal service providers. We are at a crossroads. To maintain public confidence in the profession, to meet the need for innovation in how we deliver legal services, to increase access to justice, and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members’ state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.

The Task Force Recommendations

In its report entitled The Path to Lawyer Well-Being: Practical Recommendations for Positive Change, published in August 2017, the Task Force opens by offering three primary reasons to take action: organizational effectiveness, ethical integrity, and humanitarian concerns; and defines lawyer well-being as a “continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections.”

The Task Force indicates the report’s recommendations focus on five central themes:

1. identifying stakeholders and the role each of us can play in reducing the level of toxicity in our profession,
2. eliminating the stigma associated with help-seeking behaviors,
3. emphasizing that well-being is an indispensable part of a lawyer’s duty of competence,
4. educating lawyers, judges, and law students on lawyer well-being issues, and
(5) taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.

The Report is divided into two sections. The first section sets out a series of recommendations suitable for input and implementation by all stakeholders. The recommendations are fully set out with analysis and commentary in the report at https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf.

In brief, these recommendations are as follows:

- Acknowledge the Problems and Take Responsibility.
- Use This Report as a Launch Pad for a Profession-Wide Action Plan.
- Leaders Should Demonstrate a Personal Commitment to Well-Being.
- Facilitate, Destigmatize, and Encourage Help-Seeking Behaviors.
- Build Relationships with Lawyer Well-Being Experts.
  - Partner with Lawyer Assistance Programs.
  - Consult Lawyer Well-Being Committees and Other Types of Well-Being Experts.
- Foster Collegiality and Respectful Engagement Throughout the Profession.
  - Promote Diversity & Inclusivity.
  - Create Meaningful Mentoring and Sponsorship Programs.
- Enhance Lawyers’ Sense of Control.
- Provide High-Quality Educational Programs and Materials About Lawyer Well-Being.
- Guide and Support the Transition of Older Lawyers.
- De-emphasize Alcohol at Social Events.
- Use Monitoring to Support Recovery from Substance Use Disorders.
- Begin a Dialogue About Suicide Prevention.
- Support A Lawyer Well-Being Index to Measure the Profession’s Progress.

The second section identifies specific stakeholders and sets out specific recommendations for their implementation. Recommendations are set out for:

- The Judiciary;
- Regulators;
- Legal employers, including law firms;
- Law schools;
- Bar associations;
- Professional liability carriers; and
- Lawyer assistance programs.

Those recommendations addressing the judiciary include:

- Communicate that Well-Being Is a Priority.
Develop Policies for Impaired Judges.
Reduce Stigma of Mental Health and Substance Use Disorders.
Conduct Judicial Well-Being Surveys.
Provide Well-Being Programming for Judges and Staff.
Monitor for Impaired Lawyers and Partner with Lawyer Assistance Programs.

Those recommendations addressing lawyer regulators include:

- Take Actions to Meaningfully Communicate That Lawyer Well-Being is a Priority.
- Adopt Regulatory Objectives That Prioritize Lawyer Well-Being.
- Modify the Rules of Professional Responsibility to Endorse Well-Being as Part of a Lawyer’s Duty of Competence.
- Expand Continuing Education Requirements to Include Well-Being Topics.
- Require Law Schools to Create Well-Being Education for Students as an Accreditation Requirement.
- Adjust the Admissions Process to Support Law Student Well-Being.
- Re-Evaluate Bar Application Inquiries About Mental Health History.
- Adopt Essential Eligibility Admission Requirements.
- Adopt a Rule for Conditional Admission to Practice Law with Specific Requirements and Conditions.
- Publish Data Reflecting Low Rate of Denied Admissions Due to Mental Health Disorders and Substance Use.
- Adjust Lawyer Regulations to Support Well-Being.
- Implement Proactive Management-Based Programs (PMBP) That Include Lawyer Well-Being Components.
- Adopt a Centralized Grievance Intake System to Promptly Identify Well-Being Concerns.
- Modify Confidentiality Rules to Allow One-Way Sharing of Lawyer Well-Being Related Information from Regulators to Lawyer Assistance Programs.
- Adopt Diversion Programs and Other Alternatives to Discipline That Are Proven.
- Add Well-Being-Related Questions to the Multistate Professional Responsibility Exam (MPRE).

Those recommendations to be implemented by law firms and other legal employers include:

- Establish Organizational Infrastructure to Promote Well-Being.
- Form a Lawyer Well-Being Committee.
- Assess Lawyers’ Well-Being.
- Monitor for Signs of Work Addiction and Poor Self-Care.
- Actively Combat Social Isolation and Encourage Interconnectivity.
- Provide Training and Education on Well-Being, Including During New Lawyer Orientation.
- Emphasize a Service-Centered Mission.
Create Standards, Align Incentives, and Give Feedback.

Recommendations directed toward law schools include:

- Create Best Practices for Detecting and Assisting Students Experiencing Psychological Distress.
- Provide Training to Faculty Members Relating to Student Mental Health and Substance Use Disorders.
- Adopt a Uniform Attendance Policy to Detect Early Warning Signs of Students in Crisis.
- Provide Mental Health and Substance Use Disorder Resources.
- Assess Law School Practices and Offer Faculty Education on Promoting Well-Being in the Classroom.
- Empower Students to Help Fellow Students in Need.
- Include Well-Being Topics in Courses on Professional Responsibility.
- Commit Resources for Onsite Professional Counselors.
- Facilitate a Confidential Recovery Network.
- Provide Education Opportunities on Well-Being Related Topics.
- Provide Well-Being Programming During the 1L Year.
- Create a Well-Being Course and Lecture Series for Students.
- Discourage Alcohol-Centered Social Events.
- Conduct Anonymous Surveys Relating to Student Well-Being.

Those recommendations directed toward bar associations include the following:

- Encourage Education on Well-Being Topics in Association with Lawyer Assistance Programs.
- Sponsor High-Quality CLE Programming on Well-Being-Related Topics.
- Create Educational Materials to Support Individual Well-Being and “Best Practices” for Legal Organizations.
- Train Staff to Be Aware of Lawyer Assistance Program Resources and Refer Members.
- Sponsor Empirical Research on Lawyer Well-Being as Part of Annual Member Surveys.
- Launch a Lawyer Well-Being Committee.
- Serve as an Example of Best Practices Relating to Lawyer Well-Being at Bar Association Events.

The Task Force recommends that lawyer professional liability carriers undertake the following:

- Actively Support Lawyer Assistance Programs.
- Emphasize Well-Being in Loss Prevention Programs.
- Incentivize Desired Behavior in Underwriting Law Firm Risk.
- Collect Data When Lawyer Impairment is a Contributing Factor to Claims Activity.
Finally, the Task Force makes the following recommendations for lawyer assistance programs:

- Lawyers Assistance Programs Should Be Appropriately Organized and Funded.
- Pursue Stable, Adequate Funding.
- Emphasize Confidentiality.
- Develop High-Quality Well-Being Programming.
- Lawyer Assistance Programs’ Foundational Elements.

**Implementation**

Within a week of the release of the Task Force report in 2017, the Conference of Chief Justices passed Resolution 6 at its Annual Meeting, providing its support for the goals of reducing impairments and addictive behavior and improving lawyer well-being. The resolution further recommended that each jurisdiction consider the recommendations set out by the Task Force. See [https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_conference_of_chief_justices_resolution_6.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_conference_of_chief_justices_resolution_6.authcheckdam.pdf).

Over the course of the past several months, lawyer assistance programs and regulators have advanced the report and its recommendations in several states, circulating the report to bar leaders, justices of their highest courts and others who are positioned to implement and advance the recommendations. This resolution calls on stakeholders to consider the recommendations more comprehensively.

**Conclusion**

As the conclusion of the Task Force report states:

This Report makes a compelling case that the legal profession is at a crossroads. Our current course, one involving widespread disregard for lawyer well-being and its effects, is not sustainable. Studies cited above show that our members suffer at alarming rates from conditions that impair our ability to function at levels compatible with high ethical standards and public expectations. Depression, anxiety, chronic stress, burnout, and substance use disorders exceed those of many other professions. We have ignored this state of affairs long enough. To preserve the public’s trust and maintain our status as a self-regulating profession, we must truly become “our brothers’ and sisters’ keepers,” through a strong commitment to caring for the well-being of one another, as well as ourselves.

The CoLAP research demonstrates the need. The National Task Force on Lawyer Well-Being has identified the solutions. It is time for the full range of stakeholders to step up and to consider the recommendations. We respectfully ask that the American Bar Association provide its leadership to further advance the path to well-being and assure a system that deserves full and complete public confidence.
Respectfully submitted,

Terry Harrell
Chair, The ABA Working Group to Advance Well-Being in the Legal Profession
February 2018
1. **Summary of Resolution(s).** The Resolution urges stakeholders to consider the recommendations set out in the report, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, by the National Task Force on Lawyer Well-Being.

2. **Approval by Submitting Entity.** November 6, 2017 during a regularly-scheduled 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?**

   At the 2017 Midyear Meeting, the ABA passed Resolution 106, amending the Model Rule on Minimum Continuing Education. A provision of this model calls on states to require lawyers to take one hour of CLE programming every three years on substance use disorders or mental health matters. This is consistent with one of the recommendations in the report addressed in this Resolution.

   At the 1990 Annual Meeting, the House of Delegates passed the Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines.

   At the 1991 Midyear Meeting, the House of Delegates passed Guiding Principles for a Lawyer Assistance Program.

   At the 2004 Annual Meeting, the House of Delegates passed the Model Lawyer Assistance Program.

   The current resolution reinforces, but does not duplicate, the current policies.

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

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

   N/A.
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** 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. Therefore, efforts to implement this policy will come from ABA leadership and be advanced in collaboration with the participating entities that comprise the Task Force. A symposium is being planned for the spring of 2018 and advancement of this policy and the Task Force recommendations will be featured at that time.

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 the Commission on Lawyer Assistance Programs, the Standing Committee on Professionalism, and the 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)

    Terry L. Harrell  
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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 the Resolution**

The Resolution urges stakeholders to consider the recommendations set out in the report, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, by the National Task Force on Lawyer Well-Being.

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 by the ABA Commission on Lawyer Assistance Programs. The research demonstrates that alcohol use, substance use and mental health disorders among law students and 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.

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

The National Task Force on Lawyer Well-Being has spent a year analyzing research and conducting outreach to craft a series of recommendations directed toward a full range of stakeholders, which, if implemented, will advance a cultural shift toward a legal profession that is better able to meet the needs of society without the burdens of alcohol and other substance use disorders or unmanaged mental health concerns.

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 and the President to re-authorize, raise the appropriation level of, and fully fund the Legal Assistance for Victims Grant Program of the Violence Against Women Act, 34 U.S. Code § 20121.
REPORT

1. THERE IS A DIRE NEED FOR HIGH-QUALITY FREE LEGAL REPRESENTATION FOR INDIGENT VICTIMS OF DOMESTIC, DATING, SEXUAL AND STALKING VIOLENCE.

A. DOMESTIC, DATING, SEXUAL AND STALKING VIOLENCE ARE EPIDEMIC.

Domestic violence, dating violence, sexual assault and stalking (DSV) are epidemics in our society with dramatic, negative effects on individuals, families and communities. These crimes know no economic, racial, ethnic, religious, age, sexual orientation or gender limits. In the United States, intimate partner contact sexual violence, physical violence, and/or stalking was experienced by 37.3% of women and 30.9% of U.S. men during their lifetime. A recent study which looked to current and lifetime victimization rates determined that “29% of male workers and 40% of female workers reported having been subjected to intimate partner violence at some point in their lives.” The researchers determined that victimization rates in the workplace were higher than those in the general populace because DSV victims are “overrepresented in the workplace.”

Sexual assault and rape also are endemic throughout the United States. About 1 in 3 women nearly 1 in 6 men experienced some form of contact sexual violence during their lifetime, with about 1 in 5 women and 1.5% of men (1 in 71) experiencing completed or attempted rape at some point in their lives. More than half (51.1%) of female rape victims report being raped by an intimate partner and 40.8% by an acquaintance; for male victims, over half (52.4%) reported being raped by an acquaintance and 15.1% by a stranger. Although the majority of sexual assault victims are assaulted by perpetrators who are known to them (80%), many perpetrators are not intimate partners.

Footnotes:
1 The ABA defined the terms domestic violence, dating violence, sexual assault and stalking in the CDSV Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases (adopted as ABA Policy, August 2007) available at https://www.americanbar.org/content/dam/aba/directories/policy/2007_am_109.authcheckdam.pdf. These terms are also defined in 34 U.S.C. 12291 (https://www.law.cornell.edu/uscode/text/34/12291).
4 Id. At 45 (Survivors require economic autonomy and stability to leave or stay safe following abuse or an assault).
5 See S.G. Smith, supra n. 2.
8 This may include, inter alia, supervisors, coworkers, and classroom peers.
Similarly, high rates of stalking experienced by women and men in the United States remains an issue of public health concern. The Centers for Disease Control and Prevention (CDC) report that 1 in 6 women and 1 in 19 men in the U.S. have experienced some type of stalking behavior over their lifetime, causing them to fear for their safety or the safety of someone close to them.9

Lesbian, gay, bisexual and transgender (LGBT) people experience domestic and intimate partner violence and sexual violence at rates similar to or higher than heterosexual and/or cisgender10 people.11 In addition:

Black non-Hispanic women (44%) and multiracial non-Hispanic women (54%) were significantly more likely to have experienced rape, physical violence, or stalking by an intimate in their lifetime, compared to White non-Hispanic women (35%)...More than 45% of Alaska Native non-Hispanic men, 40% of Black non-Hispanic men, and 39% of multiracial non-Hispanic men had experienced rape, physical violence, or stalking by an intimate partner; 28% of White non-Hispanic men experienced these same forms of IPV.12

All of these dramatic statistics are likely higher in reality, as these crimes are underreported.13

B. LEGAL SERVICES ARE A TOP PRIORITY FOR VICTIMS OF DOMESTIC, DATING, SEXUAL, AND STALKING VIOLENCE.

Accessible, high-quality legal services are a critical need of victims of DSV, who often have a broad range of legal needs created or exacerbated by the violence of their abuser.

Providing legal advocacy and representation for victims of domestic/sexual violence, and ensuring the legal system is responsive to their needs are essential to ending these forms of violence. Knowledgeable VAWA-funded attorneys and legal advocates can provide

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9 Id.
13 See Patricia Tjaden & Nancy Thoennes, 2000, National Violence Against Women Survey, U.S. Department of Justice < http://www.ncjrs.gov/txtfiles1/nij/183781.txt> (last visited November 2017) (For example, around 83 percent of all rapes committed by an intimate partner are not reported to law enforcement).
victims with information, support, and representation in both civil and criminal matters. Since these processes can often be confusing and intimidating, attorneys and advocates can enhance victims’ experience in the legal system and improve outcomes by supporting them through attorney access, support with self-representation, language and disability assistance.\textsuperscript{14}

Legal representation in family matters is especially crucial for victims of domestic violence, because offenders may continue to exert control over victims by using the legal system to force contact, restrict victims’ access to protection, make implicit threats, and create ongoing challenges through litigation. Through these forms of “paper abuse,” offenders can exert coercive control long after victims end the abusive relationship.\textsuperscript{15}

In 2016, National Domestic Violence Hotline advocates provided 163,853 referrals to domestic violence service providers and 690,096 referrals to additional resources across the country: the top requested referral was for legal resources.\textsuperscript{16}

Legal services provided by an attorney for a victim of DSV can range from educating a victim about their legal rights and remedies, to the writing of demand letters, to full representation through complex multi-year litigation. Civil orders of protection are one example of an important legal intervention for many victims of DSV. Civil protection orders are available in every jurisdiction for domestic violence victims, and in some states for sexual assault, dating violence and stalking.\textsuperscript{17} Victims of domestic violence


\textsuperscript{17} See generally ABA Commission on Domestic & Sexual Violence statutory summary charts https://www.americanbar.org/groups/domestic_violence/resources/statutory_summary_charts.html
rate the filing of an order of protection as one of the top two most effective remedies for stopping domestic violence, second only to leaving an abusive partner.\(^{18}\)

Access to a lawyer significantly increases the likelihood of a court awarding a civil order of protection to a survivor.\(^{19}\) “According to one study, 83 percent of victims represented by an attorney successfully obtained a protective order, as compared to just 32 percent of victims without an attorney.”\(^{20}\) Overall, protective orders saved one state at least $85 million each year in costs that would have been incurred if the protective order had not stopped or reduced the violence and abuse.\(^{21}\) The vast majority of victims thought the protective order was fairly or extremely effective (77%-95%) 6 months after the order was issued.\(^{22}\)

The presence or absence of legal representation also profoundly affects the outcome of child custody litigation for victims of DSV.

[C]ases in which the IPV\(^{23}\) victim parent received legal aid attorney representation were 85% more likely to have visitation denied to the IPV abusing parent, 77% more likely to have restrictions or conditions placed on the IPV abusing parent’s child custody visitation among the subset of cases in which the IPV abusing parent was awarded visitation, 47% more likely to have treatment or program completion ordered for the IPV abusing parent, and 46% more likely to have sole decision-making awarded to the IPV victim parent relative to unrepresented comparison group cases after adjusting for confounding.\(^{24}\)

For low-income DSV victims, legal needs are often interwoven between family matters, child support, housing and eviction, consumer debt, and immigration-related matters.\(^{25}\) Employment related concerns may also be raised. “In general, having an attorney’s assistance with ancillary legal matters further helps [victims] … achieve greater economic self-sufficiency (and perceptions of self-sufficiency), which in turn makes leaving their relationship a more realistic option.”\(^{26}\)


\(^{19}\) Id.

\(^{20}\) Id.


\(^{23}\) Intimate Partner Violence.

\(^{24}\) Mary A. Kernic, Final Report of the “Impact of Legal Representation on Child Custody Decisions among Families with a History of Intimate Partner Violence Study,” May 2015, pg. ii. See also “We found attorney representation, particularly by legal aid attorneys, to be associated with a range of greater protections being awarded to IPV victims and their children, relative to unrepresented IPV victims.” Id. at 44-45.

\(^{25}\) See Supporting Survivors, Supra n.1, pg. 9.

\(^{26}\) Id.
C. THERE IS A LEGAL SERVICES GAP FOR INDIGENT AND LOWER INCOME VICTIMS OF DOMESTIC, DATING, SEXUAL AND STALKING VIOLENCE.

Legal services offices can handle less than a fifth of the needs of eligible clients and often are able to offer only brief advice, not the full range of assistance that is necessary.27

1. THE MARKET FOCUS OF THE LEGAL PROFESSION PROHIBITS SUFFICIENT NUMBERS OF WELL-TRAINED FULL-TIME ATTORNEYS FROM WORKING ON BEHALF OF INDIGENT VICTIMS OF DOMESTIC, DATING, SEXUAL AND STALKING VIOLENCE.

There are insufficient numbers of highly skilled and DSV-trained attorneys who can to meet the legal needs of the diverse population of victims of DSV in this country. In large part this is due to the market focus of the legal profession, which is only compounded by the lack of resources that many DSV victims have to pay for critical legal services.

[T]here is … reason to believe that survivors do not retain attorneys at a level commensurate with the benefits of doing [so][sic] because of failures in the legal services market. Some of these market failures include limits on the availability of legal services, asymmetries between survivors and batterers in the legal services market, steep transaction costs combined with limited availability of credit, and information asymmetries between survivors and attorneys concerning the benefits of legal services…Victims with limited incomes may be unable to pay for private representation or have difficulty accessing credit to obtain funds on short notice. 28

Simply put, many highly skilled attorneys chose to not work at legal services organizations due to low pay and large caseloads, or because there are limited positions available due to funding restrictions. Victims of DSV cannot find alternative sources of representation that they can afford, or are unaware of the broad array of legal remedies they may have access to. Of female-identified survivors who reported needing legal services, 64% received no assistance from an attorney.29 Well-trained attorneys who are dedicated to serving victims of DSV are needed to conduct specific outreach to victims of DSV, especially victims from underserved or marginalized communities. Due to market factors, the private bar is unable to meet the needs of every victims as insufficient numbers of attorneys will take on pro bono or low bono cases. In addition, the private bar

27 Access to Justice, Deborah L. Rhode, Oxford University Press, 2004 g, supra note 1, at 52-53 (noting that approximately 10% of federally funded legal aid cases are litigated and the average expenditure is only about $300 per case).
28 See Supporting Survivors, Supra n.1, pg. 18.
does not necessarily have the requisite expertise needed to litigate these cases, especially complex family law and civil protection order cases, for victims of DSV.\textsuperscript{30} It is important to note that cases in which a victim of IPV hired private counsel were more successful than proceeding unrepresented, but not as successful as working with a legal aid attorney who is trained in DSV, and who who has the skills and disposition necessary to work with people in crisis (economic, inter-personal and/or other).\textsuperscript{31}

2. INDIGENT AND LOWER-INCOME SURVIVORS HAVE INSUFFICIENT RESOURCES TO OBTAIN COMPETENT LEGAL REPRESENTATION AND THEREFORE CANNOT ACCESS THE SAFETY PROVIDED BY THE LEGAL SYSTEM.

The "justice gap" is the difference between the civil legal needs of low-income individuals and the resources available to address and meet those needs.\textsuperscript{32} This gap is only exacerbated for individuals seeking DSV support, and for those victims who are from marginalized or underserved communities. For example, "71\% of low-income households have experienced a civil legal problem in the past year. The rate is even higher for some: households with survivors of domestic or sexual assault (97\%)…,"\textsuperscript{33} and "1 in 4 low-income households has experienced 6+ civil legal problems in the past year, including 67\% of households with survivors of domestic violence or sexual assault,"\textsuperscript{34} an astronomical figure. These legal issues may be family law specific, or related to the broad range of legal practice that intersects with the needs of victims, such as housing, employment, and public benefits.

On September 14, 2016, the National Network to End Domestic Violence conducted its eleventh annual National Census of Domestic Violence Services, a non-invasive, unduplicated count of adults and children who seek services from U.S. domestic violence shelter-based programs during a single 24-hour survey period. 92\% of the 1910 identified domestic violence programs in the United States and Territories, participated in the 2016 Census, reporting the following sobering facts:\textsuperscript{35}

- 72,959 victims of DV were served in one day: 41,195 domestic violence victims found refuge in emergency shelters or transitional housing provided by local domestic violence programs. 31,764 adults and children received non-residential assistance and services, including individual counseling, legal advocacy, and children’s support groups.\textsuperscript{36}

Access to legal services, such as a legal advocate or lawyer, can significantly increase a survivor’s safety and long-term stability. On

\textsuperscript{30} TK.
\textsuperscript{31} See Kernic, supra n. 27. at iii.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} National Network to End Domestic Violence, 11th Annual Domestic Violence Counts Report (2016).
\textsuperscript{36} Id. (emphasis added).
Census Day, 52% of programs were able to have an advocate accompany a victim to court, but only 12% of programs were able to assist victims with legal representation. Funding cuts have forced some programs to cut these important services and, in the past year, 29 programs reduced or eliminated their legal advocacy programs and 34 reduced or eliminated their legal representation services. On Census Day, legal representation through an attorney was the second most sought-after service request that could not be met, after housing/shelter. Without proper legal representation or advocacy, survivors and their families continue to struggle with safety issues. In Oregon, an advocate recounted: “One client does not qualify for Legal Aid, and also cannot afford an attorney even at a modest price. She will likely have to represent herself against her abuser.”37

The “justice gap” places victims of DSV at even greater risk of violence because despite the existence of a broad range of protective legal remedies, many victims of DSV are unable to access competent counsel, and therefore, favorable outcomes in litigation.

2. THE LEGAL ASSISTANCE FOR VICTIMS GRANT PROGRAM IS AN ESSENTIAL FUNDING SOURCE FOR MEETING THE NEEDS OF INDIGENT VICTIMS OF DOMESTIC, DATING, SEXUAL AND STALKING VIOLENCE FOR HIGHLY TRAINED AND FULLY DEDICATED ATTORNEYS.

A. THE HISTORY OF THE LEGAL ASSISTANCE FOR VICTIMS GRANT PROGRAM

“VAWA has been an important impetus for funding around civil legal assistance.”38 The Violence Against Women Act (“VAWA”) was enacted by Congress in 1994 as part of omnibus anti-crime legislation, with a five-year authorization. In addition to promoting interstate enforcement of civil protection orders, it created new federal rights for victims of domestic violence, imposed new funding eligibility requirements on government and authorized grants for new education and training. It provided increased or new federal funding for a range of programs including rape prevention and education programs, safe homes for victims, shelter grants, youth education, and community programs. It also created new federal criminal offenses for interstate acts of domestic violence. VAWA has since been reauthorized on three occasions, in 2000, 2005, and 2013, and is set for reauthorization again in 2018.

In 2000, through reauthorization, Congress created the VAWA-funded Legal Assistance to Victims (“LAV”) Grant program.

The Legal Assistance for Victims (LAV) Grant Program is intended to increase the availability of civil and criminal legal assistance needed to

37 Id.
effectively aid adult and youth victims of sexual assault, domestic violence, dating violence, and stalking who are seeking relief in legal matters relating to or arising out of that abuse or violence, at minimum or no cost to the victims. The LAV Grant Program supports holistic and comprehensive legal services, which involves treating the client as a whole person with access to a range of services beyond legal representation (such as counseling, support groups, and shelter/housing assistance), and a wide range of legal services to meet victim needs (such as filing protection orders, representation in housing or matrimonial court).

LAV Grant Program funds may not be used to provide criminal defense services. The LAV Grant Program makes awards to law school clinics, domestic violence victims’ programs and shelters, bar associations, rape crisis centers and other sexual assault services programs, private nonprofit entities, Indian tribal governments and tribal organizations, territorial organizations, and legal aid or statewide legal service organizations. Grant funds may be used to provide direct legal services to victims of sexual assault, domestic violence, dating violence, and stalking in matters relating to or arising out of that abuse or violence and develop innovative, collaborative projects that provide quality representation to victims of sexual assault, domestic violence, dating violence, and stalking.39

In the 23 years since its enactment, VAWA has provided significant funding to support projects and positions in law enforcement, prosecution, courts, legal services, and community-based service providers to combat intimate partner violence and its effects on victims and their families. VAWA is, in fact, the largest single source of funding, apart from the Legal Services Corporation, supporting victims’ attorneys in civil cases. LAV funding, specifically, has made a profound difference in the lives of millions of victims of domestic, dating, stalking and sexual violence, and their children, as well as their communities and workplaces across the country. LAV funding has also made a difference in the last 23 years in how our courts and legal system respond to victims of DSV.

B. THE LEGAL ASSISTANCE FOR VICTIMS GRANT PROGRAM HAS FUNDED WELL-TRAINED AND HIGHLY-SKILLED ATTORNEYS SINCE 1995 TO MEET THIS NEED

LAV has increased the availability of high-quality civil legal services for victims of DSV, especially in the areas of civil protection orders and family law matters. The value of

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39 OVW Fiscal Year 2017 Legal Assistance to Victims (LAV) Grant Program Solicitation, Cover Page, https://www.justice.gov/ovw/page/file/922496/download (last visited November 8, 2017) (Defining “Legal assistance” to include: ‘assistance to adult and youth victims of sexual assault, intimate partner domestic violence, dating violence, and stalking in: a) family, tribal, territorial, immigration, employment, administrative agency, housing matters, campus administrative or protection or stay away order proceedings, and other similar matters; and b) criminal justice investigations, prosecutions and post-trial matters (including sentencing, parole, and probation) that impact the victim’s safety and privacy.’) Id.
these programs to victims of domestic violence, dating violence, sexual assault, and stalking cannot be overstated. These programs have become essential, core components of the justice system. Nevertheless, nearly 70% of victims of domestic violence are still without legal representation,\(^40\) and victims of sexual violence and stalking violence proceed unrepresented at even higher rates.

98% of VAWA-LAV grantees use funds to pay for staff, most often civil attorneys but also victim advocates who assist with a range of issues.\(^41\) Providing quality services requires a comprehensive, “interpersonal” approach and an interdisciplinary understanding of the dynamics of DSV. Lawyers must often “encroach into the domain of ‘social work’” in order to be effective.\(^42\) LAV attorneys are required by OVW to set aside training funds in their grant budgets to use to attend OVW-funded Technical Assistance Provider trainings.\(^43\) These trainings are highly substantive and developed to increase the capacity of LAV attorneys to represent victims of DSV. The ABA Commission on Domestic & Sexual Violence has been an OVW TA provider for the LAV program since 2000.

LAV grantees serve an average of 28,553 victims per 6-month period, addressing an average of 43,736 legal issues and achieving a total of 105,543 outcomes.\(^44\)

LAV attorneys are highly trained and fully committed to addressing DSV issues, holistically and through client-centered, trauma-informed litigation.

3. THE LEGAL ASSISTANCE FOR VICTIMS GRANT PROGRAM SHOULD BE RE-AUTHORIZED, FULLY FUNDED AND EXPANDED TO MEET THE GROWING NEEDS OF INDIGENT VICTIMS OF DOMESTIC, DATING, SEXUAL AND STALKING VIOLENCE.

Even with LAV funding, there remain countless victims of DSV who are not served. The most frequent grantee justification for this includes: “Program unable to provide services because of limited resources … Program reached capacity.”\(^45\)

Grantees most frequently cited the need for more attorneys in order to serve a greater number of victims and provide more comprehensive

\(^40\) LSC 2009 Justice Gap Report at TK.
\(^41\) DOJ, Office on Violence Against Women, 2006 Biennial Report to Congress on the Effectiveness of Grant Programs Under VAWA
\(^42\) Peter Margulies, Representation of Domestic Violence Survivors as a New Paradigm in Poverty Law, G.W. Law Rev. 1995
\(^43\) U.S. Department of Justice, Office on Violence Against Women, OVW Fiscal Year 2017 Legal Assistance for Victims (LAV) Grant Program Solicitation, pg. 14, https://www.justice.gov/ovw/page/file/922496/download (visited November 2017) (“Include funds to attend OVW-sponsored training and technical assistance in the amount of $6000 (minimum) for new and continuation applicants and $10,000 (minimum) for applicants from the territories, Hawaii and Alaska.” Id.)
\(^45\) Id.
services for their clients. In particular, grantees mentioned the need for more family law attorneys able to represent clients in custody and divorce cases.\footnote{Id. at 182 (emphasis in original).}

The American Bar Association has a long history of responding to the epidemic of intimate partner violence by striving to promote access to justice and safety for its victims. In 1978—fifteen years before the Violence Against Women Act was enacted, and the ABA’s Commission on Domestic Violence was formed—the ABA adopted policy supporting efforts to combat the incidence, causes and effects of family violence and the implementation of programs to protect the victims of family violence. In nearly every year since, the ABA has continued to adopt policies that support victims and strive to strengthen legal protections on their behalf.

The Commission led the ABA’s efforts to support VAWA reauthorization in 2000, 2005, and 2013, as well as annual appropriations. Working closely with the ABA’s Government Affairs Office and the Office of the President, the Commission has sought to educate the public and the Congress about the valuable services provided through VAWA and the continued need for federal support to combat this persistent social problem. Since 1998, the Commission has participated in cooperative agreements with the U.S. Department of Justice to provide continuing education and technical assistance to lawyer-grantees under VAWA. Those lawyers are principally LAV attorneys, and the Commission has seen first-hand the important work that this large group of attorneys takes on. The Commission also knows that many of these attorneys have enormous caseloads and that additional attorneys are needed to do this important, life-saving work. The Commission currently sits on the legal services sub-committee of the \textit{ad hoc} National Task Force to End Domestic and Sexual Violence, the consortium of providers, policy advocates and experts seeking VAWA reauthorization in 2018.

LAV must be reauthorized to ensure that the strides that have been made to make victims safer are continued and reaffirmed. LAV must be expanded so that the dedicated pool of highly trained attorneys for indigent victims of DSV is large enough to meet the actual need of victims in this country. We cannot afford to see these services diminished.

Respectfully Submitted,

Mark Schickman, Chair  
ABA Commission On Domestic & Sexual Violence  
February 2018
GENERAL INFORMATION FORM

Submitting Entity: Commission on Domestic & Sexual Violence
Submitted By: Mark Schickman, Chair

1. Summary of Resolution(s).
That the American Bar Association urges Congress and the President to re-authorize, raise the appropriation level of, and fully fund the Legal Assistance for Victims Grant Program of the Violence Against Women Act (34 U.S. Code § 20121)

2. Approval by Submitting Entity.
The Commission voted to support the resolution and report on October 27, 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?
✓ Report No. 115 (Feb. 2010) (Urging Congress to Re-Authorize and Fully Fund VAWA)
✓ ABA Section of Criminal Justice, Recommendation, Volume 103 (Feb. 1978) (Supporting Efforts to Combat Family Violence).

These policies would not be adversely affected by the adoption of the proposed policy.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?
VAWA is due for reauthorization in March 2018, and it is anticipated that revisions to the legislation will be contemplated.

There is currently no legislation related to this Resolution, however, see #5.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
Upon adoption, the CDSV will work with other national organizations to address the reauthorization of the Legal Assistance to Victims grant program in the Violence Against Women Act, and will work to expand its funding level.

None.
The CDSV receives grant funding pursuant to the Violence Against Women Act.

10. Referrals.
Section of Family Law
Section of Civil Rights and Social Justice
Section of Criminal Justice
Government and Public Sector Lawyers Division
General Practice, Solo and Small Firm Division
Commission on Homelessness and Poverty
Commission on Women in The Profession
Commission on Disability Rights
Commission on Youth at Risk
Commission on Immigration
Commission on Law and Aging
National Association of Women Lawyers
National Association of Women Judges
Affiliated National Bar Associations

11. Contact Name and Address Information. (Prior to the meeting.)
Vivian Huelgo, Chief Counsel
Commission on Domestic & Sexual Violence
1050 Connecticut Avenue, NW, Suite 400
Washington, DC 20036
Phone: (202) 662-8637
Email: vivan.huelgo@americanbar.org

12. Contact name and address information. (Will present the Resolution to the House)
Mark Schickman
Freeland, Cooper & Foreman, LLP
150 Spear Street, Suite 1800
San Francisco, Ca 94105
Phone: (415) 541-0200
Email: schickman@freelandlaw.com
EXECUTIVE SUMMARY

1. Summary of Resolution

The Resolution urges Congress and the President to re-authorize, raise the appropriation level of, and fully fund the Legal Assistance for Victims Grant Program of the Violence Against Women Act (34 U.S. Code § 20121).

2. Summary of the Issue that the Resolution Addresses

Lack of funding for well-trained expert civil attorneys to represent victims and survivors of domestic, dating, sexual and stalking violence.

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

Urges Congress and the President to re-authorize, raise the appropriation level of, and fully fund the Legal Assistance for Victims grant program of the Violence Against Women Act,

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

None to date.
RESOLVED, That the American Bar Association urges all federal courts to adopt pro bono panels for civil litigants guided by a uniform set of guidelines.
REPORT

There are 94 federal district courts in the United States. A 2011 study conducted by the Federal Judicial Center for the Judicial Conference Committee on Court Administration and Case Management highlighted, however, that these courts do not provide uniform assistance to pro se litigants in civil cases.\(^1\) While many of the 90 district courts that responded stated that they maintained some processes to assist pro se litigants, only 19 (21.1% of the 90 districts that responded) disclosed that there is a "court maintained pro bono panel or list of attorneys willing to serve pro bono, made available to pro se litigants."\(^2\) Those districts were:

1. The District of North Dakota;
2. The District of Kansas;
3. The Eastern District of New York;
4. The Western District of Tennessee;
5. The District of New Jersey;
6. The District of Connecticut;
7. The Northern District of Illinois;
8. The Southern District of Iowa;
9. The District of Montana;
10. The Western District of Texas;
11. The Eastern District of Pennsylvania;
12. The District of the District of Columbia;
13. The District of Colorado;
14. The District of New Mexico;
15. The District of Delaware;
16. The District of Oregon;
17. The Central District of California;
18. The District of Vermont; and

There are six districts (6.7% of the 90 districts that responded) that disclosed a "bar maintained pro bono panel or list of attorneys willing to serve pro bono, made available to pro se litigants." Those districts were:

1. The Northern District of California;
2. The District of Hawaii;
3. The District of Idaho;
4. The District of Kansas;\(^3\)
5. The District of Oregon; and

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\(^2\) This is in contrapose to the maintenance of pro bono panels for indigent criminal defendants. Each of the 94 districts maintains such a panel.

\(^3\) The District of Kansas reported both a bar-maintained pro bono panel and a court-maintained pro bono panel.
6. The Middle District of Pennsylvania.

Thus, of the 90 districts that responded in 2011 (out of 94 total), only 24, or 26.67%, reported either a court- or bar-maintained *pro bono* panel or list of attorneys willing to serve *pro bono*, made available to *pro se* litigants. Moreover, the Districts responding that they had such panels are not generally grouped by geographic location. While there appears to be greater participation from the courts within the Second and Ninth Circuit, it is not uniform participation. Therefore, two persons in similar situations living a mile apart, suffering from the same harm, may have different access to justice based on living on opposite sides of a line dividing two adjacent federal districts.

While many of the districts offered other services to *pro se* litigants, such as providing standardized forms and instructions or providing a *pro se* law clerk and allowing direct communication, it remains apparent that providing a *pro se* litigant with access to professional representation remains the best way to ensure that litigants receive the access to justice that our society demands.\(^4\)

In fact, the Ninth Circuit Judicial Conference recognized the importance of *pro bono* panels in 2000 when it adopted a resolution concerning representation of indigent litigants. It resolved therein: “that each district shall prepare and implement an action plan to provide for the representation of litigants in meritorious claims filed in *pro per se* matters, including establishing panels of *pro bono* lawyers.”\(^5\)

This same study asked Chief District Judges to respond with the frequency that certain problems persisted in *pro se* matters. The five issues that a majority of respondents stated were present in most or all *pro se* cases are:

1. Pleadings or submissions that are unnecessary, illegible, or cannot be understood;
2. Problems with *pro se* responses to motion to dismiss or for summary judgment;
3. Lack of knowledge about legal decisions or other information that would help his or her case;
4. Failure to know when to object to testimony or evidence; and
5. Failure to understand legal consequences of his or her actions or inactions (e.g., failure to plead statute of limitation, failure to respond to requests for admissions).

\(^4\) Other districts reported appointing counsel for the representation (or limited representation) of *pro se* litigants, but doing so without a formal panel (or wheel) program in place for the selection of cases and attorneys to serve.

These persisting issues make it clear that issues plaguing pro se litigation affect the litigant at all stages of litigation, for all subject matter of litigation, and affect litigants whether they are plaintiffs or defendants. Thus where districts limit their panel programs by things such as subject matter, representation only at trial, or representation of only plaintiffs (or certain types of plaintiffs), they do not address all of these persisting issues and leave large groups of persons needing assistance without this valuable resource.

In the time since this study was conducted pro se litigants continue to inundate the federal courts. Approximately 25% of civil cases filed in federal courts are filed by pro se plaintiffs.6 While districts have made strides in the intervening time of providing more services to pro se litigants, the recent pushes have been in providing services through law clinics, which only provide guidance and answers to a litigant’s questions without real representation, or through limited appointment of counsel for purposes such as mediation.7 While providing such services greatly helps the recipient of the services, it fails to address the problems faced by pro se litigants at other stages of the proceedings. And while there are additional districts that have implemented pro bono panels since the time of the study,8 such as the Western District of Washington and the Northern District of Texas, the maintenance of these panels is far from being either uniform or universal.

I. Current Pro Bono Panels Should Communicate and Coordinate.

Even among the districts that have a pro bono panel or public list of attorneys willing to serve pro bono, there is little uniformity. For example, the pro bono panels vary in at least the following ways:

- who maintains the panel (the court or the state or local bar association);
- what types of civil litigants are eligible (i.e., some are only available for prisoners, some for only specific types of civil claims, and others have no such limitations);
- if and to what extent attorneys' fees and expenses are reimbursed;
- at what time cases are reviewed for appointment (i.e., some panels review the cases upon a request for counsel at the pleadings stage while others wait until later in the case, i.e., the summary judgment stage or trial);
- the number and quality of participating attorneys; and

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7 Simandle, supra note 6.
8 Or, conversely, did not respond to the 2011 Survey indicating the maintenance of a panel in their district.
whether there are other resources available to the pro bono counsel (i.e., training, mentors, and referrals to vendors who have already agreed to work pro bono or for reduced rates).

While those who have taken the laboring oar to establish pro bono panels for their jurisdiction should be commended, the next logical step is for those jurisdictions to communicate, share their collective knowledge, and work towards a more unified system. A civil litigant’s ability to have pro bono counsel appointed should not have to depend on the jurisdiction in which his case is filed. Instead, civil litigants should feel confident in knowing that their desire for pro bono counsel is equally met regardless of the court of jurisdiction.

In 2002 the Administrative Office of the U.S. Courts asked the Vera Institute of Justice to examine the practices of attorney panels maintained for indigent criminal defendants in each of the 94 districts. Following its examination, the Institute published its findings with a list of good practices that it found in the various districts, with encouragement for other districts to adopt those practices which were found to be most beneficial.9

No such study has been undertaken of those districts with panel attorneys to assist pro se civil litigants. Districts should engage in a similar comparative study and adopt those aspects of panels they find most helpful in addressing the problems persisting in pro se litigation.

II. Existing Panels Should Create a Set of Guiding Principles.

In addition to meeting and learning from each other to tweak their existing panels for consistency’s sake, the districts with existing pro bono panels should work to create a set of guiding principles to govern all such panels. A uniform set of guiding principles would ensure that, while some panels may need to have jurisdiction-specific differences, all panels are operating with the same principles in mind. These principles will be a way to check whether the panels are operating as efficiently as they can, to ensure that the needs of civil litigants are met. These principles will also provide bases through which districts with no such panels may begin to develop and implement similar programs.

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III. All Federal District Courts Should Consider Implementing a Panel.

Although research indicates that additional district courts have civil panels that either did not respond to, or were formed after, the 2011 survey (e.g., the Northern District of Texas and the Western District of Washington), there are still a number of district courts that do not appear to have a *pro bono* panel or public list of attorneys willing to serve *pro bono* (e.g., the Middle District of Alabama and the District of Maryland). That means whether or not *pro bono* counsel is readily available to civil litigants varies depending on what jurisdiction in which they choose to (or must) file their actions.

With guiding principles created, much of the legwork in creating a *pro bono* panel program would be completed. That leaves little reason for jurisdictions not to form their own panels and utilize the local attorneys willing to serve *pro bono*. The benefits of these *pro bono* panels cannot be overstated. They further the administration of justice by providing access to counsel for civil litigants who would otherwise be unable to afford legal representation. They also provide opportunities for attorneys to provide *pro bono* service. Rule 6.1 of the American Bar Association’s Model Rules of Professional Conduct provides that “every lawyer has a professional responsibility to provide legal services to those unable to pay.” While different jurisdictions have differing rules on what, if any, level of *pro bono* service is required, the American legal profession has a long history of *pro bono* service. In keeping with that tradition, attorneys should have access to established systems, such as *pro bono* panels, through which they can dedicate their time *pro bono*. Participation in these panels lessens the burden of providing *pro bono* service by making referrals, reimbursing costs and expenses, and providing free or reduced-rate resources. All federal district courts should at least explore the possibility of a civil *pro bono* panel for their jurisdiction, either on a court-run basis or in conjunction with the local bar.

Respectfully submitted,

Dana M. Hrelic, Chair
Young Lawyers Division
February 2018
1. **Summary of Resolution(s).**
   
   This Resolution urges federal courts to adopt pro bono panels for civil litigants guided by a uniform set of guidelines.

2. **Approval by Submitting Entity.** This resolution was unanimously approved by the Assembly of the ABA Young Lawyers Division in August 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?**
   
   This Resolution would support several interrelated policies of the Association. Specifically, it would support Goals II, III, and IV of the Association’s Mission.

   It would improve the profession by promoting pro bono and public service by the legal profession. *Pro Bono* panels are an excellent way to connect those wishing to provide pro bono services, and seeking to comply with Rule 6.1 of the Model Rules of Professional Conduct with those litigants in need and deserving of such services. This will indirectly benefit Goal I of the Association’s Mission, by advancing the professional growth of those providing such services with experience that they may not otherwise gain.

   It would help to eliminate bias and enhance diversity by promoting the full and equal participation in the legal system by all persons, regardless of financial wherewithal or geographic location.

   It would advance the rule of law by assuring meaningful access to justice for all persons.

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, if adopted, will be used by the members of the ABA Judicial Division and the ABA Division of Legal Services in efforts to create systems to ensure that all persons have a real right to legal representation, regardless of their means and regardless of whether they are the subject of criminal proceedings or are engaged in civil litigation.

   The Resolution’s goal, urging total adoption of the pro bono panel program across the districts guided by a uniform set of principles, could be accomplished in sequence to reduce barriers to entry for districts first implementing such programs. Once a uniform set of guidelines concerning the structure, organization, and function of pro bono panels is established, it will be easier for the panels to create a set of guiding principles concerning how the panels are to operate and to provide a road map for panels that are unable to meet specific guidelines due to state or district specific considerations. Finally, with those guidelines and principles in place, those districts without a pro bono panel will be able create panels to operate consistent with the other panels, nationwide, with the least amount of friction possible.

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

   There are no direct costs that will be borne as a result of adopting this Resolution. The only indirect costs will be the time of staff and ABA members in bringing the issue to the attention of the various districts.

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

   None.

10. **Referrals.** Concurrent with the filing of this Resolution and Report with the House of Delegates, the Young Lawyers Division is sending the Resolution and Report to the following entities and/or interested groups:

    Center for Pro Bono
    Federal Bar Association
    Judicial Division
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Section of Civil Rights and Social Justice
Section of Litigation
Section of Tort Trial and Insurance Practice
Standing Committee on Delivery of Legal Services
Standing Committee on Legal Aid and Indigent Defendants
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 Resolution with Report to the House? Please include best contact information to use when onsite 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 the Resolution

This Resolution urges federal courts to adopt pro bono panels for civil litigants guided by a uniform set of guidelines.

2. Summary of the Issue that the Resolution Addresses

There are 94 federal district courts in the United States. A 2011 study conducted by the Federal Judicial Center for the Judicial Conference Committee on Court Administration and Case Management highlighted, however, that these courts do not provide uniform assistance to pro se litigants in civil cases. Of the 90 district courts that responded, only 19 (21.1% of the 90 districts that responded) disclosed that there is a "[c]ourt maintained pro bono panel or list of attorneys willing to serve pro bono, made available to pro se litigations."

This disparity in the availability of panels, and the principles under which they operate, condition an indigent civil litigant’s ability to obtain representation, and the extent of that representation, on his or her geographic location within the United States.

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

The Resolution urges federal courts to implement policies that would avoid geographic differences in the substance of representation available to an indigent civil litigant by removing material differences in how pro bono panels are structured and function and by creating a set of guiding principles to ensure that the purpose behind creating and maintaining such panels is effectuated even if the form of the panel varies in a particular district. The Resolution also would urge those federal districts not already participating in pro bono panel programs to create and maintain a panel consistent with the guides and principles espoused by the extant panels. If and when the federal courts follow the ABA’s urging on these issues, a litigant will not be limited by the district in which he or she happens to reside.

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

The Young Lawyers Division is not aware of any minority view or opposition to this Resolution.
RESOLVED, That the American Bar Association urges all federal, state, local, territorial, and tribal legislative bodies and governmental agencies to enact laws and adopt policies regarding the use of solitary confinement for detainees according to the following:

(1) Solitary confinement (also referred to as “segregation” or “restrictive housing”) is prohibited for individuals with Intellectual Disability or serious mental illness; the elderly; women who are pregnant, are postpartum, or recently had a miscarriage or a terminated pregnancy; and individuals whose medical conditions will be exacerbated by such confinement; and

(2) Solitary confinement should be used only in exceptional cases as a measure of last resort, where less restrictive settings are insufficient, and for no longer than is necessary to address the specific reason for placement, typically not to exceed 15 consecutive days.
INTRODUCTION

Solitary confinement, also referred to as “segregation” or “restrictive housing,” entails confining prisoners to a cell either alone or with a cellmate (double solitary or “double celling”) for 22 to 24 hours of day, for periods of times ranging from days to decades, with limited human interaction. Typically, prisoners are allotted one hour for exercise, which is also solitary in a bare cage or concrete enclosure, five days per week. Two or three times a week, prisoners shower. The cells typically are made of concrete blocks; are smaller than an average parking space, usually six by eight feet; have solid metal doors with a slot for food trays; lack windows; and are kept lighted at all times. A metal frame or concrete platform serves as a bed, and there is a metal toilet and sink.1

Once considered a punishment of last resort reserved for the most violent and dangerous prisoners, solitary confinement has become a mainstay of prison management and control.2 Prisoners may be placed in solitary confinement because they: violated facility rules by, for example, talking back, being out of place, or failing to obey an order (disciplinary or punitive segregation); are thought to pose a risk to facility safety or security (administrative segregation); or are believed to be at risk of harm or abuse (protective custody), such as LGBTQ individuals, individuals with disabilities, youth under age 18, law enforcement or public officials, people convicted of sex offenses against children, and former gang members.3

There is a lack of data on the number of people held in solitary confinement in the United States due to state-by-state variances, unreliable methods of data collection, different terminology, and the lack of national standards on what constitutes solitary confinement. However, a 2016 report released by the Arthur Liman Public Interest Program at Yale Law School and the Association of State Correctional Administrators (ASCA) estimated that in fall 2015 67,442 prisoners were held in restrictive housing—22 hours a day, for 15 days or more—across 48 jurisdictions (the Federal Bureau of Prisons, 45 states, the District of Columbia, and the Virgin Islands).4 This figure did not include prisoners held in jails (housing hundreds of thousands of people), juvenile facilities, and military and immigration facilities.

Scientific research confirms that solitary confinement is physiologically and psychologically harmful. Although the most widely reported effects are psychological, physiological effects are

1 Margo Schlanger & Amy Fettig, Eight Principles for Reforming Solitary Confinement, AM. PROSPECT (Fall 2015), http://prospect.org/article/eight-principles-reforming-solitary-confinement-0.
3 Id. at 4.
commonly reported and include heart palpitations, diaphoresis (sudden excess sweating), insomnia, back and other joint pain, deterioration of eyesight, poor appetite, weight loss, lethargy, weakness, shaking, feeling cold, and aggravation of preexisting medical conditions.\textsuperscript{5} Individuals held in solitary confinement experience a whole host of negative responses, including negative attitudes and affect;\textsuperscript{6} insomnia;\textsuperscript{7} anxiety;\textsuperscript{8} panic;\textsuperscript{9} depression;\textsuperscript{10} and lower levels of brain function, including a decline in electroencephalogram (EEG) activity\textsuperscript{12} that is observable after only seven days in isolation.\textsuperscript{13}

The widespread use of solitary confinement and its harmful effects on prisoners’ mental and physical health has gained national attention. In January 2016, the U.S. Department of Justice published a report providing an overview of restrictive housing practices in the federal prison system and setting forth guiding principles and policy recommendations for reform.\textsuperscript{14} Professional associations of correctional and health professionals, correctional officials, social scientists, international organizations, state and federal legislatures, among numerous others, have called for reform.

It is against this backdrop that the ABA urges all federal, state, local, territorial and tribal legislative bodies and governmental agencies to enact laws and adopt policies regarding the use of solitary confinement for detainees according to the following:

(1) Solitary confinement (also referred to as “segregation” or “restrictive housing”) is prohibited for individuals with Intellectual Disability\textsuperscript{15} or serious mental illness\textsuperscript{16};

\textsuperscript{6} See, e.g., Michael Bauer et al., \textit{Long-Term Mental Sequelae of Political Imprisonment in East Germany}, 181 J. NERVOUS & MENTAL DISEASE 257, 258-61 (1993); Peter Suedfeld et al., \textit{Reactions and Attributes of Prisoners in Solitary Confinement}, 9 CRIM. JUST. & BEHAV. 303, 315-18 (1982).
\textsuperscript{7} See, e.g., Bauer et al., supra note 6, at 259.
\textsuperscript{10} See, e.g., Bauer et al., supra note 6, at 259-60.
\textsuperscript{11} See, e.g., Andersen et al., supra note 8, at 22.
\textsuperscript{12} Paul Gendreau et al., \textit{Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement}, 79 J. ABNORMAL PSYCHOL. 54, 57-58 (1972).
\textsuperscript{13} Id.
\textsuperscript{15} Formerly termed “Mental Retardation,” this condition is defined as “a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains.” \textit{AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS} 33 (5th ed. 2013).
\textsuperscript{16} The Substance Abuse and Mental Health Services Administration (SAMSHA) describes “serious mental illness” as a condition that affects “persons aged 18 or older who currently or at any time in the past year have had a diagnosable mental, behavioral, or emotional disorder (excluding developmental and substance use disorders),” that meets current “diagnostic criteria” in a fashion that “has resulted in serious functional impairment” and “substantially interferes with or limits one or more major life activities,” exclusive of “dementias and mental
the elderly; women who are pregnant, are postpartum, or recently had a miscarriage or a terminated pregnancy; and individuals whose medical conditions will be exacerbated by such confinement.

(2) Solitary confinement can be used only in exceptional cases as a measure of last resort, where less restrictive settings are insufficient, and for no longer than is necessary to address the specific reason for placement, typically not to exceed 15 consecutive days.

BACKGROUND

The Eighth Amendment

Solitary confinement is a form of punishment subject to scrutiny under the Eighth Amendment.18 “The Eighth Amendment . . . prohibits the infliction of ‘cruel and unusual punishments’ on those convicted of crimes.”19 At its core, the Eighth Amendment limits the extent to which the government can punish its prisoners.20 In Furman v. Georgia, the U.S. Supreme Court set forth four principles for determining whether a particular punishment is “cruel and unusual”: (1) a punishment that by its severity is degrading to human dignity; (2) a severe punishment that is obviously inflicted in wholly arbitrary fashion”; (3) a severe punishment that is clearly and totally rejected throughout society; and (4) a severe punishment that is patently unnecessary.21 Punishments that are barbaric or torturous,22 “involve the unnecessary and wanton infliction of pain,”23 or are “grossly disproportionate to the severity of the crime”24 violate the Eighth Amendment.

The Eighth Amendment mandates that corrections officials provide “humane conditions of confinement” for prisoners.”25 They must ensure that prisoners receive adequate food, clothing, shelter, and medical care, as well as take reasonable measures to guarantee prisoners’ safety.26 Successful Eighth Amendment claims have typically involved prison officials’ direct action or inaction, such as denying prisoners medical care,27 or depriving them of their basic human


17 Defined as individuals age 65 or older.
18 Hutto v. Finney, 437 U.S. 678, 685 (ruling that “[c]onfinement in . . . an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.”).
19 Wilson v. Seiter, 501 U.S. 294, 296-97 (1991) (internal quotation marks omitted). Prior to conviction, persons who are held pending trial may seek relief under the Fourteenth Amendment to the U.S. Constitution.
20 Under the Fourteenth Amendment, the Eighth Amendment protections against the federal government apply to the state governments. Robinson v. California, 370 U.S. 660 (1962).
21 408 U.S. 238, 281 (1972).
22 In re Kemmler, 136 U.S. 436 (1890).
needs, or “the minimal civilized measure of life’s necessities,” rather than an overall challenge to general penal practices, such as solitary confinement. Several federal courts have ruled that certain segregation practices—those limited to the isolation of incarcerated individuals who have serious preexisting mental illness or are prone to suffer severe mental injury—violate the Eighth Amendment.

The Supreme Court—At the Brink of Decision

To date, the U.S. Supreme Court has yet to rule that solitary confinement is unconstitutional, but it may be on the brink of a decision. As early as 1890 the Court recognized that, even for prisoners sentenced to death, solitary confinement bears “a further terror and peculiar mark of infamy.” The Court ruled that a Colorado statute specifying solitary confinement prior to execution was unconstitutional under ex post facto prohibition. The Court found in that context that “the solitary confinement . . . was an additional punishment of the most important and painful character, and therefore is forbidden.”

The Court recounted that in the 1700s some states erected solitary prisons where prisoners were confined in a cell and completely isolated, having “no direct intercourse with or sight of any human being.” However, serious objections emerged:

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal

29 Id. at 347.
30 Vera Institute of Justice, supra note 2, at 10.
32 In re Medley, 134 U.S. 160, 170 (1890).
33 Id. at 171.
34 Id. at 168.
better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. 35

Accordingly, solitary confinement was found to be too severe, and changes were made in the prison system.

In 2005, the Supreme Court in Wilkinson v. Austin held that prisoners at the Ohio State Penitentiary (OSP) have a liberty interest in avoiding the harsh and restrictive conditions at the state’s so-called supermax facility. 36 Although the Court found Ohio’s policy to offer sufficient procedural protections under the Due Process Clause, 37 Wilkinson stands for the proposition that where the conditions of solitary are atypical and significant in relation to the ordinary incidents of prison life, 38 due process requires that prisoners be afforded adequate procedural protections prior to placement in solitary and periodic reviews to determine if continued placement is justified.

The Court found that assignment to OSP “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” 39 Almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; cell lights may be dimmed, but are on for 24 hours; and inmates exercise only one hour per day in a small indoor room. These conditions likely would apply to most solitary confinement facilities, except for the especially severe limitations on all human contact; the fact that OSP placement is indefinite and after an initial 30-day review, is reviewed just annually; and the fact that placement disqualifies an otherwise eligible inmate for parole consideration.

Since Wilkinson, courts have found that prisoners have a constitutionally protected interest in avoiding the aforementioned harms of solitary confinement and have examined state policies to determine whether they provide procedural protections consistent with due process. 40 Such decisions call into question policies mandating the automatic placement of prisoners into solitary confinement without an individualized assessment as to security risk, or other factors justifying placement in the highly restrictive conditions of solitary confinement.

The Court almost had a chance recently to rule directly on the constitutional sufficiency of solitary confinement, in the case of Prieto v. Clarke. Alfredo Prieto, convicted of two capital murders in 1988 and another in 1990, had convinced a federal district court that the circumstances of his housing on Virginia’s death row, involving housing in a separate single cell with restricted visitation and recreation, were “uniquely severe,” such that the Virginia prison system either had to improve his conditions of confinement or afford him “an individualized classification determination” similar to those for noncapital offenders. 41

35 Id.
37 Id. at 230.
38 Id. at 222-23 (quoting Sandin v. Conner, 515 U.S. 472, 484 (1995)).
40 See, e.g., Williams v. Secretary, Pa. Dep’t of Corrs., 848 F.3d 549 (3d Cir. 2017); Shoats v. Horn, 213 F.3d 140 (3d Cir. 2000).
When the case was taken by prison officials to the Fourth Circuit Court of Appeals, Prieto’s brief victory was overturned. The appellate court reasoned that because “[a] written Virginia policy requires all capital offenders to be housed on death row prior to execution, without any possibility of reclassification,” there could be no “expectation or right on the part of Virginia capital offenders to any other housing assignment.”

Prieto gave every appearance of being a case that at least two justices were eager to hear. However, Prieto turned out not to be the case by which solitary confinement jurisprudence would be advanced—in one direction or the other. The appellant was executed before this matter could be heard, and the Court dismissed the petition for certiorari as moot. With this much advance interest having been telegraphed by two justices, it is just a matter of time before a similar matter will be considered.

In a recent concurring opinion in Davis v. Ayala, Justice Anthony Kennedy was moved to respond “only to one factual circumstance, mentioned at oral argument but with no direct bearing on the precise legal questions presented by this case.” He took that opportunity to cite numerous learned treatises as a preface to opining:

These are but a few examples of the expert scholarship that, along with continued attention from the legal community, no doubt will aid in the consideration of the many issues solitary confinement presents. And consideration of these issues is needed. Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price. In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.

Justice Kennedy’s pronouncement occurred on the heels of a dissent by Justice Stephen Breyer in Glossip v. Gross, asserting that “given the negative effects of confinement and uncertainty, it is not surprising that many inmates volunteer to be executed, abandoning further appeals,” and referred in particular to “the dehumanizing effect of solitary confinement.”

In Ruiz v. Texas, Justice Breyer dissented from the Court’s refusal to issue a stay of execution for Rolando Ruiz, finding Ruiz’s claim—that his execution would violate the Eighth Amendment because it would follow 20 years spent in solitary confinement—“a strong one.” Breyer called on this Court to determine “whether extended solitary confinement survives Eighth Amendment scrutiny.” He noted that Ruiz had developed symptoms long associated with solitary confinement, namely severe anxiety and depression, suicidal thoughts, hallucinations,

42 80 F.3d 245, 252 (4th Cir. 2015).
45 Id. at 2210 (citation omitted).
disorientation, memory loss, and sleep difficulty. “If extended solitary confinement alone raises serious constitutional questions,” Breyer concluded, “then 20 years of solitary confinement, all the while under threat of execution, must raise similar questions, and to a rare degree, and with particular intensity.”48

BUILDING ON ABA POLICY

The ABA has long been committed to promoting a criminal justice system, including humane and safe prisons, that reflects American values. It shares a growing concern over what has become the prolonged solitary confinement instituted in federal and state prisons and jails. In February 2010, a set of ABA Standards for Criminal Justice on the Treatment of Prisoners was approved by the ABA House of Delegates. The standards regarding solitary confinement center around a core ideal: “Segregated housing should be for the briefest term and under the least restrictive conditions practicable and consistent with the rationale for placement and with the progress achieved by the prisoner.”49

Based on the widespread use of solitary confinement, its physiological and psychological harmful effects, case law, and the national call for reform, this resolution goes beyond these standards. It restricts the use of solitary confinement to exceptional cases as a measure of last resort, where less restrictive settings are insufficient, and for no longer than is necessary to address the specific reason for placement, typically not to exceed 15 consecutive days.

This resolution is in agreement with the National Commission on Correctional Health Care (NCCHC) offered a position statement on “Solitary Confinement (Isolation)” that delineated the following principles50 as a means to “guide correctional health professionals in addressing issues about solitary confinement”:

(1) Prolonged (greater than 15 consecutive days) solitary confinement is cruel, inhumane, and degrading treatment, and harmful to an individual’s health.

(5) Solitary confinement as an administrative method of maintaining security should be used only as an exceptional measure when other, less restrictive options are not available, and then for the shortest time possible. Solitary confinement should never exceed 15 days. In those rare cases where longer isolation is required to protect the safety of staff and/or other inmates, more humane conditions of confinement need to be utilized.

This resolution is also in agreement with the United Nations’ Mandela Rules:

48 Id. at 1247.
108A

Rule 45

(1) Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner’s sentence.  

An additional source of support for this resolution is the U.S. Department of Justice’s 2016 Report and Recommendations Concerning the Use of Restrictive Housing, which concludes:

[There are occasions when correctional officials have no choice but to segregate inmates from the general population, typically when it is the only way to ensure the safety of inmates, staff, and the public and the orderly operation of the facility. But as a matter of policy, we believe strongly this practice should be used rarely, applied fairly, and subjected to reasonable constraints. The Department believes that best practices include housing inmates in the least restrictive settings necessary to ensure their own safety, as well as the safety of staff, other inmates, and the public; and ensuring that restrictions on an inmate’s housing serve a specific penological purpose and are imposed for no longer than necessary to achieve that purpose.]

Further, the ABA Criminal Justice Standards on Mental Health provide that “segregated housing of persons with mental disorder should only occur under the circumstances defined in Standard 23-2.8, of corresponding ABA Standards for Criminal Justice on the Treatment of Prisoners. The latter Standards provide, among other things, that: “(a) No prisoner diagnosed with serious mental illness should be placed in long-term segregated housing.” Based on scientific research documenting the psychological harms caused by solitary confinement, federal case law finding that placing people with serious mental illness into solitary confinement constitutes cruel and unusual punishment, settlements, state law, and the recommendations of numerous professional organizations discussed below, this resolution urges the prohibition of solitary confinement for persons with serious mental illness.

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53 Adopted in August 2016, these Standards were adopted to supplant the Third Edition (August 1984) of the ABA Criminal Justice Mental Health Standards, and are found at file:///C:/Users/allbriga/AppData/Local/Microsoft/Windows/Temporary%20Internet%20Files/Content.IE5/00VS4K39/mental_health_standards_2016.authcheckdam.pdf.
54 Id., at Standard 7-10.1(c) (“Services for people with mental disorder”).
56 See footnote 28.
In 2014, Colorado Governor John Hickenlooper signed Senate Bill 14-064,280, which prohibits the placement of seriously mentally ill prisoners (SMI) in “long-term isolated confinement except when exigent circumstances are present.”\(^{57}\) Nebraska law requires individuals with serious mental illness who present a high risk to others or to self and require residential mental health treatment to be housed in Secure Mental Health housing.\(^{58}\) In January 2016, a settlement was reached in a long-running class-action lawsuit brought by the ACLU of Indiana and the Indiana Protection and Advocacy Services Commission against the Indiana Department of Correction. The settlement prohibits the placement of a seriously mentally ill prisoner into solitary confinement.\(^{59}\) In December 2015, the Uptown People’s Law Center announced a landmark settlement in \textit{Rasho v. Baldwin}, a class action lawsuit against the Illinois Department of Corrections, that provides for the removal of prisoners with serious mental illnesses from solitary confinement.\(^{60}\)

The American Psychiatric Association maintains that “prolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential for harm to such inmates.”\(^{61}\) In addition, in its 2016 \textit{Report and Recommendations Concerning the Use of Restrictive Housing}, the Justice Department recommends that “[g]enerally, inmates with serious mental illness (SMI) should not be placed in restrictive housing.”\(^{62}\) NCCHC lists as one of principles that mentally ill individuals should be excluded from solitary confinement of any duration.\(^{63}\) In addition, Mandela Rule 45(2) states:

\begin{quote}
The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice continues to apply.\(^{64}\)
\end{quote}

In addition to inmates with serious mental illness, this resolution urges that solitary confinement be prohibited for individuals with Intellectual Disability; the elderly; women who are pregnant, are postpartum, or recently had a miscarriage or a terminated pregnancy; and individuals whose medical conditions will be exacerbated by such confinement. Because of its adverse psychological effects, a 2017 report by the Human Rights Clinic at the University of Texas

\(^{57}\) COLO. REV. STAT. § 17-1-113.8 (2014).
\(^{60}\) \textit{Id.} See also https://www.illinois.gov/IISNews/15-1093-IDOC_Reaches_Agreement_in_Rasho_v_John_Baldwin.pdf.
\(^{62}\) U.S. DEP’T OF JUST., supra note 52, at 99.
\(^{63}\) http://www.ncchc.org/solitary-confinement.
School of Law recommends that Texas should entirely ban the use of solitary confinement for inmates with mental illnesses or intellectual disabilities.65

Often, pregnant women in solitary confinement receive no medical care. The Justice Department recommends that generally women who are pregnant, post-partum or recently had a miscarriage or a terminated pregnancy should not be placed in restrictive housing.66 NCCHC also recommends that pregnant women should be excluded from solitary confinement of any duration.67 Mandela Rule 45(2) provides that the imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures.68

CONCLUSION

No consensus exists for outright abolition of solitary confinement—given, in particular, the need for temporary segregation under emergent circumstances—but prolonged, retributive, and arbitrary uses are clearly inappropriate and merit corrective intervention on the part of federal, state, local, territorial and tribal legislative bodies and governmental agencies. Based on the proposed reforms discussed in this report, this resolution urges the adoption of two overarching principles: (1) to limit the use of solitary confinement to exceptional cases as a measure of last resort, where less restrictive settings are insufficient, and for no longer than necessary to address the specific reason for placement, typically not to exceed 15 consecutive days, and (2) to prohibit solitary confinement altogether for individuals with Intellectual Disability or serious mental illness; the elderly; women who are pregnant, are postpartum, or recently had a miscarriage or a terminated pregnancy; and individuals whose medical conditions will be exacerbated by such confinement.

Respectfully submitted,
Morris “Sandy” Weinberg
Chair, Criminal Justice Section
February, 2018

65 HUMAN RIGHTS CLINIC, UNIVERSITY OF TEXAS SCHOOL OF LAW, DESIGNED TO BREAK YOU: HUMAN RIGHTS VIOLATIONS ON TEXAS’ DEATH ROW 9, 49 (Apr. 2017), file:///C:/Users/allbriga/AppData/Local/Microsoft/Windows/Temporary%20Internet%20Files/Content.IE5/7NNO10PF/2017-HRC-DesignedToBreakYou-Report.pdf.
66 U.S. DEP’T OF JUST., supra note 52, at 102, 114-15.
1. **Summary of Resolution(s).**
The resolution urges all federal, state, local, territorial, and tribal legislative bodies and governmental agencies to enact laws and adopt policies regarding the use of solitary confinement for detainees according to the following:

1. Solitary confinement (also referred to as “segregation” or “restrictive housing”) is prohibited for individuals with Intellectual Disability or serious mental illness; the elderly; women who are pregnant, are postpartum, or recently had a miscarriage or a terminated pregnancy; and individuals whose medical conditions will be exacerbated by such confinement; and

2. Solitary confinement should be used only in exceptional cases as a measure of last resort, where less restrictive settings are insufficient, and for no longer than is necessary to address the specific reason for placement, typically not to exceed 15 consecutive days.

2. **Approval by Submitting Entity.** This resolution was passed by the Criminal Justice Council at the Fall Council Meeting in November 2017, and by the Commission on Disability Rights at its Fall Meeting in October 2017.

3. **Has this or a similar resolution been submitted to the House or Board previously?**
Yes, in 2017, the ABA adopted a resolution urging “federal, state, local, territorial and tribal legislative bodies and governmental agencies to enact laws and adopt policies prohibiting the use of solitary confinement – the involuntary placement alone in a cell, room or other area for any reason other than as a temporary response to behavior that threatens immediate harm and ends when the threat is over and, in no case, more than 4 hours - of children and youth under age 18.” This resolution would build on this existing policy by addressing solitary confinement of adult detainees.

4. **What existing Association policies are relevant to this Resolution, and how would they be affected by its adoption?**
In February 2010, a set of ABA *Standards for Criminal Justice on the Treatment of Prisoners* was approved by the ABA House of Delegates. The standards regarding solitary confinement center around a core ideal: “Segregated housing should be for the briefest term and under the least restrictive conditions practicable and consistent with the rationale for placement and with the progress achieved by the prisoner.” Further, the ABA *Criminal Justice Standards on Mental Health* provide that “segregated housing of persons with mental disorder should only occur under the circumstances defined in Standard 23-2.8” of corresponding *ABA Standards for Criminal Justice on the Treatment of Prisoners*, which
provide, among other things, that: “(a) No prisoner diagnosed with serious mental illness should be placed in long-term segregated housing.”

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.
Adoption of the policy will allow the ABA to support efforts in all branches of government that are working to end the practice of excessive solitary confinement of adult detainees.

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

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:

- Section of Civil Rights and Social Justice
- Health Law Section
- Section of International Law Government and Public Sector
- Section of Litigation
- Section of Science & Technology Law
- Law Practice Division
- Lawyers Division
- Solo, Small Firm and General Practice Division
- Commission on Hispanic Legal Rights and Responsibilities
- Commission on Homelessness & Poverty
- Commission on Immigration
- Commission on Racial & Ethnic Diversity in the Profession
- Center for Human Rights
- Coalition on Racial & Ethnic Justice
- Standing Committee on Legal Aid and Indigent Defendants
- Standing Committee on Federal Judiciary
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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The resolution urges all federal, state, local, territorial, and tribal legislative bodies and governmental agencies to enact laws and adopt policies regarding the use of solitary confinement for detainees according to the following:

   1. Solitary confinement (also referred to as “segregation” or “restrictive housing”) is prohibited for individuals with Intellectual Disability or serious mental illness; the elderly; women who are pregnant, are postpartum, or recently had a miscarriage or a terminated pregnancy; and individuals whose medical conditions will be exacerbated by such confinement; and

   2. Solitary confinement should be used only in exceptional cases as a measure of last resort, where less restrictive settings are insufficient, and for no longer than is necessary to address the specific reason for placement, typically not to exceed 15 consecutive days.

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

   Concern over the circumstances under which adult detainees are held in locked facilities has been evident for years to the point where a variety of legal, social scientific, and other sources have weighed in on this issue and its deleterious impact on incarcerated persons. Various entities assert that the use of this practice violates the Eighth Amendment proscription against cruel and unusual punishment.

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

   The proposed position will allow lawyers and the ABA to continue to work with other jurisdictional officials to curtail unacceptable solitary confinement practices in all correctional facilities.

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 urges federal, state, local, territorial, and tribal legislatures to enact legislation creating a substantive right and procedures for individuals to challenge their convictions by demonstrating that forensic evidence used to obtain their convictions has been undermined or discredited by verified, accepted, and credible scientific research or technological advances.
REPORT

I. Summary

This resolution calls for jurisdictions to enact legislation that would create a mechanism for people to prove their innocence when the non-DNA forensic science used to convict has subsequently been undermined or discredited.

II. Introduction

The power of DNA evidence to exonerate is well known and undisputed. All fifty states have a law in place that provides some means of challenging convictions based on DNA evidence.1 Less well known and understood, but just as serious a problem, are wrongful convictions based on the misapplication of non-DNA forensic techniques and expert testimony that overstates the probative value of the results of DNA forensic testing and analysis. Subsequent scientific research and technological advances have circumscribed the use of certain kinds of forensic evidence, and some forensic techniques are no longer used because they have been found to lack scientific validity.2 Jurisdictions must provide a remedy for prisoners facing convictions based on invalid scientific testimony where no DNA evidence is available to test. Such a law is necessary to create a vehicle for relief for wrongfully convicted people who would otherwise be time-barred or face extreme delays under existing post-conviction relief laws or narrowly drawn newly discovered evidence laws. Legislation to challenge a conviction based on a “change in science” is an opportunity to correct the harm imposed on the wrongfully convicted and the public, thereby maintaining integrity and public trust in the criminal justice system. In some instances, the revelation of the wrongful conviction might also lead to the detection of the actual perpetrator of the crime.

The ABA has a number of policies concerning forensic science, including accreditation of forensic science training programs,3 funding for crime laboratories,4 creating a code of ethics for forensic scientists,5 and encouraging prosecutors to educate their offices as to the weaknesses of certain forensic evidence.6 Most relevant to this resolution is 2017 MY 112A,7 which urges the United States Department of Justice to continue its accuracy and quality assurance efforts in the area of microscopic hair analysis and urges prosecutors, similarly, to commit to a timely review of all cases in which such erroneous expert testimony was used and to consider adopting the Department of Justice’s policy. This resolution would continue the ABA’s long-standing position on encouraging

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1 See e.g. Va. Code Ann. § 8.01-654 (West); See also Fla. R. Crim. P. 3.853.
3 2004 AY 111B.
4 2010 AY 100D.
5 2010 AY 100E.
6 2012 AY 107B.
7 2017 MY 112A.
accuracy and credibility in the forensic science field, and in ensuring that those with legitimate claims of innocence are given a legal mechanism to challenge those convictions.

III. The Problem

In 2009, the National Academy of Sciences released a report which called into question the scientific validity of many forensic techniques. The authors stated that the “law's greatest dilemma in its heavy reliance on forensic evidence . . . concerns the question of whether--and to what extent--there is science in any given ‘forensic science’ discipline.” This report examined many discredited forensic methods that are still widely in use, such as analysis of burn patterns in arson investigations to determine whether an accelerant was used.\(^8\) It also expressed concerns over the lack of uniform standards within other forensic disciplines and the lack of uniform certification of forensic examiners.\(^9\)

The FBI has recognized the duty to correct and notify when forensic testimony of its agent examiners has later been proven to have been based on scientifically flawed assumptions or exceeded the proper scientific limitations.\(^10\) Specifically after an NRC study on Composite Bullet Lead Analysis established that the Bureau had made faulty assumptions about what conclusions could be drawn based on the chemical content of bullets,\(^11,12\) it agreed to re-examine thousands of cases with the Innocence Project and the National Association of Criminal Defense lawyers and to notify courts, prosecutors, defense lawyers, and defendants about testimony that exceeded the limits of science. Similarly, the Bureau agreed to review microscopic hair comparison testimony from agent examiners with the Innocence Project and NACDL and notify the affected parties of erroneous testimony and reports.\(^13\) Most importantly, the Justice Department specifically agreed to waive all procedural objections it might raise in federal court to having post-conviction courts review the significance of those errors and further agreed to perform mitochondrial DNA testing on hairs at no charge.\(^14\) The Bureau urged state prosecutors to forgo procedural bar objections in state cases where FBI examiners offered hair testimony that exceeded the limits of science and urged states who relied on hair

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8 Strengthening Forensic Science in the United States: A Path Forward, Committee on Identifying the
Needs of the Forensic Sciences Community, National Research Council (2009)
9 Id.
10 FBI/DOJ Microscopic Hair Comparison Analysis Review,
bullet-lead-examinations.
14 FBI Notification to Prosecutors letter – redacted August 2013 version (received via email).
examiners trained by the FBI to conduct similar reviews. In short, leaders in the forensic science community recognize the duty to correct and notify whenever forensic evidence that was used to convict has subsequently been undermined or discredited by scientific research or technological advances. It is important that state and federal law provide consistent avenues to make sure claims made on this basis can be adjudicated.

Laws governing an individual’s ability to challenge a conviction vary from state to state. With the exception of California and Texas, which now have clear procedures for challenging a conviction based on changes in science, most state laws have various procedural roadblocks to successfully challenging a conviction based on non-DNA scientific evidence, including changes in science. While challenges based on changes in science are, in theory, allowable in most states, petitioners often face insurmountable procedural bars to bringing such claims. For example, many states adhere to a strict statute of limitations for raising claims of newly discovered evidence. Unlike other forms of newly discovered evidence, it is extremely difficult to point to a specific date by which petitioner ought to have filed. Developments in science take decades, so petitioners are often time-barred from asserting such claims. Indigent incarcerated prisoners with no access to scientific journals should not be required to keep abreast of the latest scientific developments that may have some impact on their cases. This is still a problem even where there are theoretical dates to point to. For example, NFPA 921 was published in 1992, but it was not immediately accepted by fire investigators, and

15 Id.
16 A report from the President’s Council of Advisors on Science and Technology (PCAST), Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods, drew attention not only to flawed science, but also to flawed scientific testimony. Many forensic experts often overstated the probative value of their evidence, stating that they were “100% certain” of their findings. This is problematic for a number of reasons, particularly because no laboratory test can have a zero error rate. The report further highlighted this critical shortcoming of many forensic science techniques: lack of a known error rate. If a technique does not have an error rate, or an estimation of accuracy, the report considers it to have low probative or scientific value. This report has faced criticism from the prosecution bar for numerous reasons, including the lack of forensic practitioners consulted on the report, and the fact that it would deprive prosecutors and law enforcement of numerous investigative techniques. The fact remains, however, that when forensic techniques are discredited, a remedy must exist for those convicted using discredited forensic techniques, or through scientifically invalid testimony.
17 Assuring a Remedy For Defendants Whose Convictions Rest On Discredited Or Changing Forensic Techniques, The Innocence Project, Cardozo School of Law, Yeshiva University.
18 Senate Bill No. 1058; See http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1058
20 Id.
21 Assuring A Remedy For Defendants Whose Convictions Rest On Discredited Or Changing Forensic Techniques, The Innocence Project, Cardozo School of Law, Yeshiva University.
23 Id.
24 In a study conducted by Families Against Mandatory Minimums (FAMM) only 3% of inmates surveyed reported having access to a computer. See http://famm.org/wp-content/uploads/2017/05/Prison-Report_May-31_Final.pdf.
IV. Cases

Flawed forensic techniques have led to wrongful convictions in hundreds of cases. It was not until NFPA 921 gained acceptance in that community that arson convictions started to get overturned. Additionally, many states require that newly discovered evidence prove actual innocence, and not be “merely impeaching.” This poses a challenge to petitioners because changes in science are introduced to discredit expert testimony at trial, and are viewed by many courts as simply impeachment evidence, not evidence of actual innocence.

a. Bite Mark Analysis

A recent example of a wrongful conviction based on discredited forensic techniques is the case of Keith Harward, who was convicted of the 1982 beating death of Jesse Perron and the repeated sexual assault of Perron’s wife, Teresa. The attacker had bitten Teresa.

Harward’s conviction hinged on an eyewitness identification and the testimony of a bite mark expert who told the jury that there was a “very, very, very, very high degree of probability” that Harward’s teeth matched the bite marks on Teresa’s body and that it was a “practical impossibility” that it was anyone else.

26 Id.
27 Id.
28 Id.
33 Clanitra Stewart Nejdl & Karl Pettitt, Wrongful Convictions and Their Causes: An Annotated Bibliography, 37 N. Ill. U. L. Rev. 401 (2017); See also ABA Report No. 112A (Midyear 2017).
35 Id.
In 2015, Harward’s attorneys were able to have the blood and semen recovered from the crime scene subjected to DNA testing. The results excluded Harward and matched another man named Jerry Crotty, who had died in prison years earlier after committing multiple serious felonies. Harward was released in 2016 after the prosecution acknowledged that he was factually innocent.36

Had the DNA evidence in Harward’s case been destroyed, or, as is often the case, had there been no DNA evidence at all, Harward would in all likelihood still be in prison serving out his life sentence.

Bite mark evidence has been widely discredited.37 But Virginia, like most states, has no statute that would have allowed Harward to go back to court to challenge his conviction on the basis of a “change in science”—that is, a consensus in the scientific community that bite mark testing and testimony has no scientific validity and therefore no probative value.38

b. Discredited Arson Techniques

Many investigative techniques for arson have been discredited in recent years. In 1992, the National Fire Protection Association (NFPA) published a “Guide for Fire and Explosive Investigation.”39 This resource found no scientific validity for many investigative techniques commonly used both in criminal investigations and at trial to prove fires were of an incendiary origin.40 Since 1989, there have been 22 exonerations in which defendants were cleared because new scientific evidence has undermined earlier findings of arson—8 arson convictions and 14 arson-murder convictions.41

These flawed methods have led to convictions for arson in cases of accidental fires. In 1992, Cameron Todd Willingham’s three children were killed in a home fire.42

36 Id.
37 Presidential Council of Advisors on Science and Technology (PCAST) Report (September 2016) p. 87, “Few empirical studies have been undertaken to study the ability of examiners to accurately identify the source of a bitemark. Among those studies that have been undertaken, the observed false positive rates were so high that the method is clearly scientifically unreliable at present.”
38 In Virginia, convicted prisoners can prove their innocence only by filing an appeal within 21 days of his conviction, a habeas petition within one year after the denial of the direct appeal, or by seeking a writ of actual innocence by proving that they “did not, as a matter of fact, commit the crimes for which they were convicted.” 
Carpitcher v. Commonwealth, 273 Va., 335, 345 (2007). Harward was time-barred from pursuing the first two remedies and could not have conclusively proved his innocence “as a matter of fact” based on a challenge to the bite mark evidence.
40 Id.
42 David Grann, Trial By Fire, The New Yorker (2009)
Willingham was convicted of intentionally setting this fire based on now-debunked arson expert testimony about burn pattern analysis,\textsuperscript{43} alligatoring,\textsuperscript{44} and crazed glass.\textsuperscript{45} Willingham was executed by lethal injection in 2004. Experts in the field essentially are in agreement that Willingham was convicted and killed based on science that has since been completely invalidated.\textsuperscript{46}

\textbf{V. Recent Developments}

These are just two highly publicized examples. In Virginia alone, post-conviction DNA testing has led to the exoneration of nine other men whose cases were affected by flawed forensic testimony, including false serology testimony and discredited hair testimony.\textsuperscript{47} These exonerations underscore the necessity of enacting legislation that allows wrongfully convicted people a means of proving their innocence on the basis of changes in forensic science that contradict or undermine the forensic evidence introduced by the prosecution at trial or to obtain a guilty plea.

Support for change-in-science legislation exists across partisan lines. Change in science statutes have been enacted in California, where the legislature is controlled by Democrats, and in Texas, where the legislature is controlled by Republicans.\textsuperscript{48} Currently, the American Legislative Exchange Council (ALEC), a non-profit organization that writes model legislation on a number of issues and usually stakes out right-of-center positions,\textsuperscript{49} has a model change-in-science bill posted to its website and has actively encouraged states to adopt some version of it.\textsuperscript{50}

\textbf{VI. Conclusion}

In the majority of states, men and women whose convictions rest on forensic testimony that has, decades later, been proved faulty or false have no means of challenging their convictions. Traditional remedies such as post-conviction relief acts or habeas corpus...

\textsuperscript{48}California Penal Code section 1473(b)(1), (e); Texas Code of Criminal Procedure Art. 11.073.
statutes are insufficient, because the defendant is almost always time-barred. By enacting “change in science” legislation, states can remedy this problem and provide wrongfully convicted people a way of proving their innocence. The benefit inures not only to the exoneree, it is also a crucial means of ensuring the integrity of the criminal justice system.

For all of these reasons, the Criminal Justice Section recommend that the ABA House of Delegates adopt this resolution.

Respectfully submitted,

Morris “Sandy” Weinberg
Chair, Criminal Justice Section
February, 2018
108B

GENERAL INFORMATION FORM

Submitting Entity:  Criminal Justice Section
Submitted By:  Sandy Weinberg, Chair

1. Summary of Resolution(s).

This resolution calls for jurisdictions to enact legislation that would create a mechanism for people to prove their innocence when the non-DNA forensic science used to convict has subsequently been undermined or discredited.

2. Approval by Submitting Entity.

This resolution was passed by the Criminal Justice Council at the Fall meeting in Washington, DC, in (November, 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?

The ABA has a number of policies concerning forensic science, including accreditation of forensic science training programs,\(^{51}\) funding for crime laboratories,\(^{52}\) creating a code of ethics for forensic scientists,\(^{53}\) and encouraging prosecutors to educate their offices as to the weaknesses of certain forensic evidence.\(^{54}\) Most relevant to this resolution is 2017 MY 112A,\(^{55}\) which urges the United States Department of Justice to continue its accuracy and quality assurance efforts in the area of microscopic hair analysis and urges prosecutors, similarly, to commit to a timely review of all cases in which such erroneous expert testimony was used and to consider adopting the Department of Justice’s policy. This resolution would continue the ABA’s long-standing position on encouraging accuracy and credibility in the forensic science field, and in ensuring that those with legitimate claims of innocence are given a legal mechanism to challenge those convictions.

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

N/A

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\(^{51}\) 2004 AY 111B.
\(^{52}\) 2010 AY 100D.
\(^{53}\) 2010 AY 100E.
\(^{54}\) 2012 AY 107B.
\(^{55}\) 2017 MY 112A.
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, if adopted, would be used by ABA Governmental Affairs to advocate on behalf of change in science laws on the federal and state level. It would also be a valuable resource for appellate and habeas practitioners challenging convictions based on recently debunked forensic evidence, as well as judges making determinations regarding new trials or evidentiary hearings for habeas petitioners.

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

N/A

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

N/A

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:

    - Standing Committee on Legal Aid & Indigent Defense
    - Commission on Disability Rights
    - Special Committee on Hispanic Legal Rights & Responsibilities
    - Commission on Homelessness and Poverty
    - Center for Human Rights
    - Coalition on Racial & Ethnic Justice
    - Commission on Youth at Risk
    - Young Lawyer’s Division
    - Section of Civil Rights and Social Justice
    - Government and Public Sector Lawyers Division
    - Judicial Division
    - Law Practice Division
    - Section of Science & Technology
    - Section of Litigation
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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    T: 305-358-2000  
    Cell: 305-333-5444  
    E: nrslaw@sonnett.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

This resolution calls for jurisdictions to enact legislation that would create a mechanism for people to prove their innocence when the non-DNA forensic science used to convict has subsequently been undermined or discredited.

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

Technological advances in forensic science have circumscribed the use of certain kinds of forensic evidence, and some forensic techniques are no longer used because they have been found to lack scientific validity. Jurisdictions must provide a remedy for prisoners facing convictions based on invalid scientific testimony where no DNA evidence is available to test. Such a law is necessary to create a vehicle for relief for wrongfully convicted people who would otherwise be time-barred or face extreme delays under existing post-conviction relief laws or narrowly drawn newly discovered evidence laws.

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

This resolution calls for jurisdictions to enact legislation that would create a mechanism for people to prove their innocence when the non-DNA forensic science used to convict has subsequently been undermined or discredited.

Legislation to challenge a conviction based on a “change in science” is an opportunity to correct the harm imposed on the wrongfully convicted and the public, thereby maintaining integrity and public trust in the criminal justice system. In some instances, the revelation of the wrongful conviction might also lead to the detection of the actual perpetrator of the crime.

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

N/A.
RESOLVED, That the American Bar Association urges the United States Department of Justice to reconsider the guidelines contained in its May 10, 2017 Memorandum regarding charging and sentencing policies and to utilize the *ABA Standards on the Prosecution Function (2015)* in revising the guidelines;

FURTHER RESOLVED, That all prosecuting authorities should adopt and pursue charging policies that are consistent with the *ABA Standards on the Prosecution Function (2015)*; assess each case individually to determine whether, under the totality of the circumstances, charging the most serious, readily provable offense is likely to achieve justice in the individual case; prohibit filing of charges and recidivist enhancements simply to exert leverage to induce a guilty plea, and prohibit seeking mandatory minimum sentences unless required by law or justified by such factors as: a defendant’s leadership role in the offense, use or threat of violence, significant criminal history, ties to large-scale criminal organizations or serious victim injury.
I. Introduction

For nearly 50 years the American Bar Association has opposed mandatory minimum sentencing.1 Indeed, the ABA reiterated that position at this year’s Annual Meeting.2 Mandatory minimum sentencing laws nevertheless remain a feature of the federal and many state criminal codes. A need and opportunity therefore exists for the ABA to express a view on how prosecutors should exercise discretion, where it exists, regarding the use of such statutes.

Although the resolution covers all prosecuting authorities, it is not feasible to examine the policies that have been adopted in the thousands of state and local prosecuting offices. It is possible, however, to examine the developments in the United States Department of Justice over more than three decades and to draw lessons about how overly rigid policies can result in mass incarceration and sentences that are more severe than warranted by many offenses and offenders. This examination might be a cautionary tale to be carefully considered by prosecution offices throughout the country.

On May 10, 2017, Attorney General Jeff Sessions issued a two-page memorandum to federal prosecutors that significantly revised charging and sentencing policy for the Department of Justice (“Sessions Memo”). It directs that federal prosecutors should "charge and pursue the most serious, readily provable offense." The memorandum identifies as “most serious” that offense carrying “the most substantial guidelines sentence, including mandatory minimum sentences.” The memorandum permits deviation from charging the most serious readily provable offense in the “good judgment” of prosecutors and their supervisors when there are “unusual facts.” The Sessions Memo also directs prosecutors to obtain supervisory approval to vary from recommending a sentence within the guidelines range, state reasons for doing so in the file, disclose to the court all facts that impact the guidelines calculation or mandatory minimum sentence. The memorandum also announces that “[a]ny inconsistent previous policy of the Department of Justice relating to these matters is rescinded.” The Sessions Memo thus explicitly repeals the limitations on the uses of mandatory minimums and other charging reforms enacted during the previous administration. The Sessions Memo directs an increased use of mandatory minimum sentences for low level and nonviolent drug offenders and will almost certainly lead to a further rise in the over-incarceration that has characterized the federal prison system for the past 25 years.

The May 10 memorandum is the last in a line of memoranda by a series of Attorneys General setting forth charging policy for federal prosecutors. It is inconsistent with longstanding ABA policies regarding mandatory minimum sentences and the recently adopted ABA Standards on the Prosecution Function (2015). It is useful to consider the fits and starts that have governed federal charging policies to understand why this latest

1 See notes 15-26, infra.
2 American Bar Association, Annual 2017 109B
memorandum from the Attorney General is a step backward from recent efforts to improve the federal criminal justice system.

II. The Sessions Memo is a Step Backwards in Criminal Justice Reform

The Sessions Memo, when viewed against the historical evolution of federal prosecutorial charging policies, is a regression in criminal justice reform. An understanding of this evolution is critical to appreciating the meaning and potential impact of the Sessions Memo.

In 1980, Attorney General Benjamin R. Civiletti promulgated the “Principles of Federal Prosecution” (“Principles”). These Principles instructed federal prosecutors how they should determine which charges to bring, when to plea bargain, and which sentences they should seek in court. These Principles were subsequently clarified by a series of memoranda by successive attorneys general—Thornburgh (1989), Reno (1994), Ashcroft (2003), Comey (Deputy Attorney General) (2005), Holder (2010, 2013 & 2014) and, recently, Sessions (2017).

A. Civiletti’s Principles of Prosecution (1980)

Civiletti’s Principles gave birth to the position that prosecutors should charge defendants with the most serious, readily provable offense. But, those principles also provided for flexibility in plea bargaining and, in the pre-guidelines era, limited prosecutorial input at sentencing. The Principles stated that, when plea bargaining, a prosecutor could bargain for a plea to a charged offense or a “lesser or related offense” that “bears a reasonable relationship to the nature and extent” of the defendant’s conduct. The Principles also provided that the prosecutor’s role in sentencing was “to assist the sentencing court” and that “sentencing in federal criminal cases is primarily the function and responsibility of the court.” Prosecutors were to “avoid routinely taking positions with respect to sentencing” and only authorized to recommend a specific sentence when it was required by the plea agreement or justified by some public interest concern.

In the limited instances when a prosecutor was authorized to recommend a sentence, the Principles instructed prosecutors to consider several factors including the defendant’s background, personal circumstance, cooperation, age, mental health, physical health, drug dependence, employment record, roots in the community, remorse or contrition, and acceptance of responsibility—even though many of these factors were “the very same factors that the Sentencing Commission declared, seven years later, were generally irrelevant in determining whether a court could depart from a guideline range in imposing sentence.”

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B. Thornburgh Memo (1989)

Under the 1989 memorandum issued by Attorney General Richard Thornburgh ("Thornburgh Memo"), prosecutors were again instructed to "initially charge the most serious, readily provable offense or offenses consistent with the defendant’s conduct." But, the Thornburgh Memo provided some additional flexibility with regard to plea bargaining. His memorandum directed prosecutors to plea bargain down from the most serious charges when the prosecutor believed that there was insufficient evidence to sustain those charges in court, when the indictment exaggerated the seriousness of the offense, when the applicable guidelines range would be unaffected, or when a supervisor approved the plea bargain "for reasons set forth in the file." Those reasons could be, for instance, "the U.S. Attorney’s Office was overburdened, the case would be time consuming to try, and proceeding to trial would significantly reduce the number of cases disposed of by the office." The Thornburgh Memo directed prosecutors to bargain for a sentence within the guidelines range, but it also authorized prosecutors to depart from the guidelines with supervisory approval or to recommend sentences at the low end of the guidelines range.

C. Reno Memo (1993)

The Thornburgh policies were clarified by Attorney General Janet Reno in 1993 ("Reno Memo"). In the Reno Memo, prosecutors were given additional flexibility to consider various subjective factors in determining charges and in plea-bargaining. The Reno Memo stated that "a faithful and honest application of the guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case.” This “individualized assessment” allowed prosecutors to determine when, for instance, the available charges were too severe for the facts of the particular offense conduct.

Mindful of the potential consequences at sentencing, the Reno Memo also instructed prosecutors to weigh such factors as “the Sentencing Guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant’s conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.” (Emphasis added.) Finally, in deciding whether to recommend a sentence, prosecutors were advised to consider whether that sentence was “proportional to the seriousness of the defendant’s conduct.”

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5 Memorandum from Attorney General Dick Thornburgh to all federal prosecutors on Plea Bargaining Under The Sentencing Reform Act (Mar. 13, 1989) ("Thornburgh Memo").

6 Vinegrad, supra note 6.


Attorney General John Ashcroft brought an end to much of the discretionary flexibility given to prosecutors by Reno, in his 2003 memorandum ("Ashcroft Memo"). The Ashcroft Memo stated that prosecutors “must” (as opposed to the “should” of past directives) charge the most serious, readily provable offense. Exceptions to this required supervisory approval were to be included in the file, in writing. The Ashcroft Memo also limited the prosecutors’ discretion in plea bargaining, authorizing plea agreements to less than the most serious offense in only narrow and limited circumstances such as when the lesser plea did not affect the sentencing guidelines range or when it was required to secure a defendant’s cooperation. The Ashcroft Memo dropped the flexibility given to prosecutors to strike a plea bargain based on an “individualized assessment” of the facts or based on the prosecutor’s determination that the indictment exaggerated the seriousness of the offense.

The Ashcroft Memo also took a more rigid stance toward sentencing, forbidding prosecutors from recommending a downward departure except in very limited circumstances. Moreover, prosecutors were instructed to “affirmatively oppose” any such request for a departure by a defendant and not “stand silent.”

E. Comey Memo (2005)

In 2005, the Supreme Court held that mandatory sentencing guidelines are unconstitutional and, thus, the guidelines were rendered advisory. United States v. Booker, 543 U.S. 220 (2005). Following Booker, Deputy Attorney General James B. Comey issued a memorandum that reiterated the hardline charging and plea-bargaining policies outlined in the Ashcroft Memo and that instructed prosecutors to “actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases” and that they “must take all steps necessary to ensure adherence to the Sentencing Guidelines.”

F. Holder Memos (2010, 2013, and 2014)

In 2010, Attorney General Eric Holder issued a memorandum that signaled a return to the more flexible pre-Ashcroft policies ("2010 Holder Memo"). For instance, the 2010 Holder Memo states that prosecutors “should ordinarily charge” the most serious readily provable offense and this decision “must always be made” based on an “individualized assessment” of the factors listed in the Reno Memo. In plea bargaining, the Holder memo also returned to the pre-Ashcroft prosecutorial discretion, noting that plea bargains

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8 Memorandum from Attorney General John Ashcroft to All Federal Prosecutors on Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003) ("Ashcroft Memo").
9 Memorandum from Deputy Attorney General James Comey, to All Federal Prosecutors on Departmental Policies and Procedures Concerning Sentencing (Jan. 28, 2005) ("Comey Memo").
10 Memorandum from Attorney General Eric H. Holder Jr. to All Federal Prosecutors on Department Policy on Charging and Sentencing (May 19, 2010) ("2010 Holder Memo").
should be “informed by an individualized assessment of the specific facts and circumstances of each particular case.” The 2010 Holder Memo also addressed the importance of the 18 U.S.C. § 3553 factors in sentencing and recognized that, in light of Booker, the guidelines were advisory. This Memo states that “given the advisory nature of the guidelines, advocacy at sentencing—like charging and plea agreements—must also follow from an individualized assessment of the facts and circumstances of each particular case.” The memo prohibited filing or dismissing charges to gain leverage in plea negotiations.

Three years later, in 2013, Holder issued a second memorandum on mandatory minimum sentences (“2013 Holder Memo”). This memo “refine[d]” the DOJ’s charging policy for crimes carrying a mandatory minimum sentence. He instructed that the most severe mandatory minimum sentences for drug offenses be reserved for “serious, high-level, or violent drug traffickers,” as long sentences for low level offenders have led to unduly harsh sentences that do not advance public safety, rehabilitation, or deterrence. The 2013 Holder Memo directed that such charges should not be brought for low-level drug offenders without significant ties to gangs; whose conduct did not involve violence, death or injury, the use of weapons, or involvement of minors; and where the defendant did not have a significant criminal history.

Prosecutors were also instructed to limit using severe mandatory minimum sentencing enhancements under 21 U.S.C. § 851 to only those defendants whose history or conduct made such increases appropriate.

In 2014, the Attorney General forbade prosecutors from threatening or imposing a so-called “trial penalty,” by manipulating severe mandatory minimum enhancements under 21 U.S.C. § 851 in plea negotiations. The need to secure a plea agreement was not, he said, an appropriate factor to be considered when determining whether to seek the recidivist enhancement which could double a five or ten-year sentence and result in a life sentence in certain cases.

At the time, Attorney General Holder endorsed a “fundamentally new approach” to incarceration. He criticized the war on drugs for its contribution to a prison population that had grown by almost 800 percent since 1980 and a country that incarcerates almost a quarter of the world’s prisoners, while representing only five percent of the world’s population. President Obama recognized that mandatory minimum sentencing of drug

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13 The total number of inmates under the Bureau of Prisons’ (BOP) jurisdiction increased from approximately 25,000 in FY1980 to over 205,000 in FY2015. Between FY1980 and FY2013, the federal prison population increased, on average, by approximately 5,900 inmates annually.
offenders was a “primary driver of this mass-incarceration phenomenon.” By avoiding charges that trigger mandatory minimums—where appropriate—the Holder Memo policies were intended to help mitigate the overpopulation of federal prisons that stemmed from the lengthy imprisonment of low-level, non-violent drug offenders and ensure charging practices advanced public safety and individual justice.

G. Sessions Memo

As noted above, in May 2017, Attorney General Sessions issued a memorandum to federal prosecutors that explicitly repealed the Holder reforms and returned prosecutorial charging and plea-bargaining policy to standards more similar to that of the Ashcroft regime. The Sessions Memo, like the memoranda of several previous attorneys general, states that prosecutors “should charge and pursue the most serious, readily provable offense” and returns to the use of mandatory minimums in all cases where they may be applicable in the absence of “unusual facts” and with supervisory approval.

Significantly, the Sessions Memo does provide greater prosecutorial discretion than the policies issued by Ashcroft and Comey. Whereas the Ashcroft Memo phrased the directive to pursue the most serious readily provable offense as a “must,” the Sessions Memo uses the word “should.” Exceptions to such charges under the Ashcroft Memo were limited to matters of caseload and expedience rather than an assessment of the facts of a case, whereas the Sessions Memo permits exceptions based “good judgment” or “unusual facts.” While the Comey Memo directed prosecutors to seek sentences within the range established by the Sentencing Guidelines in all but “extraordinary cases,” the Sessions Memo directs prosecutors to seek within range sentences “in most cases.” The Sessions Memo did not purport to rescind the guidance in the United States Attorneys Manual that prohibits the use of charges and recidivist enhancements to exert leverage to induce a guilty plea.

Although the Sessions Memo signals only a partial return to the policies dictated by Ashcroft, it explicitly rescinded the limitations on the uses of mandatory minimums and recidivist enhancements on low level and non-violent offenders. These limitations were the product of years of policy work and consultation by the Department of Justice with all stakeholders in the federal criminal justice system. The Sessions Memo and its rescission of these reforms took place swiftly and without input from stakeholders in the federal system or anyone else. No fact-based explanation for these changes has been offered, and no examples of under-punishment resulting from the previous policies have been cited.

II. Impact on Criminal Justice System – Reintroducing Mandatory Minimum Sentences & Over Incarceration

The Sessions Memo policies will effectively force prosecutors to charge all defendants, regardless of their criminal histories or personal circumstances, with the most serious crimes and to seek the lengthiest sentences available under the guidelines, including mandatory minimum sentences, unless a case presents “unusual facts.” These policies threaten to eradicate years of progress in criminal justice reform.

The Sessions Memo therefore presents the most recent action underscoring the real and pressing need for policies guiding prosecutors in the use of mandatory minimums where they exist. To understand the defects and dangers presented by mandatory minimums, a brief history is set forth below.

A. Longstanding ABA Policy Opposes Mandatory Minimum Sentencing

The ABA has opposed mandatory minimum sentencing—which it believes raises grave issues of public policy—for almost 50 years. All senses of “fairness, due process and the rule of law” require that criminal sentencing be uniform amongst similarly situated offenders and proportional to the criminal conduct. Mandatory minimum sentences are inconsistent with both of these principles. For almost 25 years, the ABA has adopted resolutions and issued recommendations challenging mandatory minimum sentences as unjust and as a driving force in over incarceration:


- (2003-2004) The ABA establishes the Justice Kennedy Commission to further investigate the state of sentencing and corrections in the United States and to make recommendations to address the problem of over-incarceration. The Kennedy Commission issues a series of recommendations urging broad reforms to address sentencing policy, racial and ethnic disparities in the justice system, use of clemency

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16 Letter from ABA President Karen Mathis to Committee Leadership regarding the House of Representatives Hearing on Mandatory Minimum Sentencing Laws (July 3, 2007), https://www.americanbar.org/content/dam/aba/migrated/poladv/letters/crimlaw/2007jul03_minimumsenth_lauthcheckdam.pdf (“Mathis Letter”) Mandatory minimum sentences are also against the ABA’s Standards for Criminal Justice on Sentencing. The Standards state clearly that “[a] legislature should not prescribe a minimum term of total confinement for any offense.” Standard 18-3.21(b). In addition, Standard 18-6.1(a) directs that “[t]he sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized,” and “[t]he sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender’s criminal history, and the personal characteristics of an individual offender that may be taken into account.”

17 Mathis Letter.

18 Recommendation 129, Annual 1995 (Special Committee on the Drug Crisis).
and sentence reduction, and prison conditions and prisoner reentry.\footnote{Recommendation 121A, Annual 2004 (Criminal Justice Section).} The Kennedy Commission issues a recommendation urging all jurisdictions, including the federal government, to “[r]epeal mandatory minimum sentence statutes.”\footnote{Id.}

- (2005) The ABA expresses its concerns regarding over-reliance on imprisonment in a policy adopted in response to the Supreme Court’s decision in\textit{ United States v. Booker}, 543 U.S. 220 (2005), urging Congress to permit increased judicial discretion in departing from the ranges of imprisonment advised by the federal Sentencing Guidelines.\footnote{Recommendation 301, Midyear 2005 (Criminal Justice Section).}

- (2010) The ABA advocates against mandatory minimum sentencing before the Sentencing Commission, offering testimony that “[s]entencing by mandatory minimums is the antithesis of rational sentencing policy.”\footnote{See Testimony of James E. Felman on behalf of the American Bar Association before the United States Sentencing Commission, June 2, 2010.}

- (2011) The ABA recognizes the unwarranted severity of the federal guidelines for the sentencing of high loss economic crimes and issues a recommendation urging the Sentencing Commission to complete a comprehensive assessment of the guidelines for these offenses to ensure that they are proportional to offense severity and adequately take into consideration individual culpability and circumstances.\footnote{Recommendation 104C, Midyear 2011 (Criminal Justice Section).}

- (2011) The ABA advocates for further reform of drug quantity laws through the retroactive application of the amendments to the federal guidelines enacted pursuant to the Fair Sentencing Act of 2010.\footnote{See, e.g., Testimony of James E. Felman on behalf of the American Bar Association before the United States Sentencing Commission (June 1, 2011).}

- (2011) The ABA issues a resolution urging the Sentencing Commission to complete a comprehensive assessment of the guidelines for child pornography offenses, taking into account the severity of each offense and factors pertaining to the current nature of these offenses, offenders, victims, and the role of technology in these offenses.\footnote{Resolution 105A, available at https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_105a.authcheckdam.pdf}

B. Practitioners, Lawmakers, and the Sentencing Commission Have Criticized Mandatory Minimum Sentences

Criticism of mandatory minimum sentencing is widespread. In response to the Sessions Memo, Senators Cory Booker (D-NJ), Mike Lee (R-UT), Dick Durbin (D-IL), and Rand Paul (R-KY) issued a bipartisan letter questioning the Sessions policies and their likely result in “counterproductive sentences that do nothing to make the public safer.”27 The letter emphasizes that mandatory minimum sentencing “requires nonviolent first-time offenders to receive longer sentences than violent criminals… [s]entences of this kind not only ’undermine respect for our legal system,’ but ruin families and have a corrosive effect on communities.” Even before Sessions issued his memorandum, Sens. Cory Booker of New Jersey, Dick Durbin of Illinois and Patrick Leahy of Vermont sent Sessions a letter “pleading with him not to promote mandatory minimum sentencing.”28 The senators wrote:

“Changes to current drug charging policies that lead to more mandatory minimum penalties in low-level, nonviolent drug cases will not increase public safety and will only increase taxpayer spending on our bloated federal prison system…”

“We are concerned about a possible shift in the Justice Department’s treatment of federal drug cases and the specter that mandatory minimum penalties may once again be used by the Justice Department on a routine basis as tools to prosecute low-level nonviolent drug offenses.”29

In a recent Washington Post analysis by former federal judge Nancy Gertner and former federal prosecutor Chiraag Bains, the authors warn:

“[M]andatory minimums have swelled the federal prison population and led to scandalous racial disparities. They have caused untold misery at great expense. And they have not made us safer.”30

The critical flaws of mandatory minimum sentences have been recognized by the Sentencing Commission for over 25 years. A Commission report from 1991 identified several problems including that a “lack of uniform application [of mandatory minimum] creates unwarranted disparity in sentencing and the “disparate application of mandatory

29 Id. (emphasis added).
minimum sentences . . . appears to be related to the race of the defendant.”

Twenty years later, a 2011 Commission report identified many of the same flaws:

- The certain mandatory minimum provisions apply too broadly, are set too high, or both, to warrant the prescribed minimum penalty for the full range of offenders who could be prosecuted under the particular criminal statute;

- Notable differences exist in the application of drug mandatory minimum penalties among various demographic groups, but these differences are largely attributable to the cumulative effects of criminal history and weapon involvement.

- The “stacking” of mandatory minimum penalties for multiple violations of section 924(c) results in excessively severe and unjust sentences in some cases.

- The severity of the mandatory minimum penalties for violating section 924(c), particularly the penalties for committing multiple violations of section 924(c), has produced inconsistencies in the application of the penalties among judicial districts.

- [M]andatory minimum penalties for certain child pornography offenses and the resulting guidelines sentencing ranges may be excessively severe and as a result are being applied inconsistently.

The Department of Justice recently released a report entitled “Review of the Department’s Implementation of Prosecution and Sentencing Reform Principles under the Smart on Crime Initiative.” The report found that between 2010 and 2015, sentencing outcomes in drug cases had shifted in a manner that was consistent with the first two principles of Smart on Crime [“prioritize prosecutions to focus on most serious cases” and “reform sentencing to eliminate unfair disparities and reduce overburdened prisons”]. This was reflected by significantly fewer mandatory minimum sentences being imposed in drug cases nationwide, as well as a decrease in mandatory minimum sentences for those defendants who might otherwise have received such a sentence…

C. Mandatory Minimums Lead to Disparate Sentencing

In practice, mandatory minimums paradoxically result in disparate sentences for similarly situated offenders. Drug offenses, which contribute to a large proportion of mandatory

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34 Id.
minimum sentences, can give rise to arbitrary, severe punishments.\textsuperscript{35} Even minor differences in drug quantities can lead to similar offenses where only some trigger mandatory minimums, leading to a resulting “cliff effect” between similarly situated offenders.\textsuperscript{36} For instance, someone arrested with 0.9 gram of LSD will not likely spend much time incarcerated, while an arrest for one gram will trigger a mandatory minimum sentence of five years behind bars.

Application of mandatory minimum sentencing is also harsher for one specific racial community — African Americans. The Commission’s 2011 Report to Congress explains that “Blacks account for 30.3 percent of drug offenders convicted of an offense carrying a mandatory minimum penalty” but they account for a higher percentage of drug offenders who receive a mandatory minimum at sentencing 40.4 percent.\textsuperscript{37} The Commission states that this disparate application is “largely attributable to the cumulative effects of criminal history and weapon involvement.”\textsuperscript{38}

The Commonwealth of Massachusetts provides one example in which the race-based disparity in sentencing that is created by mandatory-minimum sentencing has been documented. In 2009, the Massachusetts Bar Association concluded that in that state, where the racial minority composition of the state population was determined to be 20%, approximately 75% of mandatory minimum offenders were determined to be racial minority members.\textsuperscript{39} This was despite evidence that at this same time-frame the national drug use rates among white, black and Latino racial groups was nearly identical.\textsuperscript{40} The 2009 Massachusetts Bar Association study concluded, citing a review conducted under the auspices of the Boston University School of Public Health, that 74.6% of defendants convicted of mandatory drug distribution offenses were racial/ethnic minorities and only 25.4% of defendant’s convicted of such mandatory minimum offenses were white.\textsuperscript{41}

The gross, race-based, disparate impact of mandatory minimum sentencing policy is long-recognized as a national phenomenon. As far back as in 1991, the U.S. Sentencing


\textsuperscript{36} Id. (citing Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199, 213 (1993)).


\textsuperscript{38} Id.


Commission’s Special Report to Congress on mandatory minimum sentences observed “the disparate application of mandatory minimum sentences” in that “whites are more likely than non-whites to be sentenced below the applicable mandatory minimum.”

Indeed, a 2013 Yale study found that “prosecutors file mandatory minimums twice as often against black men as against comparable white men. Moreover, for those concerned about mass incarceration of black men, expanding mandatory minimums would be counterproductive.”

D. Mandatory Minimums Lead to Unduly Harsh Sentences

The research on mandatory minimum sentences is replete with stories of unduly harsh sentences for drug offenses. In one case, a financially desperate single mother with four children and zero criminal history was paid $100 by a stranger to mail a package that, unbeknownst to her, contained 232 grams of crack cocaine. For that single act, she was sentenced to 10 years imprisonment even though the sentencing judge believed that sentence was completely unjust and irrational.

Mandatory minimum sentences also ignore all the circumstances surrounding the conduct and blind the court to all factors outside of the criminal act itself — courts cannot consider the defendant’s role in the offense, the defendant’s level of culpability, nor his or her acceptance of responsibility.

E. Mandatory Minimums Lead to Over Incarceration

Between 1980 and 2013, the combined federal, state, and local prison populations increased at 340% from 503,600 to 2,200,300 individuals. In this period, the federal population grew the most, 786% from 24,363 to 215,866 individuals. The United States has the highest incarceration rate in the world at a cost of more than $80 billion a year.

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44 Id. (citing Steven Nauman, Brown v. Plata; Renewing the Call to End Mandatory Sentencing, 65 Fla. L. Rev. 855, 866–67 (2013)).

Mandatory minimums have been a driving force in the mass incarceration that plagues the United States, placing an enormous burden on taxpayers and having dire social consequences. Former Deputy Attorney General Sally Yates explains in a recent Washington Post article that the Holder policies enabled prosecutors to focus “limited federal resources on cases that had the greatest impact on our communities — the most dangerous defendants and most complex cases.”\(^{46}\) She emphasizes that the resources spent on imprisoning low-level nonviolent offenders “is a dollar we don’t have to investigate and prosecute serious threats, from child predators to terrorists.”\(^{47}\) Packing our prison system with low-level nonviolent offenders is costly and it does nothing to improve public safety.

**Conclusion**

For the reasons set forth above, mandatory minimums represent the antithesis of rational sentencing policy and reflect a policy decision to jettison the entire array of ordinarily relevant sentencing factors in favor of a single fact that often bears little relationship to the defendant’s true culpability. Because the Sessions Memo directs a return to the use of mandatory minimums in all but “unusual” cases, the American Bar Association calls upon the Department of Justice to reinstate its policies permitting federal prosecutors to make individualized assessments of each case and to pursue mandatory minimum sentences and recidivist enhancements only where justified by a defendant’s leadership.


\(^{47}\) Id.
role in the offense, use or threat of violence, significant criminal history, ties to large-scale drug trafficking organizations, or serious victim injury.

Neither the Sessions Memo nor mandatory minimums provide the justice that careful prosecutorial policy produces. Instead, a prosecutor’s assessment should consider that charges are not greater in number or degree than can reasonably be supported with evidence at trial and are necessary to fairly reflect the gravity of the offense and deter similar conduct, prosecutors should consider such additional factors as the extent or absence of harm caused by the offense or victim impact or injury; the impact of the decision to charge or not charge on the public welfare; the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation; whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender; the unwarranted or disparate treatment of similarly situated persons; any cooperation by the offender in the investigation, apprehension or conviction of others; and the possible influence of any racial, cultural, ethnic, socioeconomic or other improper biases.

The American Bar Association also calls upon state and local prosecutors to make certain that charging decision truly involve an individualized assessment of each crime and offender. There are lessons to be learned from the 37 years of United States Attorney Generals’ sentencing policies, and those lessons teach that generally pursuing charges that result in the most severe possible sentences in every case does not do justice, for doing justice requires careful consideration and the exercise of sound judgment in every case.

Respectfully submitted,

M. Sandy Weinberg
February 2018
1. **Summary of Resolution(s).**

This Resolution calls upon all prosecuting authorities, including the Department of Justice, to pursue policies, by utilizing the *ABA Standards on the Prosecution Function (2015)*, that permit prosecutors to make individualized assessments of each case and to pursue mandatory minimum sentences and recidivist enhancements only where justified by a defendant’s leadership role in the offense, use or threat of violence, significant criminal history, ties to large-scale drug trafficking organizations, or serious victim injury.

2. **Approval by Submitting Entity.** A previous version of this resolution was passed by Massachusetts Bar Association in July 2017 and by the American Bar Association Criminal Justice Council in July 2017. A revised version was resubmitted to the Criminal Justice Council in November 2017, and was passed by the council at that time.

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

Yes, it was withdrawn for further coordination prior to consideration by the House.

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

As the report outlines, this resolution is consistent with previous ABA policy on mandatory minimums, prosecutorial discretion, and criminal justice charging decisions. Existing policies include:

- (Recommendation 129, Annual 1995) The ABA adopts a resolution calling for the equalization of the federal penalties for crack and powder cocaine.

- (Recommendation 121A, Annual 2004) The ABA establishes the Justice Kennedy Commission to further investigate the state of sentencing and corrections in the United States and to make recommendations to address the problem of over-incarceration. The Kennedy Commission issues a series of recommendations urging broad reforms to address sentencing policy, racial and ethnic disparities in the justice system, use of clemency and sentence reduction, and prison conditions and prisoner reentry. The Kennedy Commission issues a recommendation urging all jurisdictions,
including the federal government, to “[r]epeal mandatory minimum sentence statutes.”

- (Recommendation 301, Midyear 2005) The ABA expresses its concerns regarding over-reliance on imprisonment in a policy adopted in response to the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), urging Congress to permit increased judicial discretion in departing from the ranges of imprisonment advised by the federal Sentencing Guidelines.

- (Recommendation 104C, Midyear 2011) The ABA recognizes the unwarranted severity of the federal guidelines for the sentencing of high loss economic crimes and issues a recommendation urging the Sentencing Commission to complete a comprehensive assessment of the guidelines for these offenses to ensure that they are proportional to offense severity and adequately take into consideration individual culpability and circumstances.

- (Resolution 105A, Annual 2011) The ABA issues a resolution urging the Sentencing Commission to complete a comprehensive assessment of the guidelines for child pornography offenses, taking into account the severity of each offense and factors pertaining to the current nature of these offenses, offenders, victims, and the role of technology in these offenses.

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 resolution will be used in lobbying efforts, amicus briefs, and public awareness campaigns.

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

   None.

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

   N/A.
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:

- ABA Veterans Legal Services Initiative
- Standing Committee on Legal Aid & Indigent Defendants
- Commission on Disability Rights
- Special Committee on Hispanic Legal Rights & Responsibilities
- Commission on Homelessness and Poverty
- Center for Human Rights
- Commission on Immigration
- Center for Racial & Ethnic Diversity
- Coalition on Racial & Ethnic Justice
- Commission on Youth at Risk
- Young Lawyer's Division
- Section of Civil Rights and Social Justice
- Government and Public Sector Lawyers Division
- Section on International Law
- Judicial Division
- Law Practice Division
- Science & Technology Law
- Section of Health Law
- Section of Litigation

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The American Bar Association calls upon the Department of Justice to reinstate its policies, by utilizing the ABA Standards on the Prosecution Function (2015) and permit federal prosecutors to make individualized assessments of each case and to pursue mandatory minimum sentences and recidivist enhancements only where justified by a defendant’s leadership role in the offense, use or threat of violence, significant criminal history, ties to large-scale drug trafficking organizations, or serious victim injury.

2. Summary of the Issue that the Resolution Addresses

This Resolution addresses the new policies of Attorney General Sessions and the Department of Justice.

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

This Resolution calls upon the Department of Justice to re-examine their new policies, and can be used in lobbying efforts, amicus briefs, and public awareness campaigns.

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, territorial and tribal courts to extend Batson v. Kentucky, 476 U.S. 79 (1986), to prohibit discrimination against jurors on the basis of sexual orientation or gender identity/expression.
Summary

“[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”

– Justice Anthony Kennedy

The right to trial by a fair and impartial jury is constitutionally protected and furthered, in part, by the use of peremptory challenges during voir dire. However, when peremptory challenges are used to exclude prospective jurors solely on the basis of sexual orientation or gender identity/expression, the discrimination against the LGBT community pervasive in this country invades our court system. This practice not only denies LGBT individuals the opportunity to participate in an important civic duty, but also violates the Constitution.

In *Batson v. Kentucky*, the U.S. Supreme Court held that the Equal Protection Clause precludes the use of peremptory challenges to strike prospective jurors based solely on their race.

The Court later extended *Batson* to prohibit the use of peremptory challenges to remove prospective jurors because of their gender. The Court explained that, although no one has an absolute right to sit on the jury, once summoned for jury service, prospective jurors “have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.” Since then, courts have emphasized that *Batson* prohibits peremptory challenges based on any classification that warrants heightened judicial scrutiny.

Although the Supreme Court has not explicitly held that sexual orientation or gender identity/expression classifications are subject to heightened scrutiny, its recent decisions in *Windsor* and *Obergefell* indicate a level of scrutiny that is significantly more stringent than rational basis, i.e. “heightened.” Moreover, the factors that the Supreme Court has looked to in determining whether heightened scrutiny should apply—whether the classified group has experienced a history of discrimination, whether the classification has any bearing on a person’s ability to contribute to society, whether the group is politically powerless, and whether the defining characteristic of the group is immutable—all point to finding that classifications based on sexual orientation or gender identity/expression are subject to heightened scrutiny. Indeed, several state supreme courts have

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4 *Id.* at 129.
5 See, e.g., *Bowles v. See’y for the Dept. of Corrections*, 608 F.3d 1313, 1316 (11th Cir. 2010), *cert. denied*, 131 U.S. S.Ct. 652 (2010) (the Supreme Court “has drawn the line of application [of *Batson*] at distinctive groups entitled to heightened scrutiny”); *United States v. Watson*, 483 F.3d 828, 831 (D.C. Cir. 2007) (“A member of a class entitled to heightened scrutiny ... receives protection under the rule established in *Batson*.”); *United States v. Santiago-Martinez*, 58 F.3d 422, 423 (9th Cir. 1995) (finding *Batson* did not apply to prohibit peremptory strike on basis of obesity because discrimination on the basis of obesity is not subject to heightened scrutiny).
held that sexual orientation classifications are subject to heightened scrutiny. Furthermore, in Smithkline Beecham Corp. v. Abbott Laboratories, the Ninth Circuit explicitly found that classifications based on sexual orientation are subject to heightened scrutiny in determining that Batson applied to peremptory strikes based on sexual orientation. Accordingly, the principles of Batson should be extended to protect against the continued discrimination of gay men and lesbian prospective jurors.

A handful of states have laws in place that prohibit discrimination against jurors on the basis of sexual orientation and gender identity/expression, but many states lack such a prohibition and no equivalent federal law exists. Without the protection of anti-discrimination laws, it is incumbent upon the courts to extend Batson, in accordance with Supreme Court jurisprudence, to exclude peremptory challenges on the basis of sexual orientation and gender identity/expression. Failing to do so offends the rights and dignity of the excluded juror, interferes with the litigant’s right to a fair trial by an impartial jury, and “undermines public confidence in the fairness of our justice system.”

I. Introduction

For many people, their only interaction with the court system is being called for jury service. Unfortunately, for LGBT individuals, this experience is oftentimes a negative one. LGBT individuals have reported being forced to disclose their sexual orientation against their will during voir dire, and hearing judges, attorneys, and witnesses sometimes make negative comments about a person’s sexuality. Indeed, data indicates a substantial number of non-heterosexual prospective

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7 See Smithkline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471, 484-89 (9th Cir. 2014).

8 California, Colorado, Minnesota, and Oregon have laws in place that prohibit discrimination against jurors on the basis of sexual orientation. See CAL. CIV. PROC. CODE § 231.5 (prohibiting use of a peremptory challenge to remove a prospective juror on the basis of an assumption that the juror is biased merely because of his sexual orientation); COLO. REV. STAT. § 13-71-104(3)(a) (“No person shall be exempted or excluded from serving as a trial or grand juror because of . . . sexual orientation.”); MINN. STAT. ANN. § 593.32 (same); OR. REV. STAT. § 10.030 (same). And, in Rhode Island, the Rules of Professional Conduct for lawyers include a provision making harmful or discriminatory treatment of jurors based on sexual orientation a form of professional misconduct. See R.I. Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 8.4.


9 Batson, 476 U.S. at 87; see also Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 628 (1991) (“[D]iscrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there.”).

jurors encounter bias in some form. For example, in a California study, 30% of lesbian or gay court users believed those who knew their sexual orientation did not treat them with respect, and 39% believed their sexual orientation was used to lessen their credibility.

Discrimination against LGBT prospective jurors may also occur through peremptory challenges. For instance, in *Smithkline Beecham*, which involved disputes related to a licensing agreement and the pricing of HIV medications, the district judge questioned jurors during the jury selection process based on their questionnaires. During the course of questioning Juror B, the juror referenced “his partner three times using the masculine pronoun ‘he,’ and the judge subsequently referred to Juror B’s partner as ‘he’ in a follow-up question.” Abbott Laboratories’ counsel asked Juror B only five questions, all of which related to the juror’s knowledge of and familiarity with the medications at issue in the case, and, when the time came, used his first peremptory challenge to challenge Juror B. Smithkline’s counsel immediately raised a *Batson* challenge, asserting that Abbott’s counsel appeared to be excluding “anybody who is gay” from the jury pool. The following colloquy ensued:

**The Court:** Well, I don't know that, number one, whether *Batson* applies in civil, and number two, whether *Batson* ever applies to sexual orientation. Number three, how we would know—I mean, the evil of *Batson* is not that one person of a given group is excluded, but that everyone is. And there is no way for us to know who is gay and who isn't here, unless somebody happens to say something. There would be no real way to analyze it. And number four, one turns to the other side and asks for the basis for their challenge other than the category that they are in, and if you have one, it might be the better part of valor to tell us what it is.

**Abbott’s Counsel:** Well, he—

**The Court:** Or if you don't want to, you can stand on my first three reasons.

**Abbott’s Counsel:** I will stand on the first three, at this point, your honor. I don't think any of the challenge applies. I have no idea whether he is gay or not.

**Smithkline’s Counsel:** Your honor, in fact, he said on voir dire that he had a male partner. So—

**Abbott’s Counsel:** This is my first challenge. It's not like we are sitting here after three challenges and you can make a case that we are excluding anybody.

Despite the fact that it was apparent from questioning that Juror B was gay and that Abbott’s counsel offered no non-discriminatory reason for challenging Juror B, the district judge allowed

11 See Vanessa H. Eisemann, *Striking A Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1, 7 (2001) (citing an empirical study in California courts, which noted that 22% of gay and lesbian court users felt threatened because of their sexual orientation in general, and 38% felt threatened when sexual orientation became an issue).


13 See *Smithkline*, 740 F.3d at 474.

14 Id.

15 See id. at 474-75.

16 Id. at 475.

17 Id.
Abbott’s strike. Similarly, in May 2012, prosecutors in California used peremptory challenges to remove two gay prospective jurors from the jury pool in the “Equality 9” case involving protestors who were arrested for demonstrating outside of the San Diego county clerk’s office in response to Proposition 8.

As explained herein, such discriminatory peremptory challenges of LGBT potential jurors violate the Constitution and harm the judicial system.

II. Background

A. History of the Peremptory Challenge

The Sixth Amendment to the United States Constitution guarantees a trial by an impartial jury. To satisfy this requirement, lawyers and judges engage in the process of voir dire to question jurors and decide which jurors will be selected to hear the case. During voir dire, lawyers may utilize challenges for cause, which are used to excuse prospective jurors who are unlikely to be fair and impartial, or peremptory challenges, which may be used without providing the court with a justification for the challenge.

Peremptory challenges date back to Roman times and were implemented under English common law, brought to the American colonies and subsequently adopted by all states. Since its inception, the peremptory challenge has been an important part of our legal tradition and its “principal value. . .is that it helps produce fair and impartial juries” by eliminating extreme bias on both sides of a case.

However, even though peremptory challenges are a valuable tool, they are not without limitations. As the Supreme Court has stated: “[peremptory challenges] are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial.” Today, parties may exercise a peremptory challenge to “remove from the venire any group or class of individuals normally subject to rational basis review.”

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18 On appeal, however, the Ninth Circuit found that Abbott’s use of a peremptory challenge to strike Juror B was a violation of Batson, and remanded for a new trial. See Smithkline, 740 F.3d at 486-88.
20 U.S. CONST. Amend. VI. (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”) (emphasis added).
22 See id.
25 J.E.B., 511 U.S. at 143.
B. Batson v. Kentucky and its Progeny

In the landmark case of Batson v. Kentucky, the Supreme Court overruled Swain v. Alabama, and held that the Equal Protection Clause of the Fourteenth Amendment was violated by the use of peremptory challenges by a prosecutor to strike a black juror based solely on the juror’s race. The Court noted that peremptory challenges may generally be used “for any reason at all” and without explanation, but concluded that voir dire — like all government action — is “subject to the commands of the Equal Protection Clause.”

The Court also outlined a three-step test for determining whether there is impermissible discrimination in jury selection, which continues to be applicable law today. First, the challenging party must make a prima facie case showing discrimination; second, opposing counsel must offer a neutral basis for striking the juror in question; and, third, the trial court must determine whether the party making the Batson challenge has “established purposeful discrimination” or if the opposing counsel’s neutral explanation is sufficient.

The Batson ruling, which was limited to peremptory strikes by prosecutors, was subsequently extended to apply to civil litigants and criminal defendants. And in J.E.B. v. Alabama ex rel. T.B., the Court again expanded these protections and condemned peremptory challenges based on gender as similarly barred by the Equal Protection Clause. In issuing its ruling, the Court stressed the “long and unfortunate history” of discrimination against women that included laws barring them from participating in all aspects of society, including civic life and the democratic process. While the Court acknowledged, as it had in previous cases, that no one has a right to serve on a jury, it reaffirmed that once an individual is summoned for jury service, he or she has “an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.”

Applying Batson to preclude peremptory challenges based on sexual orientation or gender identity/expression is consistent with, and warranted by, the logic and reasoning of J.E.B. and the cases upon which it relied. Indeed, as explained below, LGBT individuals have suffered a long history of discrimination at the hands of the federal, state, and local governments, which has extended into the judicial system. As with race- and sex-based peremptory challenges, allowing prospective jurors to be precluded from the venire because of their sexual orientation or gender identity/expression serves no purpose other than to perpetuate and reinforce invidious discrimination. Not only is this harmful to the juror, the litigants, and the judicial system, it directly contravenes the Equal Protection Clause and should not be permitted.

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26 See Batson, 476 U.S. at 100.
27 Id. at 89.
28 Id. at 96-98.
29 See Edmonson, 500 U.S. at 614 (extending Batson to apply to private civil litigants); Georgia, 505 U.S. at 59 (extending Batson to criminal defendants).
30 See J.E.B., 511 U.S. at 129, 136-37 (applying heightened scrutiny and finding that “gender-based peremptory challenges are not substantially related to an important government objective”).
31 Id. at 136-37.
32 See id. at 128-29.
III. Peremptory Challenges of Potential Jurors Based on Sexual Orientation or Gender Identity/Expression Violates the Equal Protection Clause

A. Judicial Review of Classifications Based on Sexual Orientation

Generally, government classifications, whether embodied in law or other state action, are presumed valid if rationally related to a legitimate government purpose. Certain classifications, however, carry a particularly high risk of being employed illegitimately and are therefore treated as “suspect” or “quasi-suspect.” In such cases, courts must examine the classification under heightened judicial review. Although the Supreme Court has never expressly stated what level of judicial review should apply to classifications based on sexual orientation, its decisions in *Windsor* and *Obergefell* imply through their language and reasoning that such classifications warrant heightened scrutiny.

1. *United States v. Windsor*

In *United States v. Windsor*, the Supreme Court held that the federal Defense of Marriage Act (DOMA) violated the Equal Protection Clause. In doing so, the Court found that the principal effect of DOMA was “to identify a subset of state-sanctioned marriages and make them unequal” and that the principal purpose was to “impose inequality.” The Court also called for “careful consideration” of laws singling out lesbians and gay men for special advantage. As Justice Scalia noted in his dissent, the Court “certainly” was not applying anything that resembled the deferential framework of rational basis review.

The Ninth Circuit, in *Smithkline*, undertook an analysis of *Windsor* to determine what level of scrutiny the Supreme Court was applying and agreed with Justice Scalia’s conclusion, stating: “In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review.” The Ninth Circuit looked at three factors to reach this conclusion. First, unlike typical rational basis review cases that have looked at post-hoc hypothetical reasons for the classification, *Windsor* evaluated the legislative history of the law and did not consider any hypothetical reasons for DOMA’s enactment, despite being offered such reasons by the respondent in its brief. Second, *Windsor* failed to apply the deference to the state that is typical of rational basis review, instead “balancing the government’s

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34 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); *Cleburne*, 473 U.S. at 440 (certain legal classifications must be considered “suspect” or “quasi-suspect” because they “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy — a view that those in the burdened class are not as worthy or deserving as others.”); *see also Romer v. Evans*, 517 U.S. 620, 629 (1996) (noting that, to date, the Supreme Court had accorded heightened scrutiny under equal protection analysis to classifications based on race, national origin, sex, religion, illegitimacy, and alienage).
35 133 S. Ct. 2675 (2013).
36 Id. at 2694.
37 *Windsor*, 133 S. Ct. at 2692-96 (requiring the government to establish that a “legitimate purpose overcomes” the injury that its discrimination inflicts on lesbians and gay men).
38 Id. at 2706 (Scalia, J., dissenting).
39 *Smithkline*, 740 F.3d at 481.
40 See id. at 481-82.
interest against the harm or injury to gays and lesbians” and demanding a justification for the disparate treatment of the group. Third, *Windsor* relied on more cases that applied heightened scrutiny than rational basis review, which the Ninth Circuit concluded leaned in favor of applying heightened scrutiny.

2. **Obergefell v. Hodges**

Similarly, in *Obergefell v. Hodges*, the Supreme Court did not articulate what level of scrutiny it was applying in determining that denying same-sex couples the right to marry violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The decision does, however, implicitly acknowledge that four factors the Court has considered in determining whether a classification should be treated with suspicion are satisfied with respect to sexual orientation. These factors are: (1) whether the classified group has suffered a history of discrimination; (2) whether the classification has any bearing on a person’s ability to perform in society; (3) whether the group is a minority or politically powerless; and (4) whether the defining characteristic is “immutable” or beyond the group member’s control.

First, the Court explained in detail that lesbians and gay men have been subject to historic discrimination by the government in the form of criminalizing same-sex intimacy, prohibiting certain employment, including military service, being excluded under immigration laws, and in many other arenas. Second, the Court found that sexual orientation does not bear any relation to an individual’s ability to contribute to society. Third, the Court recognized that lesbians and gay men remain a politically vulnerable minority. And, fourth, the Court held that sexual orientation is a defining and immutable characteristic.

3. **Additional Precedent**

Prior to the Supreme Court’s rulings in *Windsor* and *Obergefell*, numerous other cases looked to these four factors in determining that classifications based on sexual orientation were subject to heightened scrutiny, finding that: (1) lesbians and gay men have suffered from a history of pervasive discrimination; (2) sexual orientation has no bearing on a person’s ability to perform or to contribute to society; (3) gay men and lesbians are a minority, with relatively limited political power; and (4) sexual orientation is immutable.

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41 See id. at 482-83 (“Windsor’s balancing is not the work of rational basis review.”).
42 See id. at 483.
45 See *Obergefell*, 135 S. Ct. at 2596-97.
46 See id. at 2596, 2600 (observing that same-sex couples lead open and public lives, establish families, and “provide loving and nurturing homes to their children”).
47 See id. at 2606 (noting that when a fundamental right is impacted the Court should not adopt a cautious approach and let the democratic process play out, especially if it would cause pain and humiliation).
48 See id. at 2594, 2596 (noting that psychiatrists and others now recognize sexual orientation as immutable).
even the Executive Branch, have concluded that heightened scrutiny applies to sexual orientation
classifications on equal protection grounds.\textsuperscript{50}

In sum, classifications based on sexual orientation require heightened judicial scrutiny.
Classifications based on sexual orientation satisfy all the indicia the Supreme Court has examined
in evaluating whether heightened scrutiny is appropriate. Further, because, like race and sex,
classifications based on sexual orientation generally are based on “prejudice and antipathy” rather
than any “legitimate state interest,”\textsuperscript{51} courts must be suspicious of governmental classifications
based on sexual orientation to guard against continued discrimination against LGBT individuals
at the hands of the government — including, in the context of peremptory challenges.

B. Judicial Review of Classifications Based on Gender Identity/Expression

The Supreme Court, in \textit{J.E.B.}, extended \textit{Batson} to prohibit the use of peremptory challenges to
remove prospective jurors because of their gender.\textsuperscript{52} Although the Supreme Court has never
expressly stated that discrimination based on gender identity/expression is impermissible gender
discrimination, its decision in \textit{Price Waterhouse v. Hopkins} implies that classifications based on
gender identity/expression should be analyzed as classifications based on gender.\textsuperscript{53} Following
\textit{Price Waterhouse}, multiple courts have held that gender discrimination encompasses
discrimination based on gender identity/expression in the context of Title VII, the Equal Credit
Opportunity Act (ECOA), and the Gender Motivated Violence Act (GMVA). As such, the
Supreme Court’s decisions in \textit{Windsor} and \textit{Obergefell} and the implied heightened scrutiny with
regard to sexual orientation, explained \textit{supra}, coupled with its extension of gender
identity/expression within the realm of gender discrimination in \textit{Price Waterhouse}, imply that
classifications based on gender identity/expression also warrant heightened judicial review.

\textsuperscript{50} See \textit{supra} note 6; see also \textit{Baskin v. Bogan}, 766 F.3d 648 (7th Cir. 2014) (holding that sexual orientation
classifications are constitutionally suspect as a matter of equal protection and noting that “\textit{Windsor}’s balancing is not
the work of rational basis review”) (quoting \textit{SmithKline}, 740 F.3d at 483); \textit{SmithKline}, 740 F.3d at 481 (noting
“\textit{Windsor} requires that we reexamine our prior precedents” and concluding that “we are required by \textit{Windsor} to apply
heightened scrutiny to classifications based on sexual orientation”); \textit{Windsor v. United States}, 699 F.3d 169, 181-85
(2d Cir. 2012) (holding that classifications based on sexual orientation warrant equal protection heightened scrutiny);
Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011),

\textsuperscript{51} \textit{Cleburne}, 473 U.S. at 440.


In *Price Waterhouse*, the Supreme Court held that “sex stereotyping” is evidence of gender discrimination under Title VII. To support the “sex stereotyping” principle, the court stated that Congress’ intent in prohibiting gender discrimination was to eliminate the “disparate treatment of men and women resulting from sex stereotypes.” Numerous federal courts have expanded the scope of the *Price Waterhouse* ruling. For example, the First Circuit, in *Rosa v. Parks W. Bank & Trust Co.*, expanded the scope of *Price Waterhouse*’s “sex stereotyping” principle beyond Title VII and applied it to the ECOA, a federal law that statutorily prohibited discrimination on the basis of sex. The court held that a plaintiff may bring a claim of gender discrimination under the ECOA when they are discriminated against because of nonconformity with “sex stereotypes.”

The Sixth Circuit, in *Barnes v. City of Cincinnati*, applied the “sex stereotyping” principle from *Price Waterhouse* to find in favor of a transgender plaintiff in a Title VII suit. The court held that discrimination based on nonconformity with “sex stereotypes” was discrimination based on gender. Thus, the court used *Price Waterhouse*’s “sex stereotyping” principle to categorize discrimination based on gender identity/expression as gender discrimination.

Moreover, the Ninth Circuit, in *Schwenk v. Hartford*, undertook an analysis of *Price Waterhouse* to find that discrimination based on nonconformity with sex stereotypes was gender discrimination under the GMVA. The court ruled in favor of a transgender plaintiff and held that violence motivated by gender identity was violence motivated by gender. In so doing, the court interpreted the scope of gender discrimination as including gender identity/expression. Lastly, the Eleventh Circuit, in *Glenn v. Brumby*, held that discrimination based on gender nonconformity was impermissible gender discrimination under the Equal Protection Clause. In relying on *Price Waterhouse*’s “sex stereotyping” principle, the court noted that “[t]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.” As such, the court held that discrimination motivated by an individual’s gender identity/expression was impermissible gender discrimination in violation of the Equal Protection Clause.

In sum, *Batson* and *J.E.B.* prohibit peremptory challenges based on gender identity/expression because such challenges are, in actuality, based on gender, not simply “sex.” As evidenced, *supra*, a growing number of courts apply the heightened judicial scrutiny of a gender classification to classifications based on gender identity/expression. Because gender identity/expression is an ingredient of gender, it finds protection under *Batson*, which courts interpret as prohibiting
peremptory challenges based on any classification that warrants heightened judicial scrutiny. Gender identity/expression further finds protection under *J.E.B.*, in which the Supreme Court explicitly prohibits peremptory challenges based on gender. Thus, *Batson* and *J.E.B.* prohibit peremptory challenges based on gender identity/expression.

**IV. Peremptory Challenges Based on Sexual Orientation or Gender Identity/Expression Harm the Judicial System**

The exclusion of prospective jurors, or entire groups from jury service based on invidious discrimination deprives the excluded individual of the opportunity to participate in one of our most important democratic institutions, interferes with the litigant’s right to a fair trial by an impartial jury, perpetuates stereotypes, and, ultimately, “undermine[s] public confidence in the fairness of our system of justice.”

That LGBT individuals have suffered a long history of discrimination by federal, state, and local governments is clear. They have long been barred from other hallmarks of civic participation, such as service in the military and being able to legally marry. Moreover, the experience of LGBT individuals in the court system has been one of widespread *de facto* discrimination. The Ninth Circuit noted in *Smithkline* that “[e]mpirical research has begun to show that discriminatory attitudes toward gays and lesbians persist and play a significant role in court room dynamics.” Indeed, lesbians and gay men report that, whether they were jurors or court users, when their sexual orientation became visible, their experience with the court became increasingly negative.

All discrimination is harmful; however, the impact is exacerbated when it occurs within the courthouse. Allowing discriminatory court procedures such as striking a juror based on sexual orientation or gender identity/expression “continue[s] the deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals” and such strikes “deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with their fitness to serve.” Indeed, not only is the dignity of the excluded juror denigrated by the use of a preemptory challenge based solely on a juror’s sexual orientation or gender identity/expression, but also a clear message is sent to all those in the courtroom, and “all those who may later learn of the discriminatory

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67 See, e.g., *Bowles*, 608 F.3d at 1316; *Watson*, 483 F.3d at 831; *Santiago-Martinez*, 58 F.3d at 423.
68 See *J.E.B.*, 511 U.S. at 129, 136-37 (applying heightened scrutiny and finding that "gender-based peremptory challenges are not substantially related to an important government objective").
69 *Batson*, 476 U.S. at 87; see also *Edmonson*, 500 U.S. at 628.
70 See supra notes 45 & 49 and accompanying text.
72 Brower, supra note 10 at 676, 695-96.
73 *Edmonson*, 500 U.S. at 628 ("Few places are a more real expression of the constitutional authority of the government than the courtroom, where the law itself unfolds.").
74 *Smithkline*, 740 F.3d at 485.
act” that LGBT individuals “are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree.”

Jury service is one of the most significant opportunities most Americans have to participate in the democratic process, aside from voting. For many, the experience is an important educational opportunity that fosters democratic values and a sense of civic responsibility. Allowing peremptory strikes because of assumptions based on sexual orientation or gender identity/expression revokes the potential juror’s ability to exercise this important civic duty and participate equally in our democratic institutions.

Finally, excluding LGBT persons from the venire solely because of their sexual orientation or gender identity/expression is a disservice to litigants, because it “deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.” In other words, the impartiality of the jury is questionable, where a certain subset of the population is excluded. This is not to say that all LGBT individuals hold identical beliefs, but rather, that they have a common perspective that is "based upon membership" in the LGBT community and is informed by a shared history of persecution and discrimination. Courts have found that maintaining the "diverse and representative character of the jury" is essential to impartiality of the jury that is representative of the community rather than one dominant segment. "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience." Doing so not only undermines the impartiality of the jury, but also the fairness of the entire court system.

Furthermore, any concern by defense counsel that eliminating their ability to strike LGBT self-identifying persons from a jury pool simply because of their sexual orientation or gender identity/expression will result in a biased jury is unfounded. The Batson challenge prevents discrimination in jury selection, but has no effect on an attorneys’ ability during voir dire to question a potential juror on their ability to be fair and impartial. As such, extending Batson to LGBT jurors helps to ensure fairness in the justice system, but has no effect on a defendant’s ability to receive a fair and impartial jury.

75 J.E.B., 511 U.S. at 142.
76 See Powers, 499 U.S. at 407 (“[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”); see also Smithkline, 740 F.3d at 485 (“Jury service is one of the most important responsibilities of an American citizen.”)
78 See Smithkline, 740 F.3d at 485; see also J.E.B., 511 U.S. at 145-46 (“Equal opportunity to participate in the fair administration of justice is fundamental to our democratic society. It not only furthers the goals of the jury system, it reaffirms the promise of equality under the law.”).
80 Garcia, 77 Cal. App. 4th at 1277 (“Commonality of perspective does not result in identity of opinion. That is the whole reason exclusion based upon group bias is an anathema. It stereotypes.”).
81 See, e.g. J.E.B., 511 U.S. at 134 (internal quotation marks omitted).
In sum, permitting peremptory challenges to exclude LGBT individuals from the venire inflicts the harm—exclusion from our most fundamental institutions—that the Supreme Court has long recognized warrants constitutional protection.

V. Conclusion

Utilizing peremptory challenges to strike prospective jurors on the basis of their sexual orientation or gender identity/expression violates the Equal Protection Clause and significantly harms the judicial system by continuing a pattern of discrimination and exclusion based on invidious stereotypes. Accordingly, federal and state courts should extend *Batson* to apply to discriminatory uses of peremptory challenges based on sexual orientation and gender identity/expression.

Respectfully submitted,

Sandy Weinberg
Chair, Criminal Justice Section

February 2018
1. **Summary of Resolution(s).**

This resolution seeks to apply the ruling in *Batson* to sexual orientation and gender identity/expression. It recognizes that any peremptory strikes used during voir dire on the basis of sexual orientation or gender identity/expression would violate the equal protection clause of the constitution and would undermine public confidence in the judiciary.

2. **Approval by Submitting Entity.**

This resolution was passed by the Criminal Justice Council at the Fall meeting in Washington, DC. (11/2017).

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?**

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)

The Commission on Sexual Orientation and Gender Identity has lobbied on this issue in the past. There are currently companion bills in the US Congress (S. 635/H.R. 1515), supported by ABA affiliate the National LGBT Bar Association, that aim to do the same as this resolution. The adoption of this resolution would provide uniformity in ABA policy regarding existing legislation.

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

This policy, if adopted, would be used by ABA Governmental Affairs Office to advocate on behalf of courts that states that any peremptory strikes used during voir dire on the basis of sexual
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orientation or gender identity/expression violate the equal protection clause of the constitution and would undermine public confidence in the judiciary.

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

N/A.

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

N/A.

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 Sexual Orientation and Gender Identity
- Standing Committee on Ethics and Professional Responsibility
- LGBT Criminal Justice Committee
- Civil Rights and Social Justice
- Judicial Division
- Litigation
- 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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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 seeks to apply the ruling in *Batson* to sexual orientation and gender identity/expression. It recognizes that any peremptory strikes used during voir dire on the basis of sexual orientation or gender identity/expression would violate the equal protection clause of the constitution and would undermine public confidence in the judiciary.

2. Summary of the Issue that the Resolution Addresses

While race, gender, and religion are protected under *Batson*, there are currently no protections against striking potential jurors on the basis of sexual orientation or gender identity/expression. This creates both discrimination in the legal field and a lack of public confidence in judicial decisions.

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

The policy would add these two classes of people to the protected classes under *Batson*. Attorneys would therefore need to provide a reasoning for the strikes outside of a potential juror’s real or perceived sexual orientation or gender identity/expression.

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 the Executive Branch to rescind its
decision to end the Deferred Action for Childhood Arrivals (DACA) program; and

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation
permitting DACA recipients and other undocumented immigrants who entered the United States
as children and who meet age, residency, educational and other qualifications (“DREAMers”)
who meet certain educational, work, or military requirements, successfully pass a background
check, and remain in good legal standing, to apply for permanent legal status and citizenship;
and

FURTHER RESOLVED, That in the absence of Congressional legislation, the American Bar
Association urges the Department of Homeland Security to exercise its discretion and refrain
from apprehending, detaining, or removing DREAMers, and that any exclusion based on
criminal conduct be limited to specified convictions.
I. Introduction

The Deferred Action for Childhood Arrivals program, commonly known as DACA, has allowed almost 800,000 immigrant youth to remain in the United States since its inception by the Obama Administration in 2012. This Presidential policy, by way of Executive Action, targeted minors who may have been brought to the country illegally or overstayed their visas before the age of 16 and who applied before the age of 31. DACA has provided temporary relief from deportation and has authorized employment for those who have successfully demonstrated that they completed high school or have a GED, were currently enrolled in school or had been honorably discharged from the military, and who do not have a felony, serious misdemeanors or three other misdemeanors on his or her criminal record. Each recipient has been required to reapply every two years for continued protection.

DACA arose after the failure by Congress to pass the Development Relief and Education for Alien Minors (or DREAM) Act in 2007 and again in 2011. So-called DREAMers who qualified would have been granted conditional resident status on a path to permanent residency after six years and fulfillment of all other statutory requirements. Unfortunately, both the House of Representatives and the Senate have failed to take action, which prompted then-President Obama to instruct then-Secretary of Homeland Security Janet Napolitano to issue an Executive Branch Memorandum directing the Department of Homeland Security to establish DACA as a temporary exercise of prosecutorial discretion against deportation for eligible applicants.

On September 5, 2017 the Trump Administration announced the termination of the program, with a complete phase out over the next couple of years. This has left the fate of approximately 800,000 DACA recipients in limbo and most likely subject to removal from the United States. It is estimated that without any further protective action by either Congress, approximately 305,000 recipients will lose their protection in 2018, followed by 403,000 in 2019, and another 86,000 in 2020. The President agreed to wait for six months, or March 5, 2018, to determine whether Congress would act before making any further decisions on the fate of DACA and its recipients.

President Obama’s action ensured that youth without immigration status could stay in the country they called home and to continue to thrive in our country’s schools and economy. In fact, many states and other leading economists have predicted significant economic losses in the event that the DACA program is rescinded, and a significant proportion of recipients are enrolled in school or have received college degrees. During the month of August, 2017, for example, Tom K. Wong of the University of California, San Diego; United We Dream (UWD); the National Immigration Law Center (NILC); and the Center for American Progress fielded a national survey to further analyze the economic, employment, educational, and societal experiences of DACA recipients. This is the largest study to date of DACA recipients with a sample size of 3,063 respondents in 46 states as well as the District of Columbia. Their primary conclusions were as follows:
Our findings could not paint a clearer picture: DACA has been unreservedly good for the U.S. economy and for U.S. society more generally. Previous research has shown that DACA beneficiaries will contribute $460.3 billion to the U.S. gross domestic product over the next decade—economic growth that would be lost were DACA to be eliminated.

As our results show, the inclusion of these young people has contributed to more prosperous local, state and national economies; to safer and stronger communities through increased access to cars and home ownership; and to a more prepared and educated workforce for the future. Ending DACA now would be counterproductive at best and, at worst, cruel. At present, 800,000 lives—as well as the lives of their families and friends—hang in the balance. At a time when the continuing existence of DACA is facing its most serious threat ever, understanding the benefits of the program for recipients; their families and communities; and to the nation as a whole is all the more important.1

In another set of studies conducted by the Center for American Progress, the estimated economic losses created by the deportation of DACA recipients ran close to half of a trillion dollars over the next ten years:

Using data from two Center for American Progress publications—a report that estimates the gross domestic product (GDP) declines that would accompany removing all unauthorized workers from the country and a survey that estimates the share of DACA recipients who are employed—CAP estimates that ending DACA would result in a loss of $460.3 billion from the national GDP over the next decade. Ending DACA would remove an estimated 685,000 workers from the nation’s economy.2

DREAMers, under certain circumstances, can enlist in the military. As part of the Pentagon’s pilot program Military Accessions Vital to the National Interest, DREAMers who hold critical skills are allowed to serve in the United States military3. 900 DREAMers are currently serving under this program as physicians, nurses, and experts in certain languages with associated cultural backgrounds.4 Ending DACA and placing DREAMers in removal proceedings will remove them from high-need positions, which will have an impact on our nation’s military.

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3 https://studyinthestates.dhs.gov/what-is-mavni-information-for-designated-school-officials

The American Bar Association cannot allow for the termination of DACA and the resulting deportations to happen without taking action. This resolution calls upon Congress to protect DACA recipients, to enact pending DREAMer legislation, and to establish clear and fair rules and regulations for its implementation.

Congress is currently considering three major pieces of relevant legislation:

**Dream Act of 2017 (S. 1615)**

On July 20, 2017, Senator Graham (R-SC), joined by Senators Durbin (D-IL), Flake (R-AZ) and Schumer (D-NY) introduced this bill that would authorize the cancellation of removal and adjustment of status of certain individuals who are long-term United States residents and who entered the United States as children, such as DACA recipients. Six other Senators have signed on as co-sponsors (Murkowski, R-AK; Cortez Mastro (D-NV); Feinstein (D-CA); Harris (D-CA); Gardner (R-CO); and Bennet (D-CO)). This bill has been referred to Committee on the Judiciary.

**Recognizing America’s Children Act (H.R. 1468)**

On March 9, 2017, Representative Curbelo (R-FL-26) has sponsored a bill similar to S.1615 and which has been co-sponsored by 34 other Representatives from nineteen different state delegations (33 Republicans, 1 Democrat). On March 22, 2017, this bill was referred to the Committee on Armed Services, Homeland Security and Counterterrorism and Intelligence and other committees of the House.

It is important to note that in both pieces of legislation, there is a codified pathway to conditional residency and thereafter to permanent resident status.

**Bar Removal of Individuals who Dream and Grow our Economy (BRIDGE) Act (S.128, H.R.496)**

Senators Lindsey Graham (R-SC) and Dick Durbin (D-IL), along with five other senators, have introduced the BRIDGE Act, bipartisan legislation whose intent is to allow people who are eligible for or who have received work authorization and temporary relief from deportation through Deferred Action for Childhood Arrivals (DACA) to continue living in the U.S. with permission from the federal government. Identical legislation was introduced in the House of Representatives by Rep. Mike Coffman (R-CO) and seven other House members.

Congressional representatives from both sides of the aisles have publicly voiced their support for DACA and DREAMer immigrants.5

**Sen. Lindsey Graham (R-SC):** “I do not believe that we should pull the rug out and push these young men and women – who came out of the shadows and registered with the federal government – back into the darkness.”

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5 List of quotes from members of Congress collected from: https://dreamers.fwd.us/what-congress-is-saying
Sen. Dick Durbin (D-IL): “For over a decade, I’ve come to the Senate floor to share with my colleagues and the American people the stories of talented young undocumented immigrants, who have overcome the odds to give back to the only country they call home. Since the establishment of DACA, we’ve witnessed them realized their full potential. We cannot squander that talent and dedication and send them back to countries they barely know.”

Sen. Marco Rubio (R-FL): “Then there is the human side, and that is, okay, there is no legal right but is there not a humanitarian rational for perhaps allowing some of the people here legally to remain because they are good people because they were brought here as children.”

Sen. Joe Donnelly (D-IN): “Our country is still in need of comprehensive immigration reform, but in the interim we should pass this bipartisan legislation to give these young people, who were brought here through no fault of their own, some clarity and stability. Upending existing protections for the nearly 10,000 young people in Indiana who have come forward, registered, and have been working here legally for several years isn’t the path we should take.”

Rep. Mike Coffman (R-CO): “It’s so important to recognize that young people who were brought here as children, who grew up here, went to school here, and who often know of no other country, be allowed to remain in the U.S. Let’s give them a chance to achieve the American dream through work, education or military service, and to help us together build a stronger America.”

Rep. Pramila Jaypal (D-WA): “It’s our moral responsibility to protect children who were brought here years ago through no fault of their own. Not only because they are our friends, neighbors and loved ones, but because it’s the right thing to do. We are the land of opportunity that welcomes anyone seeking a better life and access to the American dream. Our inhumane immigration system goes against our values. We need to work together to solve this crisis. This is an important first step toward protecting these young people from deportation. I will continue to advocate for a permanent solution not only for these children, but also their families.”

Rep. Peter King (R-NY): “I have said that I hope the Dreamers who obeyed the law, have gone to school and/or served the military get a path to citizenship.”

DACA has strict eligibility requirements pertaining to applicants’ criminal records. Any applicant who has been convicted of a felony offense, a significant misdemeanor offense, or three or more misdemeanors not occurring on the same day and related to the same misconduct is automatically ineligible for DACA unless the Department of Homeland Security (DHS) determines there to be exceptional circumstances. DHS conducts thorough background investigations to ensure applicants are not a threat to national security or public safety. Even

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6 https://www.uscis.gov/archive/frequently-asked-questions#criminal%20convictions
records that have been expunged can be considered grounds for ineligibility, which is indicative of the high level of scrutiny DHS uses when reviewing applications.\(^7\)

**Conclusion**

For the reasons set forth above, the American Bar Association urges Congress to act appropriately in enacting legislation to address those who have benefitted from DACA, to allow them to continue to live their lives and contribute to American society, but also to consider a more lenient approach to the criminal based exclusion grounds to avoid an overly harsh consequence for minor criminal behavior.

Respectfully submitted,

Sandy Weinberg
Chair, Criminal Justice Section

February, 2018

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\(^7\) https://www.uscis.gov/archive/frequently-asked-questions#criminal%20convictions
108E

GENERAL INFORMATION FORM

Submitting Entities: ABA Criminal Justice Section

Submitted By: Sandy Weinberg, Chair, ABA Criminal Justice Section

1. Summary of Resolution(s).
   
   This resolution advocates for continued use of prosecutorial discretion in a manner that prevents DHS resources from being used to apprehend, detain, and deport DREAMers and it advocates for clean, standalone, and bipartisan legislations that protects DREAMers from removal and accords them a reasonable pathway to citizenship.

2. Approval by Submitting Entity.

   This resolution was passed by the ABA Criminal Justice Council in November 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?

   The following Association policy is relevant but none would be affected by the adoption of this resolution:

   2006 (MY) 107B: Immigration Reform
   Supporting a regulated, orderly and safe system of immigration and the need for an effective and credible immigration enforcement strategy, including one that respects domestic and international legal norms.

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

   N/A.


   Dream Act of 2017 (S. 1615)

   On July 20, 2017, Senator Graham (R-SC), joined by Senators Durbin (D-IL), Flake (R-AZ) and Schumer (D-NY) introduced this bill that would authorize the cancellation of removal and adjustment of status of certain individuals who are long-term United States residents and
who entered the United States as children, such as DACA recipients. Six other Senators have signed on as co-sponsors (Murkowski, R-AK; Cortez Mastro (D-NV); Feinstein (D-CA); Harris (D-CA); Gardner (R-CO); and Bennet (D-CO)). This bill has been referred to Committee on the Judiciary.

Recognizing America’s Children Act (H.R. 1468)

On March 9, 2017, Representative Curbelo (R-FL-26) has sponsored a bill similar to S.1615 and which has been co-sponsored by 34 other Representatives from nineteen different state delegations (33 Republicans, 1 Democrat). On March 22, 2017, this bill was referred to the Committee on Armed Services, Homeland Security and Counterterrorism and Intelligence and other committees of the House.

BRIDGE Act (S.128, H.R. 496)

Both bills were introduced in their respective chambers of Congress on January 12, 2017. No action is pending at this time.

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

This resolution will be used by the Government Affairs Office in its lobbying efforts, as well as by ABA members who wish to engage with members of Congress and the Executive Branch to advocate on behalf of the interests expressed in this resolution. It will also be used in amicus briefs and to assist ABA members who may be representing DACA Applicants or individuals pursuing immigration relief and/or benefits.

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

None.

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

N/A

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
    - Standing Committee on 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
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Commission on Racial & Ethnic Diversity
Coalition on Racial & Ethnic Justice
Commission on Youth at Risk
Young Lawyer’s Division
Section of Civil Rights and Social Justice
Government and Public Sector Lawyers Division
Section on International Law
Judicial Division
Law Practice Division
Section on Science & Technology
Section on Health Law
Section of Litigation
Law Student Division,
Solo, Small Firm, and General Practice Division
Standing Committee on Armed Forces Law
Standing Committee on Legal Assistance for Military Personnel

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

Kevin Scruggs
1050 Connecticut Avenue NW, Suite 400
Washington, D.C. 20036
E: kevin.scruggs@americanbar.org

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

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

1. Summary of the Resolution

This resolution advocates for continued use of prosecutorial discretion in a manner that prevents DHS resources from being used to apprehend, detain, and deport DREAMers and it advocates for clean, standalone, and bipartisan legislations that protects DREAMers from removal and accords them a reasonable pathway to citizenship.

2. Summary of the Issue that the Resolution Addresses

The Deferred Action for Childhood Arrivals program, commonly known as DACA, has allowed almost 800,000 immigrant youth to remain in the United States since its inception by the Obama Administration in 2012. This Presidential policy, by way of Executive Action, targeted minors who may have been brought to the country illegally or overstayed their visas before the age of 16 and who applied before the age of 31. On September 5, 2017, the Trump Administration announced the termination of the program, with a complete phase out over the next couple of years. This has left the fate of approximately 800,000 DACA recipients in limbo and most likely subject to removal from the United States. The President agreed to wait for six months, or March 5, 2018, to determine whether Congress would act before making any further decisions on the fate of DACA and its recipients.

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

This resolution will be used by the Government Affairs Office in its lobbying efforts, as well as by ABA members who wish to engage with members of Congress and the Executive Branch to advocate on behalf of the interests expressed in this resolution.

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

None known.
RESOLUTION

RESOLVED, That the American Bar Association urges the Congress to approve appropriations to the Library of Congress necessary to enable the Law Library of Congress to adequately staff, maintain, modernize, and enhance its services, collections, facilities, digital projects, and outreach efforts.
Established by the U.S. Congress in 1832, the primary mission of the Law Library of Congress ("LLC") is to provide Congress with timely, innovative and excellent in-depth analytical research and reports for foreign, comparative, international and U.S. law. To accomplish that objective, the LLC has assembled a staff of experienced foreign and American-trained lawyers and law librarians to interpret complex and dynamic legal issues for all three branches of federal government: Members of Congress, the federal judiciary, and executive branch agencies. Staff rely on the Law Library’s collection, the world’s largest legal repository, with approximately three million volumes. About 60% of the collection is foreign, and often, those materials are unique and unavailable in their originating countries. In addition, staff continue developing the collection for 300 legal systems and jurisdictions, U.S. states and territories in the following formats: manuscripts, journals, film, artwork, electronic books and documents, and microfilm.

Fairly recently, the Law Library developed the Indigenous Law Portal (https://www.loc.gov/law/help/indigenous-law-guide/index.php), bringing together materials from the Law Library of Congress, and links to tribal websites and primary source materials. Indigenous law materials can be difficult to locate, as they may not be available electronically, or they may only be passed on through oral tradition. The portal includes tribal laws and ordinances, codes and constitutions, along with digitized copies of historic Native American constitutions from the Law Library’s collection.

The magnitude and maintenance of such a unique collection brings great challenges to the development and daily administration of the collection while maintaining it for the benefit of our nation and the world. Relied on by Congress, the Supreme Court, and the nation’s lawyers, the LLC persistently faces challenges to reaching its full potential. Sustained enthusiastic support from the American Bar Association ("ABA") and its Standing Committee on the Law Library of Congress, cognizant of current conditions, remains critical. As the need for this information and expertise grows, and new technologies emerge, the challenge of maintaining appropriate staffing and caring for collections increases. Collections care includes that facilities are maintained and that collections are preserved, stored at optimum humidity and temperature, and readily accessible.

Spurred by congressional testimony of Supreme Court Justice Harlan Stone in 1933 regarding the importance of providing sufficient funding to the LLC to expand its collection and address gaps in materials “for the purpose of conducting legal investigation and research,” the ABA established a Special Committee on Facilities of the Law Library of Congress in 1932. In its report to the ABA House of Delegates in 1933, the Committee discussed the status of the facilities and collection, the existing needs of the LLC, congressional appropriations, and the role of the Association and its members in “the building up of a legal research center for lawyers and for researchers.”1 The report noted the Committee’s ongoing collaboration with the Librarian of Congress and the Law

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1 Remarks of James Oliver Murdock, Chair, Special Committee on the Facilities of the Law Library of Congress, before the ABA House of Delegates, 1933.
Librarian, the importance of acquiring foreign legal materials, and a recent appropriation increase for the acquisition of books. The Law Library’s John T. Vance thanked the members of the ABA House of Delegates for their support, underscoring the importance of the Association’s advocacy by stating:

“When Senator Reed of Pennsylvania, upon the floor of the Senate last February moved an amendment to the legislation increasing the appropriation of the law library, he called particular attention to the fact that it had been supported and endorsed by the American Bar Association and I have not the slightest doubt but that that was very effectual in its passage. I can say without hesitation that the continued support of the American Bar Association is absolutely indispensable to the proper development of the Law Library of Congress.”

In recognition of the importance of the LLC to Congress, the nation’s lawyers, and the legal profession, in 1993 the ABA Special Committee became the Standing Committee on the Law Library of Congress. Through the Committee, the ABA actively serves as the voice of the legal profession concerning the Law Library of Congress. Working with Members of Congress and their staffs, the Committee has obtained higher levels of funding for the LLC over the past 85 years. Collaborating closely with the LLC and other nationally recognized professional societies, the Committee also has increased Law Library visibility and supported digitization of legal materials and other efforts that improve access to legal literature and resources. These efforts have included bringing LLC tours, presentations and information to ABA Day participants and to ABA entities and leadership; organizing in-person workshops and webinars presented by LLC specialists for ABA members; participating in outreach about the highly expert staff and the unparalleled collections – their richness and breadth, diversity, and import for the rule of law worldwide – that, in one example, reached not only an intended audience of ABA law student members but also multitudes of lawyers when other outlets aired the talk (https://legaltalknetwork.com/podcasts/aba-law-student-podcast/2017/02/library-congress-free-legal-research-resource/); co-organizing major undertakings (such as Magna Carta) that bring attention to the collections; and more. The Committee continues to work on enhancing the LLC as a national resource serving not only Congress but also the legal profession, universities and law schools, and the public.

The early challenges facing the Law Library continue today, along with new challenges posed by rapidly evolving technology, staff shortages and retirements, and aging equipment and facilities. Demand continues to outpace what its funding levels support, including furnishing access to U.S., foreign and comparative law materials unavailable elsewhere. This situation affects the work of the U.S. Congress, the U.S. Supreme Court, executive agencies, lawyers, law students, universities and law schools.

As a pillar of support to the rule of law worldwide, when Haiti sustained a massive earthquake it was the LLC, along with partners worldwide, that located and provided to the Haitian people primary source materials and access to their laws. When Afghanistan

was liberated from Taliban rule in 2001, the LLC located and provided the Afghani people a preserved copy of their legal codes. Other collections within the larger Library of Congress provide materials of importance to global stability and security, such as the general library collection in which the only known U.S. copy of the autobiography of Osama Bin Laden was found. Despite this, and further recognized as the premier source of international and foreign law in a single collection, due to inadequate funding the LLC lags in its ability to provide ready, full, and safe access to its wide-ranging collections.

Through its Board of Governors and House of Delegates, the ABA has on several occasions adopted formal resolutions intended to advance the case for the LLC in the face of budget cuts and budget constraints. 3 With budget cuts and Continuing Resolutions (“CR’s”) that have not kept pace with the needs of the LLC, the LLC faces dire issues, including staffing sufficiency, safety, and preservation concerns. Congress has failed to provide adequate funding for such essentials as these – among other requirements:

- Maintenance of key LLC resources, including overseas offices (critical to the LLC’s ongoing efforts to obtain legal materials from jurisdictions with acquisitions challenges); specialized foreign law staff, consisting principally of foreign-born and foreign-trained lawyers employed by the LLC; specially-trained staff of U.S. lawyers and librarians; and other LLC staff that provide critical support such as foreign language law material cataloguers in the Acquisitions and Bibliographic Access Directorate of the Library of Congress. Increasing globalization makes availability of foreign, international, and comparative law materials and expertise necessary at unprecedented levels;
- Full reclassification of material under the “Law” shelving arrangement to the modern “K” classification: 311,805 volumes remain to be reclassified. Law titles that remain in the obsolete LAW classification scheme require specialized language expertise to retrieve. Reclassification enables faster retrieval of materials, improved patron service, and better collection discovery through availability on shared online catalogs. Classifying titles from LAW to the K class has uncovered materials not previously cataloged, added titles to the online system that were omitted in previous transfers of information, and increased the number of inventoried volumes with scannable barcodes for easy identification. All has improved the discoverability of the collection for staff and patrons;
- Construction of enough environmentally sensitive off-site storage facility modules at Ft. Meade, Maryland to store the voluminous materials for which space no longer is available in Washington, DC;
- Meeting escalating costs of both acquisition of new materials and preservation of existing collections;
- Acquisition of an automated commercial off-the-shelf Content Management System to track inquiries, work products, workflows, and other processes, as well

as to manage document archival and retrieval throughout the Law Library to better serve Congress and other Law Library users;
- Mounting of large-scale exhibitions of materials and related programs that engage citizens across the globe and of all ages in discussions about critical issues highlighting the rule of law in resolution of cultural conflicts;
- Digital initiatives that will provide greater transparency and access to digital materials, benefiting the globe in the law-making process, among other benefits;
- Staff training; and
- Safe staff access to materials that presently reside on outdated, insufficient basement compact-shelving units.

The FY2017 Consolidated Appropriations Act was signed into law recently after a seven-month Continuing Resolution (CR). With the exception of funding for replacement of compact shelving in Quad C in the LLC’s basement, the enacted budget was flat compared with FY2016. In addition to failing to provide funding for the LLC to improve services and most facilities, the flat budget requires the LLC to absorb increased payroll costs, compelling them to hold vacant critically-needed positions. While the LLC was able to receive unspent funds from other Library of Congress divisions, this has not made up for the lack of adequate congressional funding. Upon submission of this report, the LLC is operating once again under a CR, through December 8, 2017, absorbing yet more unfunded “mandatories.” The consequences of inadequate funding are many, as evidenced by the bulleted list above.

Even were FY2018 and FY2019 congressional appropriations to meet every single stated need of the Library of Congress and its LLC – an unrealistic notion – that would be far from a guarantee of adequate funding in succeeding years. This is particularly so given that the Library and LLC require funds simply to catch up with ongoing essentials, much less to maintain and enhance services, systems, and facilities. Clear-cut ABA support for adequate congressional funding for a 21st-century LLC well into the future is a necessity. Today’s proposed statement of support both updates the House of Delegates on LLC and will enable the ABA to continue to advocate on this matter before Congress for years to come based on an informed understanding of the LLC’s essential needs.

The LLC’s diverse stakeholders – Congress, the U.S. Supreme Court, the legal profession, law libraries throughout the country and around the world, the business community, and the general public – deserve a fully functioning institution that meets the needs of our increasingly complex and competitive world. Whether through digital access or in-person scrutiny of print materials, the hundreds of thousands of stakeholders must be able to rely on the LLC for prompt access to authentic, accurate sources of law and reliable analysis.

In many societies and regions of the world, the rule of law is under threat or altogether absent. This state of affairs harms both our nation and international stability. The Law Library of Congress possesses a rich store of expertise and personalized guidance, helping to implement U.S. efforts in support of the rule of law through access to primary materials (in many languages) and other important authenticated documents. Further, the
LLC services and collections are available not only in person but also online, through Law.gov, Congress.gov, Ask-a-Librarian, and the Global Legal Monitor, among its many platforms. Online access can occur at any time of day or night, 365 days a year.

Aligned with the ABA’s priority to maximize access to justice and the availability of legal assistance to all who may need it, a key – and immeasurable – benefit of the LLC is that anyone, regardless of economic circumstances or geographic location, has access. From in-house counsel to non-profit organizations, solo practitioners to law school libraries, clients in major metropolitan areas to remote U.S. towns, or villages abroad, the Law Library of Congress offers its bounty. But its ability to keep up with the demand for its services and to preserve and facilitate timely access to its materials is stretched thin. For a nation of laws, the Law Library of Congress is an American treasure in the fullest sense. Congress must adequately fund the Library of Congress in order to effectively support the needs of our nation’s law library, and the ABA very strongly urges the Congress do so. It is to be noted, however, that the purpose of this resolution is to urge adequate funding of the Law Library; the resolution is not intended to provide support for reducing funding of other divisions of the Library of Congress.

Respectfully submitted,

Sheila Slocum Hollis
Chair, Standing Committee on the Law Library of Congress
February, 2018
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on the Law Library of Congress

Submitted By: Sheila Slocum Hollis, Chair

1. **Summary of Resolution(s).** The resolution calls on the ABA to urge Congress to approve appropriations necessary to enable the Library of Congress to adequately staff, maintain, modernize, and enhance the Law Library of Congress’s services, collections, facilities, digital projects, and outreach efforts.

2. **Approval by Submitting Entity.** This resolution was approved by the Standing Committee during the weeks of November 6 and 13, 2017. Cosponsors: approved by the Section of International Law on November 17, 2017; by the Section of Dispute Resolution on December 1, 2017; by the Section of Intellectual Property Law on December 5, 2017; by the Section of Environment, Energy, and Resources on December 8, 2017, by the Law Student Division on December 9, 2017; by the Law Practice Division on December 11, 2017, and by the Senior Lawyers Division on December 12, 2017.

3. **Has this or a similar resolution been submitted to the House or Board previously?** In November 1991, the ABA Board of Governors approved a resolution urging continued congressional funding for the Law Library of Congress. In February 1993, the House of Delegates approved a resolution supporting reasonable cost-recovery by the Library of Congress and Law Library of Congress for their provision of specialized services. In February 2011, the House approved a resolution supporting efforts by the Library and Law Library to develop, maintain, and enhance their services, facilities, operations, staff; materials acquisition, preservation and care; and use of the best available technologies to make their collections accessible.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** Please see response to #3. The current position builds on and updates prior policy positions.

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

6. **Status of Legislation.** The FY2017 Consolidated Appropriations Act was signed into law recently after a seven-month Continuing Resolution (CR). With the exception of funding for replacement of compact shelving in Quad C in the LLC’s basement, the enacted budget was flat compared with FY2016. In addition to failing to provide funding to improve services and most facilities, the flat budget requires the LLC to absorb increased payroll costs, compelling them to hold vacant critically-needed positions. For FY2018, the Library of Congress, parent institution of the Law Library of Congress, continues to operate under a CR through December 8, 2017, that may be extended to the end of 2017. The CR includes a rescission of 0.6791%, representing an annualized decrease of 6.3% from the amount requested to maintain the Law
Library’s current operating level. The decrease will be 6.7% if the CR rescission is applied to the entire FY18. This funding level requires the Law Library to absorb mandatory payroll increases and price level increases in FY18 outlays by holding several critical positions vacant and decreasing funds for contracted services, among other needs. This in turn jeopardizes any increase in access to legal materials, both online and in person, placing at risk the LLC’s status as a world leading foreign and comparative law research institution. H.R. 3354 decreases FY2018 appropriations below FY2017 levels; The Senate Appropriations Committee has yet to take action on all 12 of the required annual funding bills. The Library of Congress is now developing an FY2019 budget submission, due to Congress in late January.

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 reference policy – sponsored and/or supported by several concerned ABA entities operating in diverse substantive legal realms – in its advocacy efforts on behalf of the Law Library of Congress 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. This policy resolution has been referred to the following entities, including those represented through association with the Standing Committee on the Law Library of Congress:

- Section of Administrative Law & Regulatory Practice
- Section of Antitrust Law
- Business Law Section
- Section of Civil Rights and Social Justice
- 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
- Section of Intellectual Property Law
- Section of International Law
- Judicial Division
- Section of Labor & Employment Law
- Law Practice Division
- Law Student Division
- Section of Legal Education and Admissions to the Bar
- Legal Services Division
- Section of Litigation
- Section of Public Contract Law
- Section of Real Property, Trust & Estate Law
- ROLI
Section of Science & Technology Law
Section of State & Local Government
Senior Lawyers Division
Solo, Small Firm and General Practice Division
Section of Taxation
Tort Trial and Insurance Practice Section
Young Lawyers Division
Center on Children and the Law
Communications and Media Relations
Cyber Security Legal Task Force
Commission on Disability Law
Committee on Disaster Response and Preparedness
Commission on Domestic and Sexual Violence
Standing Committee on Election Law
Governmental Affairs Office
Commission on Hispanic Rights
Commission on Homelessness & Poverty
Center for Human Rights
Center for Innovation
Commission on Law & Aging
Standing Committee on Law & National Security
Center for Pro Bono
Center for Professional Responsibility
Public Education Division
Center for Racial and Ethnic Diversity
Commission on Sexual Orientation and Gender Identity
Standing Committee on Technology & Information Services
Commission on Women

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address): Sheila Slocum Hollis, Duane Morris LLP, 505 9th Street, NW, Suite 1000, Washington, DC 20004, tel. 202-776-7810; SSHollis@duanemorris.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.*): Sheila Slocum Hollis, Duane Morris LLP, 505 9th Street, NW, Suite 1000, Washington, DC 20004, tel. 202-776-7810; SSHollis@duanemorris.com.
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 Law Library of Congress to adequately staff, manage, modernize, and enhance its services, collections, facilities, digital projects, and outreach efforts.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the consistent need for adequate congressional funding for the nation’s Law Library through appropriations to its parent institution, the Library of Congress. As the representative of the nation’s legal profession, the American Bar Association must stand in support of the Law Library of Congress to ensure continued collection, preservation, and access to the vast and often unique legal resources available through the Law Library to legislators, practitioners, scholars, and law students throughout the country and across the globe.

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

The proposed policy resolution addresses the issues by identifying current and new future needs of the LLC 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.
RESOLUTION

RESOLVED, That the American Bar Association adopts the Model Provisions on Electronic Commerce for International Trade Agreements ("Model Provisions"), dated February 2018;

and

FURTHER RESOLVED, That the American Bar Association recommends the Model Provisions as a template for international trade agreements and other relevant international agreements and guidelines.
Article 1.1: Definitions

For the purposes of this [Chapter]:

1. **computing facilities** means computer servers and storage devices for processing or storing information for commercial use;

2. **covered person** means:
   (a) a covered investment as defined in Article [x.1 (Definitions)];
   (b) an investor of a Party as defined in Article [x.1 (Definitions)]; or
   (c) a service supplier of a Party as defined in Article [x.1 (Definitions)];

3. **digital product** means a computer program, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically;¹ ²

4. **electronic authentication** means the process or act of verifying the identity of a party to an electronic communication or transaction or ensuring the integrity of an electronic communication;

5. **electronic transmission or transmitted electronically** means a transmission made using any electromagnetic means, including by photonic means;

6. **personal information** means any information, including data, about an identified or identifiable natural person;

7. **trade administration documents** means forms issued or controlled by a Party that must be completed by or for an importer or exporter in connection with the import or export of goods; and

8. **unsolicited commercial electronic message** means an electronic message which is sent for commercial or marketing purposes to an electronic address, without the consent of the recipient or despite the explicit rejection of the recipient, through an Internet access service supplier or, to the extent provided for under the laws and regulations of each Party, other telecommunications service.

¹ For greater certainty, digital product does not include a digitized representation of a financial instrument, including money.
² The definition of digital product should not be understood to reflect a Party’s view on whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods.
Article 1.2: Scope and General Provisions

1. This Chapter shall apply to measures adopted or maintained by a Party that affect trade by electronic means.

2. This Chapter shall not apply to:

   (a) government procurement, provided a Party notifies other Parties to the extent the above exclusion applies; or

   (b) information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection.

Article 1.3: Customs Duties

1. No Party shall impose customs duties on electronic transmissions, including content transmitted electronically, between a person of one Party and a person of another Party.

2. For greater certainty, paragraph 1 shall not preclude a Party from imposing internal taxes, fees or other charges on content transmitted electronically, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement and on a non-discriminatory basis.

Article 1.4: Non-Discriminatory Treatment of Digital Products

1. No Party shall accord less favorable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products.³

2. This Article shall not apply to broadcasting.

Article 1.5: Domestic Electronic Transactions Framework


2. Each Party shall endeavor to:

³ For greater certainty, to the extent that a digital product of a non-Party is a “like digital product”, it will qualify as an “other like digital product” for the purposes of this paragraph.

⁴ For greater certainty, transacting parties to commercial arrangements covered by the ECC can continue to enforce rights thereunder directly, separate from government to government dispute provisions common to trade agreements.
(a) avoid any unnecessary regulatory burden on electronic transactions; and

(b) facilitate input by interested persons in the development of its legal framework for electronic transactions.

Article 1.6: Electronic Authentication and Electronic Signatures

1. Except in circumstances otherwise provided in its law, a Party or person subject to its jurisdiction shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.

2. No Party shall adopt or maintain measures for electronic authentication that would:

   (a) Prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; or

   (b) prevent parties to an electronic transaction from having the opportunity to establish before judicial or administrative authorities the signature of a transacting party, or that their transaction complies with any legal requirements with respect to authentication.

3. Notwithstanding paragraph 2, a Party may require that, for a particular category of transactions, the method of authentication meet certain performance standards or is certified by an authority accredited in accordance with its law.

4. The Parties shall encourage the use of interoperable electronic authentication.

Article 1.7: Online Consumer Protection

1. The Parties recognize the importance of adopting and maintaining transparent and effective measures to protect consumers from fraudulent and deceptive commercial activities as referred to in [any applicable Consumer Protection provision in this trade agreement] when they engage in electronic commerce.

2. Each Party shall adopt or maintain consumer protection laws to proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities.

Article 1.8: Personal Information Protection

1. The Parties recognize the economic and social benefits of protecting the personal information of users of electronic commerce and the contribution that this makes to enhancing consumer confidence in electronic commerce.

2. To this end, each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce. In the development of its legal framework for the protection of personal information, each
Party should take into account principles and guidelines of relevant international bodies.\(^5\)

3. Each Party shall endeavor to adopt non-discriminatory practices in protecting users of electronic commerce from personal information protection violations occurring within its jurisdiction.

4. Each Party should publish information on the personal information protections it provides to users of electronic commerce, including how:
   - (a) individuals can pursue remedies; and
   - (b) business can comply with any legal requirements.

5. Recognizing that the Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote compatibility between these different regimes. These mechanisms may include the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement, or broader international frameworks. To this end, the Parties shall endeavor to exchange information on any such mechanisms applied in their jurisdictions and explore ways to extend these or other suitable arrangements to promote compatibility between them.

**Article 1.9: Paperless Trading**

Each Party shall endeavor to:
   - (a) make trade administration documents available to the public in electronic form; and
   - (b) accept trade administration documents submitted electronically as the legal equivalent of the paper version of those documents.

**Article 1.10: Principles on Access to and Use of the Internet for Electronic Commerce**

Subject to applicable policies, laws and regulations, the Parties recognize the benefits of consumers in their territories having the ability to:
   - (a) access and use services and applications of a consumer’s choice available on the Internet, subject to reasonable network management;\(^6\)

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\(^5\) For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as a comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy.

\(^6\) The Parties recognize that an Internet access service supplier that offers its subscribers certain content on an exclusive basis would not be acting contrary to this principle.
(b) connect the end-user devices of a consumer’s choice to the Internet, provided that such devices do not harm the network; and
(c) access information on the network management practices of a consumer’s Internet access service supplier.

Article 1.11: Cross-Border Transfer of Information by Electronic Means

1. The Parties recognize that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.
2. Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person, subject to applicable agreements between the Parties, and laws and regulations of the Parties.

Article 1.12: Internet Interconnection Charge Sharing

The Parties recognize that a supplier seeking international Internet connection should be able to negotiate with suppliers of another Party on a commercial basis. These negotiations may include negotiations regarding compensation for the establishment, operation and maintenance of facilities of the respective suppliers.

Article 1.13: Location of Computing Facilities

1. The Parties recognize that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.
2. No Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.

Article 1.14: Unsolicited Commercial Electronic Messages

1. Each Party shall adopt or maintain measures regarding unsolicited commercial electronic messages that:
   (a) require suppliers of unsolicited commercial electronic messages to facilitate the ability of recipients to prevent ongoing reception of those messages;
   (b) require the consent, as specified according to the laws and regulations of each Party, of recipients to receive commercial electronic messages; or
   (c) otherwise provide for the minimization of unsolicited commercial electronic messages.
2. Each Party shall provide recourse against suppliers of unsolicited commercial electronic messages that do not comply with the measures adopted or maintained to paragraph 1.

3. The Parties shall endeavor to cooperate in appropriate cases of mutual concern regarding the regulation of unsolicited commercial electronic messages.

**Article 1.15: Cooperation**

Recognizing the global nature of electronic commerce, the Parties shall endeavor to:

(a) work together to assist Small and Medium-Sized Enterprises (SMEs), including micro business owners, to overcome obstacles to its use;

(b) exchange information and share experiences on regulations, policies, enforcement and compliance regarding electronic commerce, including:

(i) personal information protection;

(ii) online consumer protection, including means for consumer redress and building consumer confidence;

(iii) unsolicited commercial electronic messages;

(iv) security in electronic communications;

(v) authentication; and

(vi) e-government;

(c) exchange information and share views on consumer access to products and services offered online among the Parties;

(d) participate actively in regional and multilateral fora to promote the development of electronic commerce; and

(e) encourage development by the private sector of methods of self-regulation that foster electronic commerce, including codes of conduct, model contracts, guidelines and enforcement mechanisms.

**Article 1.16: Cooperation on Cybersecurity Matters**

The Parties recognize the importance of:

(a) building the capabilities of their national entities responsible for computer security incident response; and

(b) using existing collaboration mechanisms to cooperate to identify and mitigate malicious intrusions or dissemination of malicious code that affect the electronic networks of the Parties.
Article 1.17: Source Code

1. No Party shall require the transfer of, or access to, source code of software owned by a person of another Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.

2. Nothing in this Article shall preclude the inclusion or implementation of terms and conditions related to the provision of source code in commercially negotiated contracts; or

3. This Article shall not be construed to affect requirements that relate to patent applications or granted patents, including any orders made by a judicial authority in relation to patent disputes, subject to safeguards against unauthorized disclosure under the law or practice of a Party.
1. INTRODUCTION

The existing legal framework for global trade through electronic means remains outdated and inadequate. The ability of companies and consumers to move data has become vital in promoting, fostering, and expanding commerce and services around the globe. Many countries have enacted rules that have the effect of reducing competition and disadvantaging entrepreneurs, by imposing regulatory measures that create barriers to trade or overly restrict the free flow of information. This Resolution supports liberalization and harmonization of the regulation of business data flows from one country to another country by adopting the American Bar Association Model Provisions on Electronic Commerce for International Trade Agreements, dated February 2018, (“the Model Provisions”) as the standard template for guiding countries in negotiating international trade agreements, other relevant international agreements and guidelines, and subject to reasonable safeguards such as the protection of consumer data upon its exportation. Other related purposes include treaties facilitating economic relationships other than trade specific provisions, such as investment treaties; bilateral treaties dealing with "Friendship, commerce and navigation;" general treaties on cross-border e-commerce; intergovernmental organization texts promoting e-commerce; and texts produced by Non-Governmental Organizations (NGOs), such as the International Chamber of Commerce.

The establishment and promotion of a freer and more open Internet will enable entrepreneurial opportunities, expand social networking, broaden access to a myriad of services and information sources, and stimulate economic growth throughout the world. The Model Provisions focus on protecting the free flow of cross-border data and help to ensure digital products originating from member States of international trade agreements are not at a competitive disadvantage in another member’s market. In addition, the Model Provisions will advantage North American businesses and help to create jobs in those markets.1

The Model Provisions are based upon the existing electronic commerce provisions supported by the United States in a recent international trade agreement negotiation,2 and they take into consideration the fast-changing pace of globalization and technology. For example, the availability of cloud computing and of Internet-based products and services should not require companies and digital entrepreneurs “to build physical infrastructure and expensive data centers in every country they seek to serve.”3 However, as the Office of the U.S. Trade Representative has observed, “many countries have tried to enforce such requirements which add unnecessary costs and burdens on

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providers and customers alike." The Model Provisions specifically address these localization barriers through specific provisions designed to promote access to networks and efficient data processing. In essence, “fundamental non-discrimination principles are at the core of an efficient global trading system for goods and services,” and the Model Provisions ensure that these principles apply to cross-border data.

An overview of the Model Provisions is contained in Section 2 of this Report and Sections 3 through 8 provide background information regarding the development of e-commerce provisions in international trade agreements.

2. PROPOSED MODEL PROVISIONS ON E-COMMERCE

When negotiating the e-commerce provisions in international trade agreements, relevant agreements and guidelines, and for the related purposes, the United States and other countries should include provisions that will not only prevent unnecessary barriers to digital trade from occurring in the parties’ markets, but establish policy frameworks to allow digital trade to flourish in large part by setting out how one decides what barriers are necessary and which are not. In general, this is best accomplished by including digital transactions within the fundamental non-discriminatory principles and exceptions of free trade agreements, rather than drafting language that specifically relates to digital trade. It has been the experience worldwide in adapting a country legal regime to electronic communications that the existing conceptual framework should be maintained as far as possible. This approach has the benefit of maintaining the known legal principles and policy accommodations of existing law, and of avoiding the need to reinvent rules that already exist and that turn out to work well in any medium. In short, both economy of effort and certainty of effect benefit from this approach. The same is true for the laws of international trade.

The Model Provisions are not intended to require changes to existing conceptual domestic frameworks for electronic communications that are compatible to the Model Provisions. Also the Model Provisions, including Model Articles 1.5 and 1.6, are compatible with the Uniform Electronic Transactions Act (UETA) provisions where they cover similar matters. Article 1.5.1 is consistent with other American Bar Association Resolutions - as reflected as well in the TPP e-commerce chapter – that the parties to trade agreements ratify the UNICTRAL Model Law on Electronic Commerce 1996 or the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC). The ECC embodies exactly that principle, to

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4 Id.
5 Id.
6 Uniform Electronic Transactions Act as promulgated by the National Conference of Commissioners on Uniform State Laws.
7 ABA Resolution 06A303 urging the United States to become a signatory to the United Nations Convention on the Use of Electronic Communications in International Contracts; ABA Resolution 08A100 urging the U.S. Government to ratify the United Nations Convention on the Use of Electronic Communications in International Contracts.; and ABA Resolution 14A114A supporting modernization and simplification of the requirements, procedures, laws and regulations related to verification of signatures in cross-border contexts to increase reciprocal recognition among jurisdictions.
accommodate e-communications within existing laws with minimal disruption to the operation of those laws.

The following are highlights of the key Model Provisions that are helpful in advancing both high-level objectives noted above. The framework for the proposed provisions is based on Chapter 14 of the TPP, and the relevant key differences between the Model Provisions and Chapter 14 are discussed below.8

- **Article 1.3: Customs Duties.** This provision explicitly prohibits the parties from applying customs duties on cross-border data flows (i.e., electronic transmissions). Specifically, it prohibits imposition of customs duties on digital products, to ensure that products distributed electronically, such as software, music, video, e-books, and games are not disadvantaged. While the WTO has had since 1998 a moratorium on the imposition of customs duties on electronic transmissions and digital content, the parties to trade agreements should make that prohibition binding and enforceable. This is a core provision that prevents the parties from using such policy tools.

- **Article 1.4: Non-Discriminatory Treatment of Digital Products.** This provision ensures that the fundamental trade principle of national treatment covers digital products, so that such products created in the market of one of the parties are not discriminated against in the markets of another party. This core provision would help to ensure that digital products are not subject to trade barriers.

- **Article 1.6: Electronic Authentication and Electronic Signatures; and Article 1.7: Online Consumer Protection.** Taken together, these provisions enable digital transactions to occur more seamlessly across borders and increase consumer trust in digital trade. Traders want to know that the parties’ markets will recognize electronic signatures when the trading parties are comfortable with them, and consumers want their governments to promote measures concerning fraudulent and deceptive online commercial activities. Without trust, digital trade will not grow, so these provisions are critical elements of the proposed digital trade framework. The Model Provisions do not contain a definition of “electronic signature” because the ABA has adopted other resolutions supporting legal requirements and definitions related to electronic signatures, including the United Nations Convention on the Use of Electronic Communications in International Contracts (“E-Contracting Convention”).9 Most of the principles and legal rules embodied in the E-Contracting Convention are similarly reflected in the primary U.S. e-commerce legislation (E-SIGN and UETA), including the definition of “electronic signature.”

- **Article 1.8: Personal Information Protection.** This provision is a fundamental, innovative element of the chapter designed to promote better protection of users and digital traders’ personal data and information. The parties would be bound to establish frameworks for the protection of personal information of users of electronic commerce. In the development of these frameworks, they should consider the principles and guidelines of relevant international...
bodies, such as the OECD Privacy Principles, APEC Privacy Framework, and APEC Cross-Border Privacy Rules System.

- **Article 1.11: Cross-Border Transfer of Information by Electronic Means.** This provision is one of the key elements of the Model Provisions. In obliging the parties to allow the cross-border transfer of information by electronic means, including personal information, the Model Provisions establish a norm that the flow of data across borders, including personal data, enables trade, investment, and economic activity at the global level. Unlike TPP’s Article 14.11, this provision does not include an exception allowing a Party to adopt or maintain measures inconsistent with the rules to achieve an allegedly public policy objective. The lack of such an exception is consistent with the intent of the Model Provisions to establish an efficient legal approach to trade agreements as a whole. Parties may negotiate and rely upon general exceptions to a trade agreement but may not establish new provision-specific or medium-specific exceptions. This approach is also consistent with existing trade agreements, such as Article XIV of GATS. It also mitigates the risk of creating confusion regarding which exceptions take precedence in dispute settlement proceedings. Moreover, new provision-specific exceptions would set an undesirable precedent for future agreements; the Model Provisions choose the preferable route of establishing a framework relying on general exceptions to a trade agreement.

- **Article 1.13: Location of Computing Facilities.** Data localization requirements are policy approaches that an increasing number of governments are using in the name of protecting personal data, strengthening cybersecurity, accessing data for law enforcement purposes, or bolstering local technology sectors. Such measures are primary examples of barriers to digital trade that restrict data flows, raise costs for local and foreign companies, depress economic activity, and largely do not meet their stated policy objectives. This provision is a critical complement to Model Article 1.11. Also, similar to Model Article 1.11, this provision does not include an exception for public policy objectives for the reasons discussed above.

- **Article 1.17: Source Code.** Digital products, digitally-intensive services, cloud computing, and other digital technologies rely on software. Some governments are requiring companies as a condition of market access to transfer or provide access to software source code. This provision would expressly prohibit such requirements. In addition, the provision broadly applies to a wide range of software and does not include the mass-market software limitation or critical infrastructure software carve-out contained in Chapter 14 of TPP.

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3. INTERNATIONAL DIGITAL TRADE AND E-COMMERCE

While there is no generally accepted definition of the terms, “digital trade” and “e-commerce” generally describe transactions that involve, or are enabled by, the Internet. The U.S. International Trade Commission (“USITC”) has broadly defined digital trade as “U.S. domestic commerce and international trade in which the Internet and Internet-based technologies play a particularly significant role in ordering, producing, or delivering products and services.” The USITC explained that this definition was “adopted to capture a wide variety of economic activities that are facilitated by or occur via the Internet.” These can include “orders placed on an e-commerce website; information streams needed by manufacturers to manage global value chains; communication channels such as email and voice over Internet protocol (VoIP); and financial data and transactions relied on for online purchases or electronic banking.”

The World Trade Organization (WTO) has defined e-commerce as “the production, distribution, marketing, sale or delivery of goods and services by electronic means.” The Organization for Economic Cooperation and Development (OECD) has defined it as “the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders.” In order to fall under the definition, the goods or services must be ordered by such methods. E-commerce can involve several forms, including business-to-business transactions, business-to-consumer transactions, and business-to-government transactions. In short, any transaction that is facilitated by, or occurs through, the Internet can fall under one of the articulated definitions of digital trade or e-commerce.

4. BENEFITS OF CROSS-BORDER DATA TRANSFERS

An OECD report has found that the “Internet has become a key economic infrastructure, revolutionizing businesses and serving as a platform for innovation.” A 2014 McKinsey Global Institute study estimated that global transactions via e-commerce amounted to US$8 trillion per

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12 Id.
16 United Nations Conference on Trade and Development, In Search of Cross-Border E-Commerce Trade Data, April 2016, at 2. These can include online transactions related to goods that are subsequently sold to end-users through retail outlets or the provision of goods are services to other businesses; business to consumer transactions.
17 These can include online sales channels of retail or manufacturing companies of digital products and services or physical goods. See id.
18 These can include sales via “online marketplace platforms” or communities. See id.
19 These can include bids by the government through “e-procurement.” See id.
Internet-based growth has been coupled with global increases in data collection, retention, and analysis, covering a broad array of sectors. In turn, the need for, and value added from, cross border information flows have increased significantly.

Both large companies and small-and-medium enterprises (SMEs) benefit from cross-border data flows. Data transfers enable large companies to, among other things, support “diversified supply chains, global talent sourcing, and analysis of large data sets.” Aided by connectivity and critical marketing information, SMEs benefit by the ability to target customers around the world. As a consequence, cross border data flows can help level the playing field for such entities, and for businesses of any size that are based in smaller towns or remote locations around the world. Indeed, a 2012 study found that SMEs that “rely heavily on Internet services typically have 22% greater revenue growth than those that use the Internet minimally.” All companies (regardless of whether they engage in the sale of goods or services online) can benefit from the ability to transfer records, data, or communications in connection with the traditional goods or services they provide.

A recent study by McKinsey found that cross-border data trade generates greater economic impact than trade in traditional goods. These benefits increase the demand for and reliance upon access to data. Along with fueling revenue growth and economic development, cross-border data transfers can advance a variety of public interest or social objectives. A 2014 U.S. Chamber of Commerce study provided several relevant case studies, related to the following: transfer of medical data across borders for “maintenance and repair;” maintenance of accurate databases related to individuals that are in transit or have permanently migrated; facilitation of efficiencies for manufacturing and energy development; management of a global workforce; and the monitoring of “outbreaks and spreads of infectious diseases around the world.”

5. E-COMMERCE PROVISIONS IN TRADE AGREEMENTS OF OTHER COUNTRIES

Several recent trade agreements have included provisions related to e-commerce. Some agreements have been more robust than others in terms of commitments. For example, the e-commerce chapter in the European Union (“EU”)–Canada Comprehensive Economic and Trade

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23 Manyika & Roxburgh, supra note 21, at 4.
Agreement, which was signed in October 2016, does not contain provisions on cross-border data flows. The parties agreed *inter alia* to “promote the development of electronic commerce” and “maintain a dialogue on issues raised by electronic commerce, and committed to “not impose a customs duty, fee, or charge on a delivery transmitted by electronic means;” with an exception for certain internal tax or charges. Notably, in the Trans-Pacific Partnership (“TPP”), Canada agreed to a range of provisions related to e-commerce, which are described in more detail in Section 7(a) below.

By contrast, the e-commerce chapter in the Agreement to Amend the Singapore-Australia Free Trade Agreement (“SAFTA”), which was also signed in October 2016, contains a host of commitments related to *inter alia* data flow transfers, location of source code, consumer protection, customs duties, and electronic authorization. In particular, like the TPP, Article 13.2 provides that “[e]ach Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person,” with certain exceptions. In addition, under the e-commerce chapter of the trade agreement between Chile and Uruguay, which was also signed in October 2016, the parties agreed to “provisions aimed at maintaining a transborder flow fluid information.” In short, several agreements that have been completed after the TPP have incorporated the wide-ranging, robust standards provided in that agreement.

6. E-COMMERCE IN THE WORLD TRADE ORGANIZATION

The lack of harmonization of e-commerce laws and standards among most countries makes a global accord unlikely, but the U.S. should promote the Model Provisions in bilateral and regional agreements as a substitute to help standardize to some extent the existing regulatory framework. This Section discusses the complexity of e-commerce provisions in the WTO, and highlights the need for adopting the Model Provisions.

The WTO came into existence in 1995 without much thought given to electronic commerce, its texts having been negotiated in the late 1980s and early 1990s. But WTO members recognized the
growing importance of electronic commerce in international trade transactions at the organization’s second Ministerial Conference in May 1998. At the Conference, Ministers adopted the Declaration on Global Electronic Commerce, which called for the establishment of a “comprehensive work programme to examine all trade-related issues relating to global electronic commerce[.]” Specifically, the Ministers declared that Members “will continue their current practice of not imposing customs duties on electronic transmissions[,]” and stated that the work program would consider the economic, financial, and development needs of developing countries, and “recognize that work is also being undertaken in other international fora.”

In September 1998, the General Council adopted the “Work Programme on Electronic Commerce” (“Work Programme”). The Work Programme declares that its scope will also include issues related to the infrastructure for electronic commerce.

The Work Programme includes input from other WTO bodies, as follows:

- The Council for Trade in Services: tasked with examining and reporting on the treatment of electronic commerce within the General Agreement on Trade in Services (GATS), including issues of transparency; domestic regulation and standards; market access commitments regarding the electronic supply of services; use of public communications transport networks; and customs duties.

- The Council for Trade in Goods: tasked with examining and reporting on aspects of electronic commerce relevant to the General Agreement on Tariffs and Trade (“GATT”), including market access for, and access to, products related to electronic commerce; the valuation of imported goods; import licensing; rules of origin; and customs duties.

- The Council for TRIPS (Trade-Related Aspects of Intellectual Property Rights): tasked with examining and reporting on intellectual property issues in electronic commerce, including protection and enforcement of copyrights and trademarks, and new technologies.

- The Committee on Trade and Development: tasked with examining and reporting on the economic and financial needs of developing countries and the development implications of electronic commerce, including the role of electronic commerce in integrating developing countries into the world trading system.

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36 Id.
37 Id.
39 Id.
40 Id., ¶ 2.1.
41 Id., ¶ 3.1.
42 Id., ¶ 4.1.
43 Id., ¶ 5.1.
In addition to these four WTO bodies, the WTO General Council oversees the Work Programme and examines, in Dedicated Discussions, issues in electronic commerce that cut across different portfolios. Cross-cutting issues include the classification of an electronic transaction as a trade in goods or a trade in services (where the classification triggers the relevant legal text; GATT or GATS); the role of electronic commerce in promoting trade in developing countries; the ways in which some countries levy internal taxes on electronic commerce transactions; technological neutrality (treatment that is neutral with respect to the technology (existing or future) used); “likeness” (electronic communication is considered equivalent to paper-based communication); and jurisdiction and applicable law. Most Members agreed that the WTO should not create any “unnecessary obstacles” to the development of e-commerce.

In general, the Work Programme and the Dedicated Discussions have uncovered important and complex issues. However, very little substantive progress has been made on most issues. In July 2015, the General Council issued its latest progress report on the Work Programme. At that date, the General Council had engaged in ten Dedicated Discussions on cross-cutting issues. The report, in keeping with previous status reports, distills the difficulty that the Work Programme has had in making progress clarifying the WTO’s jurisdiction over electronic commerce. In particular, the Work Programme has not yet determined whether GATT, the agreement covering the trade in goods, or GATS, the agreement covering the trade in services, governs electronic transactions. Moreover, if GATS covers the transaction, the Work Programme provides no direction as to which “modes” of trading services and which services commitments apply.

47 GATS outlines four “modes” of supply of services:
- Mode 1: “cross-border supply” – services supplied from one country to another;
- Mode 2: “consumption abroad” – consumers or firms making use of a service in another country;
- Mode 3: “commercial presence” – a foreign company setting up subsidiaries or branches to provide services in another country;
- Mode 4: “presence of natural persons” – individuals traveling from their own country to supply services in another.

48 In GATS, member countries provide specific commitments to access to service sectors in their markets. These commitments are listed in schedules and, unless a sector is listed, a member has not agreed to market access in that sector. Members may also agree to certain limitations on access to a service sector. See, e.g., World Trade Organization, Understanding the WTO: Services: Rule for Growth and Investment, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm.
49 Two dispute settlement decisions, however, clarified the issues somewhat by concluding that electronic, cross-border delivery of a service implicates GATS mode 1 commitments (e.g., non-resident service providers supply services cross-border into a Member's territory). See Panel Report, United States – Measures Affecting the Cross-
Additionally, the report outlined many complex issues for which Members had yet to reach agreement: Some Members wanted the temporary moratorium on customs duties on electronic transmissions to be made permanent, while some Members only wanted the temporary ban extended; some Members wanted to clarify the directive of the Work Programme; Members from some developing countries noted that their internal e-commerce laws were still being drafted and that, therefore, they could not comment on specific Work Programme proposals; and some Members noted the importance of focusing on small- and medium-sized enterprises, while others noted the importance of issues related to data flows and privacy, among other issues. The report stressed that any progress on issues must be Member-driven and that the time had come to submit concrete proposals.

Despite these open issues, the Work Programme nonetheless appears to be approaching a consensus on the applicability of GATS in disputes involving the electronic delivery of service; that GATS is “technologically neutral” and, therefore, Members’ specific commitments include the electronic supply of services unless specifically stated; and on the applicability of all provisions of GATS to the electronic supply of services.51

However, many issues await resolution, including further clarification of whether the cross-border, electronic delivery of a service implicates GATS mode 1 or mode 2 commitments; the status of the moratorium on customs duties on electronic transactions; and clarification of the scope of the WTO Annex on Telecommunications52 with respect to access to and use of internet services.

7. MAJOR U.S. FREE TRADE AGREEMENTS

Two major U.S. free trade agreements widely discussed by the public or news media are the North American Free Trade Agreement (“NAFTA”) and United States-Korea Free Trade Agreement (“KORUS FTA”). NAFTA (in effect in 1994) does not have an electronic commerce chapter or provision. However, as discussed in detail below, KORUS FTA contains an article setting forth standards for digital products and electronic signatures.

KORUS FTA, which entered into force on March 15, 2012, provides a recent example of the coverage of electronic commerce within a bilateral free trade agreement. With respect to the trade in digital products, Chapter 15 of the KORUS FTA provides, among other things, that neither Party may impose customs duties, fees, or other charges on or in

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52 The Telecommunications Annex “requires each Member to ensure that all service suppliers seeking to take advantage of scheduled commitments are accorded access to and use of public basic telecommunications, both networks and services, on reasonable and non-discriminatory basis.” World Trade Organization, Explanation of the Annex on Telecommunications, available at https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_annex_expl_e.htm
connection with the importation or exportation of digital products, and they may not accord less favorable treatment to some digital products than it accords to other like digital products on a basis of the factors set forth in the Chapter.\(^{53}\)

The KORUS FTA provides that neither Party may accord less favorable treatment to digital products. It also clarifies the use of electronic signatures by providing that “Neither party may adopt or maintain legislation regarding electronic authentication that would: (a) prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; (b) prevent parties from having the opportunity to establish before judicial or administrative authorities that their electronic transaction complies with any legal requirements with respect to authentication; or (c) deny a signature legal validity solely on the basis that the signature is in electronic form.”\(^{54}\) Additionally, the agreement encourages the free flow of digital information across borders, and urges Parties to refrain from imposing or maintaining unnecessary barriers to such data flows.\(^{55}\) Further, KORUS FTA governs the electronic supply of services delivered or performed electronically in separate chapters related to investment, cross-border trade in services, and financial services.

8. RECENT HISTORY OF KEY U.S. TRADE NEGOTIATIONS

This section outlines potential opportunities for including e-commerce commitments in ongoing and prospective trade negotiations, including provisions that promote cross-border data flows and restrict data localization measures. These agreements may offer the best prospects for setting enforceable internationally-recognized standards for the movement of electronic information across borders.

a. Trade in Services Agreement

Trade in Services Agreement (TiSA) negotiations, launched in 2013, have taken place among 23 members of the World Trade Organization (WTO)\(^{56}\) that represent nearly 70 percent of the world’s $55 trillion services market in 2014.\(^{57}\) As proposed, TiSA would stand alongside and be modeled after the General Agreement on Trade in Services. While GATS predated e-commerce disciplines at the WTO and in other trade agreements, TiSA was envisaged to include e-commerce commitments that would consider new technology and the changes to the way businesses and consumers participate in trade through an increasingly digitized trading system.

As stated by USTR, the United States would pursue “the development of appropriate provisions to support services trade through electronic channels.”\(^{58}\) Similarly, the EU envisioned that the TiSA E-Commerce Annex would include provisions on cross-border data flows, localization, network access, customs duties, electronic authentication and electronic signatures, online

\(^{53}\) KORUS FTA, Art. 15.3. Footnotes omitted.  
\(^{54}\) KORUS FTA, Art. 15.4.  
\(^{56}\) https://ustr.gov/tisa/participant-list.  
\(^{57}\) https://ustr.gov/TiSA.  
\(^{58}\)https://ustr.gov/sites/default/files/01152013%20ARK%20letter%20to%20Speaker%20Boehner_0.pdf.
consumer protection and spam, net neutrality, and source code. Accordingly, the United States, “tabled an ambitious proposal to address restrictions on cross-border data flows and the troubling trend toward localization requirements.” In addition, the United States tabled a proposal to limit liability for online services and U.S. officials signaled they would pursue a data localization provision that would not exclude financial services data.

Ministers from TiSA parties last met informally in 2016 to discuss progress and reaffirmed their commitment to conclude an ambitious agreement. While the outlook for concluding negotiations is uncertain, cross-border data flows and localization provisions continue to garner high-levels of attention due to the EU’s current position on data protection and privacy rules. To date, the EU has yet to table a proposal for the full suite of e-commerce disciplines. However, in its 2015 “Trade for All Strategy” the European Commission stated that it would use FTAs and TiSA “to set rules for e-commerce and cross-border data flows and tackle new forms of digital protectionism, in full compliance with and without prejudice to the EU’s data protection and data privacy rules.” Given additional political uncertainty in the United States related to trade in general, prospects for TiSA’s E-Commerce Annex are unknown at this time. In the absence of the TPP agreement, TiSA may still represent the largest multilateral opportunity to further expand international rules on digital trade.

b. Transatlantic Trade and Investment Partnership

The United States and the European Union launched negotiations on a comprehensive free trade agreement in 2013. The Transatlantic Trade and Investment Partnership (T-TIP) was envisioned to strengthen what was already the world’s largest trading relationship through additional goods and services trade liberalization, while also addressing regulatory differences that affect transatlantic trade and investment flows. Annually, $260 billion in digital services trade moves between the United States and the EU.

With respect to e-commerce and ICT services, the U.S. has sought “to develop appropriate provisions to facilitate the use of electronic commerce to support goods and services trade, including through commitments not to impose customs duties on digital products or discriminate among products delivered electronically; [and to] include provisions that facilitate the movement of cross-border data flows.” While U.S. negotiators highlighted this area in initial statements, the EU’s negotiating mandate was void of references to data flows, data localization or other covered

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67 https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip-
aspects of e-commerce. Instead, the mandate discussed generally the EU’s intent to seek an agreement that would, “provide for the reciprocal liberalization of trade in goods and services as well as rules on trade-related issues, with a high level of ambition going beyond existing WTO commitments.”

Like TiSA, e-commerce discussions in T-TIP have largely been complicated by internal EU deliberations on the appropriate role of privacy and data protection in trade agreements. Even with the resolution and implementation of a U.S.-EU data transfer framework in 2016, EU negotiators have yet been unable to finalize negotiations over data flows. The uncertain political dynamics on trade in the United States and the EU’s lack of progress on tabling a proposal diminish the likelihood that T-TIP may serve as a vehicle for an ambitious e-commerce chapter.

c. Potential U.S. Trade Negotiation Opportunities

The USTR has released new negotiating objectives for certain existing U.S. FTAs, such as NAFTA, but there is significant potential for including meaningful e-commerce disciplines in these agreements. Most U.S. FTAs include very little on information flows and none guarantee that data flows freely across borders or address data localization measures through enforceable mechanisms. If negotiations launch to update NAFTA or to create a bilateral trade deal between the United States and United Kingdom, as is widely under discussion, it will be a good opportunity for the United States to work toward including data flows, localization, and other e-commerce language in these agreements. Similarly, if negotiations move forward to update other FTAs or launch new FTAs, new disciplines on data flows, localization, and e-commerce may also be considered.

d. Non-U.S. Trade Negotiations

1. Regional Comprehensive Economic Partnership

The Regional Comprehensive Economic Partnership (RCEP) is a trade agreement currently under negotiation among 16 Association of Southeast Asian Nations (ASEAN) and ASEAN Free Trade Partners (AFPs). RCEP was established to “broaden and deepen the engagement among parties and to enhance parties’ participation in economic development of the region.” E-Commerce disciplines are under negotiation as partners work toward “[achieving] a modern, comprehensive, high-quality, and mutually beneficial economic partnership agreement among the ASEAN Member States and ASEAN’s FTA partners.” The 16th RCEP Trade Negotiating Committee (TNC) meetings were held in December 2016. The meetings included meetings by the Working Group on Trade in Services and the Sub-Working Group on E-commerce.

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70 http://asean.org/?static_post=rcep-regional-comprehensive-economic-partnership
71 Id.
72 Id.
74 Id.
While little is known publicly about the textual proposals RCEP partners are exchanging related to e-commerce disciplines, if any, the elimination of restrictions on server localization would be important for powering both goods and services trade in the region. Business groups are actively encouraging negotiators to promote “rules that enable information flows and prohibit data localization.”\(^75\) In particular, private sector proposals currently advocate an agreement that would limit a party from preventing a service provider of another party from transferring information outside the party’s territory, including personal information, and would prohibit any requirements to use or locate computing facilities within a country as a condition for doing business in that country.\(^76\) Given the scope and magnitude of RCEP negotiations, outcomes on data flows or server localization measures would be significant. However, due to the relatively closed nature of some RCEP markets – namely China and India – ambitious outcomes on these disciplines may be difficult to realize.

2. EU – Japan Free Trade Agreement

In 2013, the European Union and Japan launched negotiations to pursue a free trade agreement that according to the EU, “is expected to enhance trade and investment relationships between the two parties.”\(^77\) Japan is the EU’s second biggest trading partner in Asia after China.\(^78\) On July 6, 2017 the EU and Japan reached an agreement in principle on the main elements of the EU-Japan Economic Partnership Agreement. The draft agreement contains a chapter on e-commerce which includes, among other things, brief provisions related to electronic signatures, sources codes (neither party can require transfer of or access to source codes), consumer protection, electronic authentication, unsolicited commercial electronic messages, and free flow of data.\(^79\)

e. Trans-Pacific Partnership (TPP)

The Trans-Pacific Partnership agreement (“TPP”) is currently not on the negotiation table for reasons unrelated to its e-commerce chapter. On January 20, 2017, the Office of the U.S. Trade Representative (USTR) issued a letter to signatories of TPP that the United States has formally withdrawn from the agreement. The brief letter also encourages future discussions on “measures designed to promote more efficient markets and higher levels of economic growth.”\(^80\) Currently, the U.S. is not negotiating the TPP, but the TPP agreement has useful provisions related to e-commerce, which have not been the subject of the Administration’s opposition to TPP.

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\(^75\) https://static1.squarespace.com/static/5393d501e4b0643446a8d28/t/575a654c86db438e83de9f8a1/1465541967821/RCEP+E-commerce+June+2016.pdf.

\(^76\) Id.


\(^78\) http://ec.europa.eu/trade/policy/countries-and-regions/countries/japan/


The guiding principle of the TPP Agreement’s e-commerce chapter is that the Internet and digital technologies provide growing opportunities for companies in all sectors and of all sizes to participate in and benefit from international trade. The global reach of the Internet, the exponential generation of data and cross-border data flows, and the growth and proliferation of massive computing power continue to lower the costs of trade and are expanding the universe of what is tradable and who can trade. The TPP’s e-commerce chapter aims to create a new body of trade rules designed to benefit a broad group of traders relying on digital technologies to advance their businesses, from micro-enterprises in Malaysia to app developers in Vietnam to farmers in Canada.

Through the Internet and digital technologies, a company or individual can almost seamlessly trade goods, data-sets, software, digital products and content (e.g., films and programs), and digitally-intensive services. All of this is digital trade. A small company in a far-flung location, if it has Internet access, can potentially use the same suite of services that would also be available to any large multinational company and store and process its data in a global cloud computing center. An individual making a bespoke product or a developer producing an app in one market can access customers in myriad markets at historically low costs because of the Internet and digital technologies.

Governments, in response to these evolving market and policy dynamics, are attempting to address legitimate public policy objectives, such as security, privacy, and consumer protection. However, many have done so through the application of what appear to be overly blunt policy instruments. Intentionally or not, governments have erected barriers to digital trade and deprived traders and investors of economic opportunities. Examples of such barriers that the Model Provisions address are restrictions on cross-border data flows, data localization requirements, mandates to transfer source code, and the absence of or overly high standards for data protection and privacy of personal information.

9. CONCLUSION

E-commerce continues to play a vital role in cross-border business transactions. The ability of companies and consumers to move data is critical in promoting, fostering and expanding international commerce and services. Therefore, the American Bar Association Model Provisions on Electronic Commerce for International Trade Agreements address these localization barriers through specific provisions designed to promote and ensure access to networks and efficient data processing. It also ensures that the fundamental non-discrimination principles of an efficient global trading system for goods and services apply to cross-border data by subsuming electronic commerce under the overarching principles of a free trade agreement.

Respectfully submitted,

Steven M. Richman
Chair, Section of International Law
February 2018
GENERAL INFORMATION FORM

Submitting Entity: SECTION OF INTERNATIONAL LAW

Submitted By: Steven M. Richman, Chair, Section of International Law

1. **Summary of Resolution(s).** The Resolution calls for the American Bar Association to adopt the *Model Provisions on Electronic Commerce for International Trade Agreements* ("Model Provisions"), dated February 2018, and recommends the Model Provisions as a template for international trade agreements, other relevant international agreements and guidelines.

2. **Approval by Submitting Entity.**
   - Approved by the Council of the Section of International Law on October 24, 2017.
   - Approved by the Council of the Section of Technology & Law on October 18, 2017.
   - Approved by the Council of the Section of Intellectual Property Law on December 5, 2017.

3. **Has this or a similar resolution been submitted to the House or Board previously?** This Resolution with Report was submitted and subsequently withdrawn at 2017 Annual Meeting.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**
   - The following Resolutions on electronic commerce are relevant:
     - The ABA Section of Science & Technology Law, Section of International Law, and Section of Business Law, (collectively the “ABA Sections”) submitted the 1997 Report in support of a Resolution recognizing that electronic commerce is increasingly important and global in nature, requiring international communication and cooperation. It also encourages international discussion and cooperation by the private sector, governments, and international organizations to remove unnecessary legal and functional obstacles to electronic commerce, to establish a legal framework within which global electronic commerce can flourish, and to develop self-regulating practices by the private sector that will protect the rights of individuals and promote the public welfare. 97A114.
     - Resolution urging the United States to become a signatory to the United Nations Convention on the Use of Electronic Communications in International Contracts. 06A303
     - Resolution urging the U.S. Government to ratify the United Nations Convention on the Use of Electronic Communications in International Contracts. 08A100
     - Resolution supporting modernization and simplification of the requirements, procedures, laws and regulations related to verification of signatures in cross-border contexts to increase reciprocal recognition among jurisdictions. 14A114A
This Resolution would expand the groundwork established by existing Resolutions in promoting the modernization and uniformity of the regulation of electronic commerce in international trade agreements, including business data flows from one country to another country.

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 law and practices of many countries pertaining to the requirements and procedures related to electronic commerce, including cross-border data flows, in cross-border contexts are evolving.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates: If the U.S. Government, other governments, or international organizations consider new international trade agreements or other types of agreements or guidelines, or amendments thereof, that would affect electronic commerce, the ABA will be able to share its position based on this subject and other ABA policies.


10. Referrals.
    ABA Cybersecurity Legal Task Force
    Section of Science & Technology Law
    Section of Business Law
    Section of Intellectual Property Law
    Section of Administrative Law
    GPSolo Division

11. Contact Name and Address Information.
    John D. Rosero, Esq.
    Vice Chair, Policy – International Trade Committee
    80 Livingston Ave.
    Roseland, NJ 07068
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12. Contact Name and Address Information of Person Presenting Report to the House.
    Glenn P. Hendrix , Esq.
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    222 N LaSalle St, Ste 2400
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    Email: gbuckley@vedderprice.com
1. **Summary of the Resolution**


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

This resolution supports modernization and uniformity of the regulation of electronic commerce, including business data flows from one country to another country. The ability of companies and consumers to move data has become paramount in promoting, fostering, and expanding commerce and services around the globe. It also urges the American Bar Association to adopt the Model Provisions as a template for international trade agreements, and other relevant international agreements and guidelines.

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

The Resolution enables the ABA to urge the United States and other governments to adopt the ABA Model Provisions on Electronic Commerce as an effective and efficient means to promote the modernization and uniformity of provisions for electronic commerce, including cross-border data flow, in international trade agreements and other international agreements and guidelines.

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

None.
RESOLUTION

1 RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense.
REPORT

Introduction

The American Bar Association (ABA) has long examined the important issue of the death penalty and has sought to ensure that capital punishment is applied fairly, accurately, with meaningful due process, and only on the most deserving individuals. To that end, the ABA has taken positions on a variety of aspects of the administration of capital punishment, including how the law treats particularly vulnerable defendants or those with disabilities. In 1983, the ABA became one of the first organizations to call for an end of using the death penalty for individuals under the age of 18.1 In 1997, the ABA called for a suspension of executions until states and the federal government improved several aspects of their administration of capital punishment, including removing juveniles from eligibility.2

Now, more than 35 years since the ABA first opposed the execution of juvenile offenders, there is a growing medical consensus that key areas of the brain relevant to decision-making and judgment continue to develop into the early twenties. With this has come a corresponding public understanding that our criminal justice system should also evolve in how it treats late adolescents (individuals age 18 to 21 years old), ranging from their access to juvenile court alternatives to eligibility for the death penalty. In light of this evolution of both the scientific and legal understanding surrounding young criminal defendants and broader changes to the death penalty landscape, it is now time for the ABA to revise its dated position and support the exclusion of individuals who were 21 years old or younger at the time of their crime.

The ABA has been – and should continue to be – a leader in supporting developmentally appropriate and evidence-based solutions for the treatment of young people in our criminal justice system, including with respect to the imposition of the death penalty. In 2004, the ABA filed an amicus brief in Roper v. Simmons, in which the U.S. Supreme Court held that the Eighth Amendment prohibited the imposition of the death penalty on individuals below the age of 18 at the time of their crime.3 It also filed an amicus brief in 2012 in Miller v. Alabama, concerning the constitutionality of mandatory life without parole sentences for juveniles convicted of homicides.4 The ABA’s brief in Roper

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3 Brief for the ABA as Amicus Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005).
emphasized our long-standing position that juvenile offenders do not possess the heightened moral culpability that justifies the death penalty.\(^5\) It also demonstrated that under the “evolving standards of decency” test that governs the Eighth Amendment, over 50 percent of death penalty states had already rejected death as an appropriate punishment for individuals who committed their crimes under the age of 18.\(^6\) In Miller, the ABA stressed that mandatory life without parole sentences for juveniles, even in homicide cases, were categorically unconstitutional because “[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal and rehabilitation.”\(^7\)

Not only has the U.S. Supreme Court held that there is a difference in levels of criminal culpability between juveniles and adults generally,\(^8\) but the landscape of the American death penalty has changed since 1983. Fifty-two out of 53 U.S. jurisdictions now have a life without parole (LWOP) option, either by statute or practice;\(^9\) and the overall national decline in new death sentences corresponds with an increase in LWOP sentences in the last two decades.\(^10\) In 2016, 31 individuals received death sentences,\(^11\) and only two of those individuals were under the age of 21 at the time of their crimes.\(^12\) As of the date of this writing, 23 individuals had been executed in 2017, further reflecting a national decline in the imposition of capital punishment.\(^13\) The U.S. Supreme Court has also recognized that the Eighth Amendment’s evolving standards of decency has made other groups categorically ineligible for the death penalty – most notably individuals with intellectual disability.\(^14\)

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\(^13\) See *Searchable Execution Database*, DEATH PENALTY INFORMATION CTR., https://deathpenaltyinfo.org/views-executions?exec_name_1=&exec_year%5B%5D=2017&sex=All&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All&Apply (last visited Nov. 13, 2017).

\(^14\) See *Atkins v. Virginia*, 536 U.S. 304 (2002). The ABA was at the forefront of this movement as well, passing a resolution against executing persons with intellectual disability in 1989. See ABA House of Delegates Recommendation 110 (adopted Feb. 1989),
Furthermore, the scientific advances that have shaped our society’s improved understanding of the human brain would have been unfathomable to those considering these issues in 1983. In 1990, President George H.W. Bush launched the “Decade of the Brain” initiative to “enhance public awareness of benefits to be derived from brain research.”\(^{15}\) Advances in neuroimaging techniques now allow researchers to evaluate a living human brain.\(^{16}\) Indeed, neuroscience “had not played any part in [U.S. Supreme Court] decisions about developmental differences between adolescents and adults,” likely due to “how little published research there was on adolescent brain development before 2000.”\(^{17}\) These and other large-scale advances in the understanding of the human brain, have led to the current medical recognition that brain systems and structures are still developing into an individual’s mid-twenties.

It is now both appropriate and necessary to address the issue of late adolescence and the death penalty because of the overwhelming legal, scientific, and societal changes of the last three decades. The newly-understood similarities between juvenile and late adolescent brains, as well as the evolution of death penalty law and relevant standards under the Eighth Amendment lead to the clear conclusion that individuals in late adolescence should be exempted from capital punishment.\(^{18}\) Capital defense attorneys are increasingly making this constitutional claim in death penalty litigation and this topic has become part of ongoing juvenile and criminal justice policy reform conversations around the country. As the ABA is a leader in protecting the rights of the vulnerable and ensuring that our justice system is fair, it is therefore incumbent upon this organization to recognize the need for heightened protections for an additional group of individuals: offenders whose crimes occurred while they were 21 years old or younger.


\(^{17}\) Laurence Steinberg, The Influence of Neuroscience on US Supreme Court Decisions about Adolescents’ criminal Culpability, 14 NATURE REVIEWS NEUROSCIENCE 513, 513-14 (2013).

\(^{18}\) Earlier this year, a Kentucky Circuit Court held pre-trial evidentiary hearings in three cases and found that it is unconstitutional to sentence to death individuals “under twenty-one (21) years of age at the time of their offense.”See Commonwealth v. Bredhold, Order Declaring Kentucky’s Death Penalty Statute as Unconstitutional, 14-CR-161, *1, 12 (Fayette Circuit Court, Aug. 1, 2017); Commonwealth v. Smith, Order Declaring Kentucky’s Death Penalty Statute as Unconstitutional, 15-CR-584-002, *1, 12 (Fayette Circuit Court, Sept. 6, 2017); Commonwealth v. Diaz, Order Declaring Kentucky’s Death Penalty Statute as Unconstitutional, 15-CR-584-001, *1, 11 (Fayette Circuit Court, Sept. 6, 2017).
Major Constitutional Developments in the Punishment of Juveniles for Serious Crimes

The rule that constitutional standards must calibrate for youth status is well established. The U.S. Supreme Court has long recognized that legal standards developed for adults cannot be uncritically applied to children and youth.\(^\text{19}\) Although “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,”\(^\text{20}\) the Court has held that “the Constitution does not mandate elimination of all differences in the treatment of juveniles.”\(^\text{21}\)

As noted above, between 2005 and 2016, the U.S. Supreme Court issued several landmark decisions that profoundly alter the status and treatment of youth in the justice system.\(^\text{22}\) Construing the Eighth Amendment, the Court held in *Roper v. Simmons* that juveniles are sufficiently less blameworthy than adults, such that the application of different sentencing principles is required under the Eighth Amendment, even in cases of capital murder.\(^\text{23}\) In *Graham v. Florida*, the Court, seeing no meaningful distinction between a sentence of death or LWOP, found that the Eighth Amendment categorically prohibited LWOP sentences for non-homicide crimes for juveniles.\(^\text{24}\)

Then, in *Miller v. Alabama*, the U.S. Supreme Court held “that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders.”\(^\text{25}\) Justice Kagan, writing for the majority, was explicit in articulating the Court’s rationale: the mandatory imposition of LWOP sentences “prevents those meting out punishment from considering a juvenile’s ‘lessened culpability ‘and greater ‘capacity for change,’\(^\text{26}\) and runs afoul of our cases ‘requirement of individualized sentencing for defendants facing the most serious penalties.’”\(^\text{27}\) The Court grounded its holding “not only on common sense… but on science and social science as

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\(^{19}\) See, e.g., *May v. Anderson*, 345 U.S. 528, 536 (1953) (“Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State ‘s duty towards children.”); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion) (“[A child] cannot be judged by the more exacting standards of maturity.”).

\(^{20}\) *In re Gault*, 387 U.S. 1, 13 (1967).


\(^{22}\) Apart from the sentencing decisions discussed herein, the Court, interpreting the Fifth and Fourteenth Amendments, held in *J.D.B. v. North Carolina*, that a juvenile’s age is relevant to the *Miranda* custody analysis. 564 U.S. 261, 264 (2011). In all of these cases, the Court adopted settled research regarding adolescent development and required the consideration of the attributes of youth when applying constitutional protections to juvenile offenders.

\(^{23}\) 543 U.S. 551, 570-71 (2005).

\(^{24}\) 560 U.S. 48, 74 (2010).

\(^{25}\) 567 U.S. 460, 479 (2012).


\(^{27}\) *Miller*, 567 U.S. at 480.
all of which demonstrate fundamental differences between juveniles and adults.

The Court in Miller noted the scientific “findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child’s ‘moral culpability’ and enhanced the prospect that, as the years go by and neurological development occurs, his ‘deficiencies will be reformed.’”\(^\text{29}\) Importantly, the Court specifically found that none of what Graham “said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific.”\(^\text{30}\) Relying on Graham, Roper, and other previous decisions on individualized sentencing, the Court held “that in imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult.”\(^\text{31}\) The Court also emphasized that a young offender’s moral failings could not be comparable to an adult’s because there is a stronger possibility of rehabilitation.\(^\text{32}\)

In 2016, the U.S. Supreme Court in Montgomery v. Louisiana expanded its analysis of the predicate factors that the sentencing court must find before imposing a life without parole sentence on a juvenile.\(^\text{33}\) Montgomery explained that the Court’s decision in Miller “did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.\(^\text{34}\) The Court held “that Miller drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption,” noting that a life without parole sentence “could [only] be a proportionate sentence for the latter kind of juvenile offender.”\(^\text{35}\)

Collectively, these decisions demonstrate a distinct Eighth Amendment analysis for youth, premised on the simple fact that young people are different for the purposes of criminal law and sentencing practices. Relying on prevailing developmental research and common human experience concerning the transitions that define adolescence, the Court has recognized that the age and special characteristics of young offenders play a critical role in assessing whether sentences imposed on them are disproportionate under the Eighth Amendment.\(^\text{36}\) More specifically, the cases recognize three key characteristics that distinguish adolescents from adults: “[a]s compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more

\(^{28}\) Id. at 471.
\(^{29}\) Id. at 472 (quoting Graham, 560 U.S. at 68; Roper, 543 U.S. at 570).
\(^{30}\) Id. at 473.
\(^{31}\) Id. at 477.
\(^{32}\) Miller 567 U.S. at 471 (citing Roper, 543 U.S. at 570).
\(^{34}\) Id. at 734 (emphasis added).
\(^{35}\) Id. (emphasis added).
\(^{36}\) See Graham, 560 U.S. at 68; see also Miller, 567 U.S. at 471-72.
vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are ‘not as well formed.’”

As both the majority and the dissent agreed in *Roper* and *Graham*, the U.S. Supreme Court has supplanted its “death is different” analysis in adult Eighth Amendment cases for an offender-focused “kids are different” frame in serious criminal cases involving young defendants. Indeed, in *Graham v. Florida*, the Court wrote “criminal procedure laws that fail to take defendants’ ‘youthfulness into account at all would be flawed.’”

Increased Understanding of Adolescent Brain Development

American courts, including the U.S. Supreme Court, have increasingly relied on and cited to a comprehensive body of research on adolescent development in its opinions examining youth sentencing, capability, and custody. The empirical research shows that most delinquent conduct during adolescence involves risk-taking behavior that is part of normative developmental processes. The U.S. Supreme Court in *Roper v. Simmons* recognized that these normative developmental behaviors generally lessen as youth mature and become less likely to reoffend as a direct result of the maturational process. In *Miller and Graham*, the Court also recognized that this maturational process is a direct function of brain growth, citing research showing that the frontal lobe, home to key components of circuitry underlying “executive functions” such as planning, working memory, and impulse control, is among the last areas of the brain to mature.

In the years since *Roper*, research has consistently shown that such development actually continues beyond the age of 18. Indeed, the line drawn by the U.S. Supreme Court no longer fully reflects the state of the science on adolescent development. While there were findings that pointed to this conclusion prior to 2005, a wide body of research has since provided us with an

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37 Miller, 567 U.S. at 471 (citing *Roper*, 543 U.S. at 569-70).
39 560 U.S. at 76.
44 See, e.g., Graham Bradley & Karen Wildman, *Psychosocial Predictors of Emerging Adults’ Risk and Reckless Behaviors*, 31 J. YOUTH & ADOLESCENCE 253, 253-54, 263 (2002) (explaining that, among emerging adults in the 18-to-25-year-old age group, reckless behaviors—defined as those actions that are not socially approved—were found to be reliably predicted by antisocial peer pressure and stating that “antisocial peer pressure appears to be a continuing, and perhaps critical, influence upon [reckless] behaviors well into the emerging adult years”); see also Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence*, 58 AM.
expanded understanding of behavioral and psychological tendencies of 18 to 21 year olds.\textsuperscript{45}

Findings demonstrate that 18 to 21 year olds have a diminished capacity to understand the consequences of their actions and control their behavior in ways similar to youth under 18.\textsuperscript{46} Additionally, research suggests that late adolescents, like juveniles, are more prone to risk-taking and that they act more impulsively than older adults in ways that likely influence their criminal conduct.\textsuperscript{47} According to one of the studies conducted by Dr. Laurence Steinberg, a leading adolescent development expert, 18 to 21 year olds are not fully mature enough to anticipate future consequences.\textsuperscript{48}

More recent research shows that profound neurodevelopmental growth continues even into a person’s mid to late twenties.\textsuperscript{49} A widely-cited longitudinal

\textit{Psychologist} 1009, 1013, 1016 (2003) ([T]he results of studies using paper-and-pencil measures of future orientation, impulsivity, and susceptibility to peer pressure point in the same direction as the neurobiological evidence, namely, that brain systems implicated in planning, judgment, impulse control, and decision making continue to mature into late adolescence. . . . Some of the relevant abilities (e.g., logical reasoning) may reach adult-like levels in middle adolescence, whereas others (e.g., the ability to resist peer influence or think through the future consequences of one’s actions) may not become fully mature until young adulthood.").

\textsuperscript{45} See Melissa S. Caulum, \textit{Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System}, 2007 Wis. L. Rev. 729, 731 (2007) (“When a highly impressionable emerging adult is placed in a social environment composed of adult offenders, this environment may affect the individual’s future behavior and structural brain development.”) (citing Craig M. Bennett & Abigail A. Baird, \textit{Anatomical Changes in Emerging Adult Brain: A Voxel-Based Morphometry Study}, 27 Hum. Brain Mapping 766, 766–67 (2006)); Damien A. Fair et al., \textit{Functional Brain Networks Develop From a “Local to Distributed” Organization}, 5 PLOS COMPUTATIONAL BIOLOGY 1-14 (2009); Margo Gardner & Laurence Steinberg, \textit{Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study}, 41 Dev. Psychol. 625, 626, 632, 634 (2005) (examining a sample of 306 individuals in 3 age groups—adolescents (13-16), youths (18-22), and adults (24 and older) and explaining that “although the sample as a whole took more risks and made more risky decisions in groups than when alone, this effect was more pronounced during middle and late adolescence than during adulthood” and that “the presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions”); Laurence Steinberg, \textit{A Social Neuroscience Perspective on Adolescent Risk-Taking}, 28 Developmental Rev. 78, 91 (2008) (noting that “the presence of friends doubled risk-taking among the adolescents, increased it by fifty percent among the youths, but had no effect on the adults”).


\textsuperscript{47} See Elizabeth S. Scott et al., \textit{Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy}, 85 Fordham L. Rev. 641, 644 (2016).

\textsuperscript{48} Laurence Steinberg et al., \textit{Age Differences in Future Orientation and Delay Discounting}, 80 Child Dev. 28, 35 (2009).

\textsuperscript{49} See Christian Beaulieu & Catherine Lebel, \textit{Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood}, 27 J. of Neuroscience 31 (2011); Adolf Pfefferbaum et al., \textit{Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women
study sponsored by the National Institute of Mental Health tracked the brain development of 5,000 children, discovering that their brains were not fully mature until at least 25 years of age.50 This period of development significantly impacts an adolescent’s ability to delay gratification and understand the long-term consequences of their actions.51

Additionally, research has shown that youth are more likely than adult offenders to be wrongfully convicted of a crime.52 Specifically, an analysis of known wrongful conviction cases found that individuals under the age of 25 are responsible for 63 percent of false confessions.53 Late adolescents’ propensity for false confessions, combined with the existing brain development research, supports the conclusion that late adolescents are a vulnerable group in need of additional protection in the criminal justice system.54

Legislative Developments in the Legal Treatment of Individuals in Late Adolescence

The trend of treating individuals in late adolescence differently from adults goes well beyond the appropriate punishment in homicide cases. As noted, scientists, researchers, practitioners and corrections professionals are all now recognizing that individuals in late adolescence are developmentally closer to their peers under 18 than to those adults who are fully neurologically developed. In response to that understanding, both state and federal legislators have created greater restrictions and protections for late adolescents in a range of areas of law.

For example, in 1984, the U.S. Congress passed the National Minimum Drinking Age Act, which incentivized states to set their legal age for alcohol purchases at age 21.55 Since then, five states (California, Hawaii, New Jersey, Maine, and Oregon) have also raised the legal age to purchase cigarettes to age 21.56 In addition to restrictions on purchases, many car rental companies have

(Ages 0 to 85 Years) Measures with Atlas-Based Parcellation of MRI, 65 NEUROIMAGE 176. 176-193 (2013).
51 See Laurence Steinberg et al., Age Differences in Future Orientation and Delay Discounting, 80 CHILD DEV. 28, 28 (2009).
set minimum rental ages at 20 or 21, with higher rental fees for individuals under age 25. Under the Free Application for Federal Student Aid (FASFA), the Federal Government considers individuals under age 23 legal dependents of their parents. Similarly, the Internal Revenue Service allows students under the age of 24 to be dependents for tax purposes. The Affordable Care Act also allows individuals under the age of 26 to remain on their parents’ health insurance.

In the context of child-serving agencies, both the child welfare and education systems in states across the country now extend their services to individuals through age 21, recognizing that youth do not reach levels of adult independence and responsibility at age 18. In fact, 25 states have extended foster care or state-funded transitional services to late adolescents through the Fostering Connections to Success and Increasing Adoptions Act of 2008. Under the Individuals with Disabilities Education Act (IDEA), youth and late adolescents (all of whom IDEA refers to as “children”) with disabilities who have not earned their traditional diplomas are eligible for services through age 21. Going even further, 31 states allow access to free secondary education for students 21-years-old or older.

Similar policies protect late adolescents in both the juvenile and adult criminal justice systems. Forty-five states allow youth up to age 21 to remain under the jurisdiction of the juvenile justice system. Nine of those states also allow individuals 21 years old and older to remain under the juvenile court’s jurisdiction, including four states that have set the maximum jurisdictional age at 24. A number of states have created special statuses, often called “Youthful


65 Id.
Offender” or “Serious Offender” status that allows individuals in late adolescence to benefit from similar protections to the juvenile justice system, specifically related to the confidentiality of their proceedings and record sealing.66

For example, in 2017, the Vermont legislature changed the definition of a child for purposes of juvenile delinquency proceedings in the state to an individual who “has committed an act of delinquency after becoming 10 years of age and prior to becoming 22 years of age.”67 This change affords late adolescents access to the treatment and other service options generally associated with juvenile proceedings.68 In 2017, Connecticut, Illinois, and Massachusetts legislators were considering similar efforts to provide greater protections to young adults beyond the age of 18.69 Notably, even when late adolescents enter the adult criminal justice system, some states have created separate correctional housing and programming for individuals under 25.70

Furthermore, several European countries maintain similarly broad approaches to treatment of late adolescents who commit crimes. In countries like England, Finland, France, Germany, Italy, Sweden, and Switzerland, late adolescence is a mitigating factor either in statute or in practice that allows many 18 to 21 year olds to receive similar sentences and correctional housing to their peers under 18.71

There has thus been a consistent trend toward extending the services of traditional child-serving agencies, including the child welfare, education, and juvenile justice systems, to individuals over the age of 18. These various laws and policies, designed to both restrict and protect individuals in this late adolescent age group, reflect our society’s evolving view of the maturity and culpability of 18 to 21 year olds, and beyond. Virtually all of these important reforms have come after 1983, when the ABA first passed its policy concerning the age at which individuals should be exempt from the death penalty.

67 The legislature made this change in 2017 in order to make Vermont law consistent, as it had also expanded its Youthful Offender Status in 2016 so that 18-to-21-year-olds would be able to have their cases heard in the juvenile court versus the adult court. See H. 95, 2016 Leg., Reg. Sess. (Vt. 2016); S. 23, 2017 Leg., Reg. Sess. (Vt. 2017).
68 Id.
Purposes Served by Executing Individuals in Late Adolescence

Regardless of whether one considers the death penalty an appropriate punishment for the worst murders committed by the worst offenders, it has become clear that the death penalty is indefensible as a response to crimes committed by those in late adolescence. As discussed in this report, a growing body of scientific understanding and a corresponding evolution in our standards of decency undermine the traditional penological purposes of executing defendants who committed a capital murder between the ages of 18 and 21. Just as the ABA has done when adopting earlier policies, we must consider the propriety of the most common penological justifications for the death penalty: “retribution and deterrence of capital crimes by prospective offenders.”

Capital punishment does not effectively or fairly advance the goal of retribution within the context of offenders in late adolescence. Indeed, the Eighth Amendment demands that punishments be proportional and personalized to both the offense and the offender. Thus, to be in furtherance of the goal of retribution, those sentenced to death – the most severe and irrevocable sanction available to the state – should be the most blameworthy defendants who have also committed the worst crimes in our society. As has been extensively discussed above, contemporary neuroscientific research demonstrates that several relevant characteristics typify late adolescents’ developmental stage, including: 1) a lack of maturity and an underdeveloped sense of responsibility, 2) increased susceptibility to negative influences, emotional states, and social pressures, and 3) underdeveloped and highly fluid character.

The U.S. Supreme Court’s holdings in *Roper* and *Atkins* were based on the findings that society had redrawn the lines for who is the most culpable or “worst of the worst.” Similarly, the scientific advancements and legal reforms discussed above support the ABA’s determination that there is an evolving moral consensus that late adolescents share a lesser moral culpability with their teenage counterparts. If “the culpability of the average murderer is insufficient to justify the most extreme sanction available to the state”, then the lesser culpability of those in late adolescence surely cannot justify such a form of retribution.

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72 Roper, 543 U.S. at 553.
74 See Commonwealth v. Bredhold, Order Declaring Kentucky’s Death Penalty Statute as Unconstitutional, 14-CR-161, *1, 7-8 (Fayette Circuit Court, Aug. 1, 2017) (After expert testimony and briefing based on contemporary science, the court made specific factual findings that individuals in late adolescence are more likely to underestimate risks; more likely to engage in “sensation seeking;” less able to control their impulses; less emotionally developed than intellectually developed; and more influenced by their peers than adults. It then held that, based on those traits and other reasons, those individuals should be exempt from capital punishment.)
Second, there is insufficient evidence to support the proposition that the death penalty is an effective deterrent to capital murder for individuals in late adolescence. In fact, there is no consensus in either the social science or legal communities about whether there is any general deterrent effect of the death penalty. Even with the most generous assumption that the death penalty may have some deterrent effect for adults without any cognitive or mental health disability, it does not necessarily follow that it would similarly deter a juvenile or late adolescent. Scientific findings suggest that late adolescents are, in this respect, more similar to juveniles. As noted earlier, late adolescence is a developmental period marked by risk-taking and sensation-seeking behavior, as well as a diminished capacity to perform rational, long-term cost-benefit analyses. The same cognitive and behavioral capacities that make those in late adolescence less morally culpable for their acts also “make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”

Finally, both the death penalty and LWOP effectively serve the additional penological goal of incapacitation, as either sentence will prevent that individual from release into general society to commit any future crimes. However, only the death penalty completely rejects the goal of providing some opportunity for redemption or rehabilitation for a young offender. Ninety percent of violent juvenile and late adolescent offenders do not go on to reoffend later in life. Thus, many of these individuals can and will serve their sentences without additional violence, even inside prison, and will surely mature and change as they reach full adulthood. Imposing a death sentence and otherwise giving up on adolescents, precluding their possible rehabilitation or any future positive contributions (even if only made during their years of incarceration), is antithetical to the fundamental principles of our justice system.

Conclusion

In the decades since the ABA adopted its policy opposing capital punishment for individuals under the age of 18, legal, scientific and societal developments strip the continued application of the death penalty against

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78 Atkins, 536 U.S. at 320.
individuals in late adolescence of its moral or constitutional justification. The rationale supporting the bans on executing either juveniles, as advanced in *Roper v. Simmons*, or individuals with intellectual disabilities, as set forth in *Atkins v. Virginia*, also apply to offenders who are 21 years old or younger when they commit their crimes. Thus, this policy proposes a practical limitation based on age that is supported by science, tracks many other areas of our civil and criminal law, and will succeed in making the administration of the death penalty fairer and more proportional to both the crimes and the offenders.

In adopting this revised position, the ABA still acknowledges the need to impose serious and severe punishment on these individuals when they take the life of another person. Yet at the same time, this policy makes clear our recognition that individuals in late adolescence, in light of their ongoing neurological development, are not among the worst of the worst offenders, for whom the death penalty must be reserved.

Respectfully submitted,

Seth Miller
Chair, Death Penalty Due Process Review Project

Robert Weiner
Chair, Section of Civil Rights and Social Justice

February, 2018
GENERAL INFORMATION FORM

Submitting Entities: Death Penalty Due Process Review Project, with Co-sponsor: Section of Civil Rights and Social Justice

Submitted By: Seth Miller, Chair, Steering Committee, Death Penalty Due Process Review Project; Robert N. Weiner, Chair, Section of Civil Rights and Social Justice.

1. Summary of Resolution.

This resolution urges each death penalty jurisdiction to not execute or sentence to death anyone who was 21 years old or younger at the time of the offense. Without taking a position supporting or opposing the death penalty, this recommendation fully comports with the ABA’s longstanding position that states should administer the death penalty only when performed in accordance with constitutional principles of fairness and proportionality. Because the Eighth Amendment demands that states impose death only as a response to the most serious crimes committed by the most heinous offenders, this resolution calls on jurisdictions to extend existing constitutional protections for capital defendants under the age of 18 to offenders up to and including the age of 21.

2. Approval by Submitting Entity.

Yes. The Steering Committee of the Death Penalty Due Process Review Project approved the Resolution on October 26, 2017 via written vote. The Council of the Section of Civil Rights and Social Justice approved the Recommendation at the Section’s Fall Meeting in Washington, D.C on October 27, 2017, and agreed to be a co-sponsor.

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

No.

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

The ABA has existing policy that pertains to the imposition of capital punishment on young offenders under the age of 18; this new policy, if adopted, would effectively supersede that policy and extend our position to individuals age 21 and under. Specifically, at the 1983 Annual Meeting, the House of Delegates adopted the position “that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committee while under the age of 18.”

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

N/A.


N/A. There is no known relevant legislation pending in Congress or in state legislatures. However, several states have passed laws in recent years extending juvenile protections to persons older than 18 years of age, including, for example, allowing youth under 21 to remain under the jurisdiction of the juvenile justice system. Additionally, this is an issue being raised more frequently in capital case litigation.

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

If this recommendation and resolution are approved by the House of Delegates, the sponsors will use this policy to enable the leadership, members and staff of the ABA to engage in active and ongoing policy discussions on this issue, to respond to possible state legislation introduced in 2018 and beyond, and to participate as *amicus curiae*, if a case reaches the U.S. Supreme Court with relevant claims. The sponsors will also use the policy to consult on issues related to the imposition of the death penalty on vulnerable defendants generally, and youthful offenders specifically, when called upon to do so by judges, lawyers, government entities, and bar associations.

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

None.

9. Disclosure of Interest. (If applicable)

N/A.

10. Referrals.

This Resolution has been referred to the following ABA entities that may have an interest in the subject matter:

- Center for Human Rights
- Center on Children and the Law
- Coalition on Racial and Ethnic Justice
- Commission on Youth at Risk
- Criminal Justice Section
- Death Penalty Representation Project
- Judicial Division
- Law Student Division
11. **Contact Name and Address Information** (prior to the meeting)

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges each death penalty jurisdiction to not execute or sentence to death anyone who was 21 years old or younger at the time of the offense.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the practice of sentencing to death and executing young persons ages 21 and under. The resolution clarifies that the ABA’s long-standing position on capital punishment further necessitates that jurisdictions categorically exempt offenders ages 21 and under from capital punishment due to the lessened moral culpability, immaturity, and capacity for rehabilitation exemplified in late adolescence.

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

The resolution aims to accomplish this goal by consulting on issues related to young offenders and the death penalty when called upon to do so by judges, lawyers, government entities, and bar associations, by supporting the filing of amicus briefs in cases that present issues of youthfulness and capital punishment, and by conducting and publicizing reports of jurisdictional practices vis-à-vis the imposition of death on late adolescent offenders for public information and use in the media and advocacy communities.

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

None.
AMERICAN BAR ASSOCIATION
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association approves the Revised Uniform
2 Unclaimed Property Act, promulgated by the National Conference of Commissioners on
3 Uniform State Laws (Uniform Law Commission), as an appropriate Act for those states
4 desiring to adopt the specific substantive law suggested therein.
REPORT

Revised Uniform Unclaimed Property Act

Summary

The Uniform Law Commission first approved a uniform act on unclaimed property in 1954 – the Uniform Disposition of Unclaimed Property Act. Since then, the act has been revised in 1966, 1981 (then renamed the Uniform Unclaimed Property Act), and 1995. The unclaimed property laws of most states are based in whole or in part on one of the multiple versions of the uniform act.

After nearly 20 years, the National Conference of Commissioners on Uniform State Laws has once again revised the act, approving the Revised Uniform Unclaimed Property Act (RUUPA) in 2016. The RUUPA provides necessary updates that keep up with technological innovation and recognizes new forms of property not included in prior versions of the act.

Like its predecessors, the RUUPA provides rules for determining when property is actually abandoned, and when it is, for determining which state gets it. The most common types of unclaimed property are bank accounts and bank deposits, life insurance proceeds, trust and fiduciary accounts, securities, wages, amounts owed in business and consumer transactions, class action proceeds, money orders and travelers checks.

The key parties involved in the distribution and processing of unclaimed property are the apparent owner, holder, and administrator. The apparent owner is the person whose name appears on the records of a holder as the owner of property held, issued, or owing by the holder. The holder is the person obligated to hold for the account of, or to deliver or pay to, the owner property that is subject to the RUUPA. If the property is “abandoned” under the act, then the holder must report the property to the administrator, the state official responsible for administering the RUUPA.

Article 2 of RUUPA establishes rules to determine if property is abandoned. Under the act, property is presumed abandoned if it is unclaimed by its apparent owner after a specified period of time (the dormancy period). The length of the dormancy period depends on the type of property. RUUPA establishes dormancy periods for some types of property that were not covered in previous versions of the act, including health savings accounts, custodial accounts for minors, stored-value cards, and more. RUUPA also clarifies that property is not presumed abandoned if the apparent owner shows an interest in the property during the dormancy period designated in the act.

Article 3 establishes three priority rules to determine which state may take custody of property that is presumed abandoned. The first-priority rule grants custody to the state of the last-known address of the apparent owner, according to the holder’s records. The second-priority rule grants custody to the state of corporate domicile of the holder, if there
is no record of the address of the apparent owner, or the address is in a state that does not permit the custodial taking of the property. The third-priority rule permits a state administrator to take custody of the property if (1) the transaction involving the property occurred in the state; (2) the holder is domiciled in a state that does not permit the custodial taking of the property; and (3) the last-known address of the apparent owner or other person entitled to the property is unknown or in a state that does not permit the custodial taking of the property.

Under Articles 4 and 5, the holder of property presumed abandoned must send a notice to the apparent owner about the property and must file a report with the administrator about the property.

Articles 6 and 7 describe how the administrator may take custody of unclaimed property and how it may sell it. Except for securities, the RUUPA allows the administrator to sell the property three years after receipt, but it is not required to do so. Securities may be sold three or more years after the administrator receives the security and gives the apparent owner notice. The administrator is prohibited from selling military medals or decorations awarded for military service. Instead, the administrator may deliver them to military veterans' organizations or governmental entities.

Article 8 directs the administrator to deposit all funds received under the act into the general fund of the state. Article 8 also requires the administrator to maintain records of the property.

Article 9 addresses various scenarios in which the administrator of one state would need to pay or deliver unclaimed property to another state, either because there is a superior claim to the property by the other state or the property is subject to the right of another state to take custody.

Article 10 explains how an administrator may request property reports and how an administrator may examine records to determine if a person has complied with the act.

Article 11 gives holders the right to seek review of determinations made by the administrator about their liability to deliver property or payment to the state.

Article 12 imposes a penalty on a holder that fails to report, pay, or deliver property within the time required by the act. Civil penalties may also apply if the holder enters into a contract to evade an obligation under the act.

Article 13 of the RUUPA governs the enforceability of an agreement between an apparent owner and a “finder” to locate and recover property. The act requires a signed record between the parties to designate the finder as an agent of the owner.

Article 14 explains what information is considered confidential under the act. The Article describes when confidential information may be disclosed under the act, and the steps that an administrator must take in the event of a security breach.
The Revised Uniform Unclaimed Property Act makes a number of improvements to earlier versions of the uniform act in order to keep up with technological changes and new forms of property.

The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Revised Uniform Unclaimed Property Act is available here.

Respectfully submitted,

Anita Ramasastry, President
Uniform Law Commission
February 2018
112A

GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws (Uniform Law Commission)

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) requests approval of the Revised Uniform Unclaimed Property Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The Uniform Law Commission granted final approval to the Act at its July 2016 Annual Meeting.

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

No.

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

The ABA approved a resolution (96A119) to support the previous version of the Uniform Unclaimed Property Act, which was finalized by the ULC in 1995.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Revised Uniform Unclaimed Property Act has been enacted in four jurisdictions to date (Delaware, Illinois, Tennessee, and Utah).
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

The Uniform Law Commission will present the act to state legislatures for consideration and enactment.

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

None.

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

None.

10. **Referrals.**

Pursuant to the agreement between the ULC and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee’s work can be found [here](http://uniformlaws.org/Committee.aspx?title=Revise%20the%20Uniform%20Unclaimed%20Property%20Act).

The following individuals were ABA Advisors to the Uniform Unclaimed Property Act:

- **Ethan D. Miller, ABA Advisor;**
- **Alexandra Darraby, ABA Section Advisor, ABA Forum on Entertainment and Sports Law;**
- **Scott Heyman, ABA Section Advisor, ABA Business Law Section;**
- **Charolette Noel, ABA Section Advisor, ABA 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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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 the Resolution

That the American Bar Association approves the Revised Uniform
Unclaimed Property Act promulgated by the National Conference of
Commissioners on Uniform State Laws (Uniform Law Commission) in July
2016 as an appropriate Act for those states desiring to adopt the specific
substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

The Uniform Law Commission first drafted uniform state legislation on
unclaimed property in 1954. Since then, revisions have been promulgated
years as well as new types of potential unclaimed property, such as gift
cards, are not addressed in the most current uniform act. The Revised
Uniform Unclaimed Property Act updates provisions on numerous issues,
including escheat of gift cards and other stored-value cards, life insurance
benefits, securities, dormancy periods, and use of contract auditors.

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

Approval of the Revised Uniform Unclaimed Property Act by the American
Bar Association House of Delegates would demonstrate to states that the
Act is an appropriate approach for addressing the issues described above.

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

A variety of views were expressed during the drafting process, and
compromises were reached. The ULC has become aware that a
subcommittee of the ABA Business Law Section may draft its own model
act in the area of unclaimed property.
RESOLVED, That the American Bar Association approves the Uniform Directed Trust Act, promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.
REPORT

THE UNIFORM DIRECTED TRUST ACT

- Summary -

The Uniform Directed Trust Act (UDTA) addresses the rise of directed trusts. In a directed trust, a person other than a trustee has a power over some aspect of the trust's administration. Such a person may be called a “trust protector,” “trust adviser,” or in the terminology of the UDTA, a “trust director.” This division of authority between a trust director and a trustee raises a host of difficult questions for which the UDTA provides clear, practical answers.

In a traditional trust, the responsibility for all aspects of the trust’s administration—including custody, investment, and distribution—belongs to the trustee. For centuries, this allocation of authority to a trustee has been a foundation of trust law. In a directed trust, however, this foundation may be modified by a grant of power over some aspect of trust administration to a trust director. A trust director is not a trustee, but has the power either to direct the trustee in the trust’s administration or to administer the trust directly. A trust director can have virtually any power over a trust, including the power to direct the trustee in the investment and distribution of trust property and the power to amend or terminate the trust.

The rise of directed trusts raises numerous unsettled questions of law. The most obvious question is how to allocate fiduciary responsibility between a trust director and a trustee. If a trust director exercises a power of direction and the trustee acts accordingly, a court must decide how much responsibility for the action belongs to the director and how much belongs to the trustee. In addition, a directed trust creates a host of further problems about how to govern a trust director, such as how to discern whether a trust director has duly accepted appointment and how to differentiate between a fiduciary power belonging to a trust director and a nonfiduciary power belonging to the holder of a power of appointment.

The purpose of the UDTA is to address these complications. The UDTA expressly validates terms of a trust that provide for a trust director and prescribes a simple set of rules for directed trusts. The UDTA’s basic strategy for allocating fiduciary duty is to impose primary fiduciary responsibility for a trust director’s actions on the director, while preserving a minimum core of duty in a trustee. A trust director has the same fiduciary duties as a trustee would have in a like position and under similar circumstances, but a trustee that acts subject to a trust director’s direction is generally liable only for the trustee’s own willful misconduct. The UDTA authorizes a similar allocation of power and duty among cotrustees.

In addition to this modified fiduciary scheme, the UDTA also offers solutions to the many practical problems created by the presence of a trust director. Among other things, the
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UDTA deals with the sharing of information among a trustee and a trust director and the compensation, succession, and appointment of a trust director.

The Uniform Directed Trust Act is appropriate for consideration in every state, whether or not the state has enacted the Uniform Trust Code or other legislation addressing directed trusts.

The work of the drafting committee is available at www.uniformlaws.org, the web site of the Uniform Law Commission. A direct link to the Uniform Directed Trust Act is available here: http://www.uniformlaws.org/shared/docs/divided%20trusteeship/UDTA_Final_2017nov3.pdf.

Respectfully submitted,

Anita Ramasastry, President
Uniform Law Commission
February, 2018
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws (Uniform Law Commission)

Submitted By: Liza Karsai, Executive Director

1. **Summary of Resolution.** The National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) requests approval of the Uniform Directed Trust Act by the American Bar Association (ABA) House of Delegates.

2. **Approval by Submitting Entity.** The Uniform Law Commission granted final approval to the Act at its July 2017 Annual Meeting.

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

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** None.

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

6. **Status of Legislation.** (If applicable) The Uniform Directed Trust Act has not yet been enacted by any state legislature, but multiple introductions are expected in 2018.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The Uniform Law Commission will present the act to state legislatures for consideration and enactment.

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

9. **Disclosure of Interest.** (If applicable) None.
10. Referrals. Pursuant to the agreement between the ULC and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The drafting committee’s work can be found here: [http://www.uniformlaws.org/Committee.aspx?title=Directed%20Trust%20Act](http://www.uniformlaws.org/Committee.aspx?title=Directed%20Trust%20Act).

The following individuals were ABA Advisors to the Uniform Directed Trust Act:

**James P. Spica, ABA Advisor;**

**Karen E. Boxx, ABA Section Advisor, ABA Real Property, Trust and Estate Law Section;**

**Amy Erenrich Heller, ABA Section Advisor, ABA Real Property, Trust and Estate 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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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 the Resolution

That the American Bar Association approves the Uniform Directed Trust Act, promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

The trustee of a typical trust has many duties, including custody of assets, administration, investment management, and distribution to beneficiaries. The modern trend is to divide these duties among multiple specialists, but the law of trusts is unclear as to the allocation of fiduciary responsibilities among multiple parties. This new uniform act provides clear default rules to ensure beneficiaries remain protected and each party is responsible for its own actions.

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

Approval of the Uniform Directed Trust Act by the ABA House of Delegates would help demonstrate to state legislatures that the Act is an appropriate approach for addressing the issues described above.

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 approves the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act, promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.
REPORT

THE UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

- Summary -

**History.** The first uniform law on guardianship was released in 1969 as Article V of the Uniform Probate Code. A few years later, it was re-published as the Uniform Guardianship and Protective Proceedings Act for states that preferred to enact only the UPC’s guardianship provisions.

Guardianship law has advanced dramatically since 1969 to better protect the rights and interests of persons legally determined to need help caring for themselves. The Uniform Law Commission has encouraged the trend toward greater independence for persons under guardianship by revising its guardianship act three times in 1982, 1997, and most recently with the approval of the newly renamed Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) in 2017. Some version of the uniform guardianship law has been adopted in nineteen states.

**The modernization of guardianship law.** In 2011, the National Guardianship Network organized the Third National Guardianship Summit. Held at the University of Utah, the summit brought together representatives from twenty national organizations concerned with issues of aging, intellectual impairments, mental illness, and the effective practice of guardianship law.

The summit produced a set of 70 recommendations and standards approved by the participants and published the following year in the Utah Law Review. The Uniform Law Commission formed a study committee to determine which of these recommendations and standards could be codified into a statute, and in 2014 approved a drafting committee to update the existing uniform law. The drafting committee was joined by participants from most of the same national organizations that attended the 2011 summit. UGCOPAA is the result of their two-year drafting effort.

**A note about terminology.** Throughout UGCOPAA, the term “guardian” refers to a person appointed by a court to make decisions about the care and well-being of another person. The term “conservator” refers to a person appointed by a court to manage the property of another person. Some states use other terms, and the act can be adapted to conform to local practices.

UGCOPAA introduces the term “protective arrangement instead of guardianship or conservatorship” to describe a less-restrictive alternative to guardianship or conservatorship. Instead of imposing a guardianship or conservatorship for a person who would otherwise need one, a court can instead enter a limited order to address a specific
need. The aim is to preserve an individual’s legal autonomy to the greatest extent possible.

**Structure.** UGCOPAA is organized into seven articles. Article 1 contains definitions and general provisions applicable to all types of court proceedings involving the protection of an individual. Article 2 addresses the guardianship of minors who do not have a parent able to provide care. Article 3 addresses the guardianship of adults who are unable to make decisions for themselves. Article 4 applies to conservatorships for both minors and adults who have money or property and are unable to manage it. Article 5 is entirely new and authorizes courts to enter single orders for less restrictive protective arrangements as an alternative to guardianship or conservatorship. Article 6 contains a set of optional forms intended to help a petitioner for a guardianship or conservatorship conduct a thorough assessment of an individual’s capabilities and needs, which will in turn help courts craft appropriate orders for each individual. The act also provides a sample notice for someone who is the subject of a guardianship or conservatorship proceeding. Article 7 is a set of miscellaneous provisions to help with implementation and interpretation of the uniform act.

**Innovations.**

- **Person-centered planning.** Under UGCOPAA, each guardianship and conservatorship will have an individualized plan that considers the person’s preferences and values. Courts will monitor guardians and conservators to ensure compliance and approve updates to the plan in response to changing circumstances.

- **Express decision-making standard.** UGCOPAA clarifies that a guardian/conservator is a fiduciary and must always act for the benefit of the person subject to guardianship or conservatorship. A guardian for an adult must make decisions the guardian reasonably believes the adult would make if able, unless doing so would cause harm to the adult. To the extent feasible, a guardian for an adult must promote the adult’s self-determination, encourage the adult’s participation in decisions, and take into account the values and preferences of the adult.

- **Enhanced notice.** UGCOPAA enhances protection for individuals subject to guardianship or conservatorship without greatly increasing the costs of monitoring by allowing the court to identify other persons to receive notice of certain suspect actions, and who can therefore serve as extra sets of eyes and ears for the court.

- **Guaranteed visitation and communication.** Without a court order, a guardian under UGCOPAA may not restrict a person under guardianship from receiving visits or communications from family and friends for more than seven days, or from anyone for more than sixty days. Unless the court orders otherwise, close family members must be notified of any change in residence.

- **Less-restrictive alternatives.** UGCOPAA prohibits courts from issuing guardianship or conservatorship orders when a less-restrictive alternative is available, such as supported decision-making, technological assistance or an order authorizing a single transaction.
• **Enhanced procedural rights.** UGCOPAA requires notice of key rights to individuals subject to guardianship or conservatorship, including the right to independent legal representation. The act allows any interested party to petition a court for reconsideration of an appointment and places limits on a guardian or conservator’s ability to charge fees for opposing the efforts to alter the terms of appointment.

• **Updated terminology.** The terms “ward,” “incapacitated person,” and “disabled person” are increasingly viewed as demeaning and offensive. UGCOPAA uses neutral terms such as “respondent” for the subject of a guardianship hearing, and “individual subject to guardianship” once a court order has been issued.

**Conclusion.** UGCOPAA modernizes the law and protects the rights of individuals who are subject to guardianship and conservatorship. It encourages courts to impose the least-restrictive orders possible to adequately protect vulnerable minors and adults, and to monitor the protective arrangement to continuously adapt to an individual’s changing capabilities and needs. It imposes clear duties upon guardians and conservators charged with protecting others and requires regular monitoring to ensure compliance. It allows courts to address specific problems with limited orders and preserve individual rights when possible. UGCOPAA is a guardianship statute suitable for the twenty-first century and should be considered for enactment in every state as soon as possible.


Respectfully submitted,

Anita Ramasastry, President
Uniform Law Commission
February, 2018
1. **Summary of Resolution.** The National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) requests approval of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act by the American Bar Association (ABA) House of Delegates.

2. **Approval by Submitting Entity.** The Uniform Law Commission granted final approval to the Act at its July 2017 Annual Meeting.

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

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** The ABA approved two previous versions of a uniform act on guardianship in 1983 (83M107A) and 1998 (98A116).

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

6. **Status of Legislation. (If applicable)** The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act has not yet been enacted by any state legislature, but multiple introductions are expected in 2018.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The Uniform Law Commission will present the act to state legislatures for consideration and enactment.

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

9. **Disclosure of Interest. (If applicable)** None.
10. **Referrals.** Pursuant to the agreement between the ULC and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The drafting committee’s work can be found here: http://uniformlaws.org/Committee.aspx?title=Guardianship,%20Conservatorship,%20and%20Other%20Protective%20Arrangements%20Act.

The following individuals were ABA Advisors to the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act:

*Catherine Anne Seal, ABA Advisor;*

*Cheryl D. Cesario, ABA Section Advisor, ABA Judicial Division;*

*Kristin B. Glen, ABA Section Advisor, ABA Commission on Disability Rights;*

*Cory Kalheim, ABA Section Advisor, ABA Health Law Section;*

*Eddie Varon Levy, ABA Section Advisor, ABA Litigation Section.*

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112C

EXECUTIVE SUMMARY

1. Summary of the Resolution

That the American Bar Association approves the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act, promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

Updates the current outdated uniform law governing guardianship and conservatorship by implementing policies and best practices recommended at the Third National Summit on Guardianship in 2011.

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

Approval of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act by the ABA House of Delegates would help demonstrate to state legislatures that the Act is an appropriate approach for addressing the issues described above.

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 approves the Uniform Parentage Act (2017), promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), as an appropriate Act for those states desiring to adopt the specific substantive law contained in the act.
The Uniform Parentage Act (UPA) provides states with a uniform legal framework for establishing parent-child relationships. UPA (2017) updates prior versions of the UPA, last revised in 2002 (UPA (2002)).

The UPA was originally promulgated in 1973 (UPA (1973)). UPA (1973) removed the legal status of illegitimacy and provided a series of presumptions used to determine a child’s legal parentage. When the UPA was revised in 2002, it augmented and streamlined UPA (1973). UPA (2002) added provisions permitting a non-judicial acknowledgment of paternity procedure that is the equivalent of an adjudication of parentage in a court and added a paternity registry. UPA (2002) also included provisions governing genetic testing and rules for determining the parentage of children whose conception was not the result of sexual intercourse. Finally, UPA (2002) included a bracketed (optional) Article 8 to authorize surrogacy agreements and establish the parentage of children born under the agreements.

UPA (2017) makes five major changes to the UPA. First (1), UPA (2017) seeks to ensure the equal treatment of children born to same-sex couples. UPA (2002) was written in gendered terms, and its provisions presumed that couples consist of one man and one woman. In Obergefell v. Hodges (2015), the United States Supreme Court held that laws barring marriage between two people of the same sex are unconstitutional. In Pavan v. Smith (2017), the Court reaffirmed that conclusion applies to rules regarding children born to same-sex spouses. After these decisions, parentage laws that treat same-sex couples differently than different-sex couples are likely unconstitutional. UPA (2017) updates the Act to address this potential constitutional infirmity by amending provisions so that they address and apply equally to same-sex couples. These amendments include broadening the presumption, acknowledgment, genetic testing, and assisted reproduction articles to make them gender-neutral. In addition to helping states comply with the Constitution, these updates provide clarity to these families and avoid unnecessary litigation.

Second (2), UPA (2017) includes a provision for the establishment of a de facto parent as a legal parent of a child. Most states recognize and extend at least some parental rights to people who have functioned as parents to children but who are unconnected to those children through either biology or marriage. New Section 609 provides a statutory process for the recognition of such individuals as parents.

Third (3), UPA (2017) includes a provision that precludes establishment of a parent-child relationship by the perpetrator of a sexual assault that resulted in the conception of the child. The U.S. Congress adopted the Rape Survivor Child Custody Act in 2015, which provides incentives for states to enact “a law that allows the mother of any child that was conceived by rape to seek court-ordered termination of the parental rights of her rapist
with regard to that child, which the court shall grant upon clear and convincing evidence of rape." New Section 614 provides language to implement the federal law.

Fourth (4), UPA (2017) updates the surrogacy provisions to reflect developments in that area, making them more consistent with current surrogacy practice and recently adopted statutes in several states.

Finally (5), UPA (2017) includes a new article – Article 9 – that addresses the right of children born through assisted reproductive technology to access medical and identifying information regarding any gamete providers. While Article 9 does not require disclosure of the identity of a gamete donor, it does require that donors be asked whether they would like their identity disclosed. It also requires a good faith effort to disclose nonidentifying medical history information regarding the gamete donor upon request.

Respectfully submitted,
Anita Ramasastry, President
Uniform Law Commission
February 2018
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws (Uniform Law Commission)

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) requests approval of the Uniform Parentage Act (2017) by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The Uniform Law Commission granted final approval to the Act as its July 2017 Annual Meeting.

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

This act is a revision to the Uniform Parentage Act (2002).

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

The ABA has a policy (74M131) approved in the wake of the approval of the original 1973 Uniform Property Act to provide for legal equality for all children regardless of the marital status of their parents. The UPA (2017) continues these protections and provides additional enhancements protecting children born to same sex parents. It also provides further clarity to this area of the law by (among other things) addressing de facto parentage, improving surrogacy provisions and addressing the rights of children born through ART (assisted reproductive technology) to access medical and identifying information regarding gamete providers. The ABA Family Law Section has a Model Act Governing Assisted Reproductive Technology and will be updating this act in 2018. The ABA model in some ways goes further than the Uniform Act, but is intended to be more of an aspirational model and does not interfere with the Family Law Section’s support of the Uniform Parentage Act (2017), which is intended to foster uniformity across the states.

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

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

   The Uniform Parentage Act (2017) has not yet been enacted in any jurisdiction.

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

   The Uniform Law Commission will present the Act to state legislatures for consideration and enactment.

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

   None.

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

   None.

10. **Referrals.**


    The following individuals were ABA Advisors to the Uniform Parentage Act (2017):

    **Steven H. Snyder, ABA Advisor;**

    **Mary Louise Fellows, ABA Section Advisor, ABA Section on Real Property, Trust and Estate Law.**

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

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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 the Resolution

That the American Bar Association approves the Uniform Parentage Act (2017), promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), as an appropriate Act for those states desiring to adopt the specific substantive law contained in the act.

2. Summary of the Issue that the Resolution Addresses

The Uniform Parentage Act (2017) provides states with a uniform legal framework for establishing parent-child relationships. This act updates prior versions of the UPA, last revised in 2002.

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

Approval of the Uniform Parentage Act (2017) by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

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

None known.
AMERICAN BAR ASSOCIATION
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association approves the Uniform Protected
2 Series Act, promulgated by the National Conference of Commissioners on
3 Uniform State Laws (Uniform Law Commission), as an appropriate act for those
4 states desiring to adopt the specific substantive law suggested therein.
In response to the growing popularity of series limited liability companies in the United States, the Uniform Law Commission promulgated the Uniform Protected Series Act (UPSA), which provides a comprehensive framework for the formation and operation of a protected series limited liability company (LLC). The UPSA is drafted as a “module” to be inserted into the enacting state’s existing LLC act and may be adopted whether or not the state’s LLC statute is based on the Uniform Limited Liability Company Act.

Article 1 contains general provisions, such as: definitions, a description of the nature of a protected series, as well as its power, purpose, and duration; how the protected series is governed by the operating agreement of the LLC; and rules for applying certain provisions of the state’s existing LLC act to protected series. The act uses the term “protected series” to highlight the internal liability shields which are a defining characteristic of the act, and to avoid confusion with the term “series,” which is often used to refer to classes of interests in business entities that do not affect liabilities to third parties. If the requirements of the UPSA are satisfied, then assets (referred to as “associated assets”) of one protected series are not available to satisfy claims of creditors of the LLC or of other protected series of the LLC.

Article 2 explains how to establish a protected series. As a default matter, all of the members must consent to establish a protected series. Further, the LLC must deliver a protected series designation to the Secretary of State, signed by the company. Article 2 also provides name, registered agent, and service of process provisions, as well as methods to obtain a certificate of good standing and reporting requirements.

Article 3 includes the record-keeping requirements that must be satisfied for an asset to qualify as an “associated asset” under the act. Unless provided otherwise in the operating agreement, the owner of an asset is responsible for meeting the record-keeping requirements for the asset. These provisions are designed to provide transparency of protected series transactions. Article 3 also provides rules for associating members with the protected series and addresses protected series transferable interests, management, and non-associated members’ rights to information.

Article 4 covers limitations on liability and enforcement of claims. The act provides two different types of liability shields: vertical and horizontal. The traditional vertical shield protects equity holders and managers from status-based liability for an
organization’s obligations. The horizontal shield protects a protected series of a series LLC and its associated assets from liability for the debts, obligations, or other liabilities of the company or another protected series of the company. This article contains provisions for claims seeking to disregard limitation of liability, protected series-level charging orders for judgment creditors, and enforcement of judgments against certain assets of the company. A creditor may enforce a judgment against another protected series of a series LLC by pursuing assets owned by the company or another protected series of the company if the act’s requirements are not satisfied for these other assets (or “non-associated assets”). With respect to foreign LLCs, this act follows the common law approach and applies an enacting state’s jurisprudence on piercing and affiliate liability companies and foreign protected series in carefully and narrowly delineated circumstances.

Article 5 addresses grounds for dissolution and provisions for winding up. Under the act, dissolution of a series LLC immediately dissolves every protected series of the company. Reinstatement of an administratively dissolved protected series or the rescinding of a voluntarily dissolved company has the same retroactive effect at the protected series level.

Article 6 includes restrictions on mergers and other entity transactions involving LLCs and protected series. The article provides additional definitions, and provides that a protected series may not be a party to an entity transaction. A series LLC may be a party to a merger if each other party to the merger is an LLC, and the surviving company is not created in a merger. Furthermore, Article 6 includes provisions dealing with plans, statements that must be filed with appropriate authorities, and effects of mergers. It also provides that a creditor’s right that existed immediately before a merger may be enforced after the merger.

Article 7 addresses foreign protected series. The law of the jurisdiction of formation of a foreign series LLC governs certain aspects of a foreign protected series. Article 7 also provides guidelines for determining whether a foreign series LLC or foreign protected series of the company is doing business in the state. The article also provides registration requirements for foreign protected series and disclosure requirements in cases where a foreign LLC or foreign protected series is a party to a proceeding in the state.

Article 8 contains miscellaneous provisions as well as transition rules for pre-existing series limited liability companies and protected series.

The work of the Drafting Committee is available at www.uniformlaws.org. A direct link to the Uniform Protected Series Act is available here.
112E

GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws (Uniform Law Commission)

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioner on Uniform State Laws (Uniform Law Commission) requests approval of the Uniform Protected Series Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The Uniform Law Commission granted final approval to the Act at its July 2017 Annual Meeting.

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

No.

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

None.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Protected Series Act has not yet been enacted in any state legislature.

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

The Uniform Law Commission will present the Act to state legislatures for consideration and enactment.

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

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

None.

10. **Referrals.**

Pursuant to the agreement between the ULC and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee’s work can be found [here](#).

The following individuals were ABA Advisors to the Uniform Protected Series Act:

Allan G. Donn, *ABA Advisor*;

Elizabeth S. Miller, *ABA Section Advisor – ABA Business Law Section*;

Norman M. Powell, *ABA Section Advisor – ABA Business Law Section*;

Greg Ladner, *ABA Section Advisor – ABA Business Law Section*;

Allen Sparkman, *ABA Section Advisor – ABA Business Law Section*;

Marla H. Norton, *ABA Section Advisor – ABA Business Law Section*;

James J. Wheaton, *ABA Section Advisor – ABA Business Law Section*;

Prof. Sandra K. Miller, *ABA Section Advisor – ABA Business Law Section*;

Kyung S. Lee, *ABA Section Advisor – ABA Business Law Section*;

John L. Williams, *ABA Section Advisor - ABA Real Property, Trust and Estate Law Section*;

Jay D. Adkisson, *ABA Section Advisor – ABA Business Law Section*;

J. Leigh Griffith, *ABA Section Advisor - ABA Section of Taxation*;

Marjorie R. Bardwell, *ABA Section Advisor – ABA Real Property, Trust and Estate Law Section*;

Prof. Carter G. Bishop, *ABA Section Advisor – ABA Business Law Section*; and

Louis T. Conti, *ABA Section Advisor – ABA Business Law Section*. 
112E

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 the Resolution

That the American Bar Association approves the Uniform Protected Series Act promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) in July 2017 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

The Uniform Protected Series Act provides a comprehensive framework for the formation and operation of a protected series limited liability company. A protected series LLC has both “horizontal” liability shields, as well as the standard “vertical” liability shield. All modern business entities provide the traditional, “vertical” shield – protecting the entity’s owners (and their respective assets) from automatic, vicarious liability for the entity’s debts. A “series” limited liability company provides “horizontal” shields – protecting each protected series (and its assets) from automatic, vicarious liability for the debts of the company and for the debts of any other protected series of the company. A horizontal shield likewise protects the series limited liability company (and its assets) from creditors of any protected series of the company. About 15 jurisdictions have some kind of series statute, but they vary widely. The act integrates into any existing LLC act, whether it is the Uniform Limited Liability Company Act or not.

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

Approval of the Uniform Protected Series Act by the American Bar Association House of Delegates would demonstrate to states that the act is an appropriate approach for addressing the issues described above.

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

None known.
RESOLVED, That the American Bar Association approves the Uniform Regulation of Virtual-Currency Businesses Act, promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.
The Uniform Regulation of Virtual-Currency Businesses Act (URVCBA) provides a statutory framework for the regulation of companies engaging in "virtual-currency business activity." Virtual-currency business activity means exchanging, transferring, or storing virtual currency; holding electronic precious metals or certificates of electronic precious metals; or exchanging digital representations of value within online games for virtual currency or legal tender.

Under the URVCBA, "virtual currency" is a digital representation of value that is used as a medium of exchange, unit of account, or store of value and is not legal tender. This technology-neutral definition encompasses as many types of virtual currency as possible. The definition excludes merchants’ rewards programs or equivalent types of values on online game platforms.

The URVCBA is unique because it offers a three-tiered structure. Tier one represents persons that are exempt from regulation under the Act. Tier two is for providers that must register with the state. The registration tier is for providers with virtual-currency business activity levels between $5,000 and $35,000 annually. The registration tier functions as a "regulatory sandbox" because it allows companies to focus on innovation and experimentation while they are in the early stage of business development. Businesses in the registration tier may operate as registrants for up to two years, so long as they remain under the $35,00 threshold. Tier three, the full licensure tier, is for companies with virtual-currency business activity levels greater than $35,000 annually.

An application for a license under the URVCBA must include information such as: (1) a description of the applicant’s current business; (2) a description of the applicant’s business for the previous five years; (3) a list of the money transmission licenses the applicant holds in other states; and (4) lawsuit and bankruptcy history of the applicant and the applicant’s executive officers.

The URVCBA creates two methods for an enacting state to authorize reciprocal licensing under the Act. Either the enacting state can choose to participate in the Nationwide Multistate Licensing System and Registry or the state can authorize reciprocity on a bilateral or multi-lateral basis.

The Act also exempts some forms of businesses already regulated by the federal government or by the states from licensure and supervision under the URVCBA.

The URVCBA is the result of two years of drafting work and collaboration with representatives from the virtual currency industry, state and federal government, trade associations, financial services providers, and academia, among others.
The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Uniform Regulation of Virtual-Currency Businesses Act is available here.

Respectfully submitted,

Anita Ramasastry, President
Uniform Law Commission
February 2018
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws (Uniform Law Commission)

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Regulation of Virtual-Currency Businesses Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The Uniform Law Commission granted final approval to the Act at its July 2017 Annual Meeting.

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

No.

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

Not applicable.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Regulation of Virtual-Currency Businesses Act has not yet been enacted in any jurisdiction.

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

NCCUSL will present the Act to state legislatures for consideration and enactment.

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

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

None.

10. Referrals.

Pursuant to the agreement between the ULC and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee’s work can be found here. http://uniformlaws.org/Committee.aspx?title=Regulation%20of%20Virtual%20Currency%20Businesses%20Act.

The following individuals were ABA Advisors to the Uniform Regulation of Virtual-Currency Businesses Act:

Stephen Middlebrook, ABA Advisor.

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 the Resolution

That the American Bar Association approves the Uniform Regulation of Virtual-Currency Businesses Act promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) in July 2017 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

The Uniform Regulation of Virtual-Currency Businesses Act creates a statutory framework for regulating companies engaged in virtual-currency business activity. Currently, legal gray areas exist for companies engaging in virtual-currency business activity and there is no uniformity from one state to the next. The Act provides clarity to both regulators and businesses, encourages innovation, and protects consumers utilizing virtual currencies.

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

Approval of the Uniform Regulation of Virtual-Currency Businesses Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

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

None known.
RESOLVED, That the American Bar Association supports the development of integrated, systemic approaches within administrative, civil, and criminal court contexts to address the special needs of youth and young adults experiencing homelessness.

FURTHER RESOLVED, That the American Bar Association urges lawmakers at federal, state, local, territorial and tribal levels to work with the legal profession to:

1. promote and support efforts to identify and address the unmet legal needs of unaccompanied minors and young adults experiencing or at risk of experiencing homelessness, including ensuring that all youth experiencing homelessness have access to a lawyer;
2. encourage the development of specialized legal services programs, pro bono projects and law school legal clinics;
3. collaborate in the identification and removal of legal barriers for homeless children and youth to benefits, education, employment, housing, identification, treatment and other services;
4. review and revise laws, regulations, policies, practices and systems of care that may act as legal barriers; and
5. implement preventive strategies such as pre-booking diversion programs, expungement and/or sealing of juvenile and criminal records, and alternatives to the criminalization of child and youth homelessness.

FURTHER RESOLVED, That youth and young adults experiencing or at risk of experiencing homelessness should have input where appropriate, in efforts to increase access to justice; and

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments as well as the legal community and public and private funders to financially support these efforts.
“Lawyers can and should play a critical role in addressing youth homelessness.”
- Report accompanying ABA Policy regarding the Runaway and Homeless Youth Act
  (Resolution 105b, approved by the ABA House of Delegates in February 2010)

Background
Youth experiencing homelessness are often called a “hidden population,” and there are limited national data on how many youth and young adults experience homelessness each year. Some reports estimate that 1.7 million youth leave home or are forced out each year, and that approximately 550,000 of those young people experience homelessness for more than one week.1 The majority of these young people have been involved with the legal system before experiencing homelessness, due to their involvement in foster care, juvenile or criminal justice matters, or in other ways.2 They have often experienced physical and sexual violence before and while experiencing homelessness, leading to trauma, educational disruption, and many other challenges.3 Youth of color, lesbian, bisexual, gay, transgender and questioning/queer youth, and youth with disabilities experience homelessness at disproportionate rates and often need legal advocacy to fight discrimination in housing, education, and employment.

Lawyers are in a unique position to help address the circumstances that lead to and prolong homelessness in a wide range of ways, from ensuring access to education and assisting with record expungement to open doors to employment, to fighting housing discrimination and helping youth access basic necessities like food and identification documents. In addition to enforcing existing law, lawyers can craft new policies to minimize the barriers that can lead to homelessness or to help young people exit homelessness quickly and permanently.

Role of the ABA and legal community
The American Bar Association, and the American legal community, have a long history of working on behalf of underserved individuals, including people experiencing poverty and homelessness, and children who are separated from their families due to abuse, neglect, family conflict, or other reasons. In 2016, through the generous support of the ABA Enterprise Fund, the ABA Commission on Homelessness & Poverty launched the Homeless Youth Legal Network with the support of the Commission on Youth at Risk, the Section of Litigation Children’s Rights Litigation Committee, the Standing Committee on Pro Bono and Public Service, and the Fund for Justice and Education, recognizing that

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3 Ibid.
legal and policy advocacy have the potential to prevent or end homelessness for youth. This initiative brings together the resources and expertise of the ABA and its members to focus on meeting the legal needs of unaccompanied minors and young adults experiencing, or at risk of experiencing, homelessness. Also in 2017, ABA President Hilarie Bass chose youth homelessness as one of her Presidential areas of focus, and launched the Legal Rights of Homeless Youth Initiative, encouraging and equipping attorneys to provide free legal services to youth and young adults experiencing homelessness.

These initiatives build upon previous ABA work and policy. The ABA’s Commission on Homelessness and Poverty, Commission on Youth at Risk, Litigation Section Children’s Rights Litigation Committee, and Standing Committee on Pro Bono and Public Services—along with the numerous other entities that make up the ABA Coordinating Committee on the Legal Needs of Homeless Youth—regularly undertake efforts and initiatives relevant to special populations such as youth experiencing homelessness.

**ABA Homeless Youth Legal Network: Best Practices and Model Programs**

In 2017, the American Bar Association selected 12 Model Programs across the country as part of its Homeless Youth Legal Network (HYLN) pilot initiative:

- Arizona Legal Women and Youth Services (ALWAYS), Arizona
- Bay Area Legal Aid, California
- Center for Children’s Advocacy, Connecticut
- Community Legal Services of Philadelphia (CLS), Pennsylvania
- Family & Youth Law Center at Capital University School of Law, Ohio
- Homeless Persons Representation Project Homeless Youth Initiative, Maryland
- Homeless Youth Legal Clinic, Utah
- Legal Counsel for Youth and Children (LCYC), Washington
- Mid-Minnesota Legal Aid Youth Law Project, Minnesota
- Pegasus Legal Services for Children, New Mexico
- Peter Cicchino Youth Project, Urban Justice Center, New York
- Legal Services Center, The Door, New York

These pilot sites were chosen strategically to showcase not only individual programs that do important, holistic work in their own communities, but also to highlight the variety of models worthy of replication that exist across the country. Each program developed a narrative description of their work providing legal services to youth and young adults experiencing or at risk of homelessness (available at ambar.org/HYLN). Those profiles, and the other data and information the Model Programs shared with the ABA as part of their engagement in the HYLN pilot initiative, illustrate numerous common challenges.
and successful strategies among the organizations, as well as some unique innovations.

The range of models used by the programs illustrate that there are many different ways to successfully represent youth experiencing homelessness. Several Model Programs are youth-specific projects or departments within larger general civil legal services organizations, while others are located within social services providers/homelessness programs. Others are housed within smaller legal organizations with a specific focus on children or homelessness, and one is part of a law school.

Most programs serve both minors, some as young as 10 or 12, and young adults, generally through their mid-twenties. Youth of color, lesbian, gay, bisexual, transgender and queer/questioning youth, and youth with disabilities have a higher likelihood of experiencing homelessness, and most Model Programs report serving a higher proportion of youth in these populations. Several also note that they served many youth who have been involved with the foster care and/or justice system, and several said that a substantial portion of their clients have been victims of a crime.

All the Model Programs provide direct legal services, with many providing regular clinics at homeless youth programs—providing comprehensive, holistic services in partnership with community-based providers. Types of services offered include full representation, brief advice and referral, and assistance with pro se representation, with most programs offering a mix of services depending on client needs.

The Model Programs all engage in systemic advocacy and/or legal education and outreach as well. This ranges from “know your rights” presentations to sitting on key advisory groups. Directly representing clients experiencing homelessness can help attorneys identify systemic issues, and help put into place practice or policy changes that can reduce the number of clients who are struggling with the same challenges over and over again.

Model Programs are supported by a range of funding sources including: private foundations, local/state bar associations, Legal Services Corporation funds, local government, and individual donations. As discussed below, several also use volunteer attorneys and/or fellows paid for by outside organizations/foundations. Program budgets range from less than $15,000 to over $1.5 million.

Not surprisingly, nearly all the Model Programs discuss challenges relating to generating sufficient resources to meet the legal needs that they see. Several groups supplement their own staff capacity by working with pro bono lawyers, or by obtaining legal fellows through national or community foundations. Several

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4 Not all programs collect this demographic information.
programs use volunteer attorneys to extend their program’s capacity to serve youth. This ranges from having volunteer attorneys support staff attorneys on cases with more unusual legal issues (e.g., estate law, federal litigation), to having pro bono lawyers staff clinics and provide brief consultation, to placing cases with volunteer lawyers for full representation.

**Homeless Youth Legal Clinic** (HYLC) is staffed completely by volunteer attorneys, and finds that while their attorneys generally have the substantive legal knowledge they need to represent youth, providing training and education on the culture, lifestyle, and common experiences of homeless youth is essential for building trusting attorney-client relationships. All HYLC’s volunteer attorneys receive training on trauma-informed advocacy and several other topics.

At **Pegasus Legal Services for Children**, volunteer attorneys conduct telephone consultations with youth twice weekly. These volunteers are frequently able to provide the necessary advice to resolve the youth’s issue. They also gather information to forward to the Pegasus attorney when further representation is necessary. In addition to expanding Pegasus’ capacity to serve more youth generally, these phone consultations allow the program to serve youth in rural areas.

**The Door**’s Legal Services Center utilizes pro bono attorneys in all areas, particularly with cases for Special Immigrant Juvenile Status. Two local firms send them new associates to work full-time at The Door for three to 18 months, and they have about ten additional pro bono partner law firms.

Many programs highlight their relationships with community-based programs as a key to their success. Youth experiencing homelessness have cross-cutting needs and therefore collaboration is essential to achieving good outcomes. Along the same lines, many of the programs underscore the importance of efforts to educate key partners, youth, and the larger community about legal issues to make their work easier and more effective. Successful programs emphasize the importance of holistic and expansive advocacy, so that attorneys can help the youth resolve not only the legal issue that brought the youth to them, but other challenges in the youth’s life that may not be able to be resolved with legal assistance. Programs that do not have the in-house capacity to meet every legal need presented have developed a network for referrals, to ensure that youth receive the right services. Several of the pilot programs have social workers on staff, and those that don’t often partner with social services agencies that provide case management support. One program mentioned that sending lawyers with different legal knowledge impacts what needs they identify and address for young people. For example, a benefits attorney at a homelessness program will
find that a lot of young people need assistance with benefits, while a family law
attorney may find civil harassment or restraining order cases.

All the programs in the pilot emphasize the importance of meeting youth where
they are. This can mean having an office in a part of town that’s easily
accessible, or holding clinics in places youth experiencing homelessness are
already going (e.g., a meals program or drop-in center). Several programs also
work hard to reach out to youth who may be not be well-connected to services
and support systems.

A number of programs also highlight the value of youth input to their work.
Beyond simply directing their own representation, as all clients do, youth can
help shape a program and can make a huge difference in systemic advocacy.

The Center for Children’s Advocacy worked with youth from the Youth
Advisory Board of a local youth-serving agency to create a design and mural for
the exterior of their Mobile Law Office’s van that would draw in and be welcoming
to homeless youth. Youth who were homeless helped the Center plan the
project’s social media and online outreach strategies, and helped develop a teen-
friendly website and social media pages by advising the Center on terms used,
selecting the website logo and providing suggestions about presentation.

The Homeless Persons Representation Project Homeless Youth Initiative in
Baltimore engages clients and other youth experiencing homelessness in
systemic advocacy in several ways. Their advocacy agenda is informed by
trends identified in individual legal cases and by asking youth about their
priorities. They also survey youth about specific systemic issues and collect their
stories, provide workshops on the state legislative process and lobbying, solicit
youth input on bill drafting and other substantive decisions, and take youth to
their state capital to meet with elected officials and testify on legislation.

There is no one right way to serve youth experiencing homelessness, but the
HYLN Model Programs discussed here illustrate that lawyers, working in
collaboration with youth and other service providers, can resolve many of the
issues that lead youth to become homeless, or prevent them from overcoming
homelessness. The HYLN Model Programs provide concrete examples of
effective methods to launch and grow a legal services practice for homeless
youth, and the ABA Homeless Youth Legal Network is available to support
attorneys and organizations who want to engage in this work. Learn more at
www.ambar.org/HYLN.

Relevant ABA policy
Although there is no previous ABA policy specifically targeted at the provision of
legal services to youth experiencing homelessness, there are many other policies
that support the role of the bar in addressing youth homelessness, including a 2010 policy supporting the Runaway and Homeless Youth Act (Resolution 105b, approved by the House of Delegates in February 2010) and a 2007 policy condemning the criminalization of homelessness (Resolution 106, approved by the House of Delegates in February 2007). ABA policy has also called for an expansion of the federal definition of homelessness (2006)—an issue which particularly impacts unaccompanied youth5—and for the progressive realization of the human right to adequate housing (2013).

Numerous ABA policies address the provision of legal assistance to underserved populations, as well as issues specific to homelessness, housing, and funding for federal programs that provide housing and support services. There are also many ABA policies that touch on the common legal issues faced by youth experiencing homelessness (see below), such as education rights, child welfare, safety issues, diversion of juvenile status offenders, transitioning from foster care, and coordination of services for at-risk youth.

Common legal needs and issues6
Common legal needs of young people experiencing or at risk of homelessness include the following:

Identification
Accessing housing, employment, education, or public benefits can be virtually impossible for young people who do not have access to their birth certificate, social security card and/or a state-issued photo ID. Obtaining these documents can be a complicated process for young people who are no longer living with their parents, and/or who do not have a stable address or money to pay required fees. Most states do not allow minors to request their own birth certificate, so youth must have an immediate family member or legal representative make the request. Individuals requesting birth certificates usually also must provide photo ID, creating a catch-22 for young adults who lack identification.

Family Law
Family conflict is the most common cause of homelessness among youth and seventy percent of all homeless youth report experiencing some form of abuse

5 In a letter to Congress supporting the Homeless Children and Youth Act of 2011 (HCYA), which would have broadened the U.S. Department of Housing and Urban Development (HUD) definition of homelessness to be in line with the definition used by federal child and youth-serving programs such as education programs under the McKinney-Vento Act, Head Start programs, and Runaway and Homeless Youth Act programs, ABA Governmental Affairs Office Director Thomas Susman said that without HCYA “many of these vulnerable American children and youth – and their families – will be able to access support from only a small portion of homelessness prevention dollars, leaving 97% of federal homeless assistance funds out of their reach.

6 This section adapted from the 2017 ABA publication “Access to Justice for Youth Experiencing Homelessness: Meeting the Legal Needs of Youth to Prevent or End Youth Homelessness,” available at www.ambar.org/hyln.
before leaving home. Many youth are able to identify adults other than their parents—including relatives and nonrelatives—with whom they could safely reside, but may need assistance making these arrangements legal. Youth who are parents themselves may also need help with parenting plans, child support agreements, and with defending their own parental rights.

Child Welfare (Child Protective) System Involvement
Some youth may leave home because they were kicked out, or were not safe, and may want to access services through their local child welfare (protective) system but need assistance doing so. Others may be under the jurisdiction of the child welfare system but find their placements unsafe or unsuitable. Additionally, young parents who do not have stable housing may need assistance preserving their parental rights.

Juvenile or Criminal Justice Involvement
Many jurisdictions make it illegal to sleep, sit, or eat in public spaces, effectively criminalizing homelessness. Young people may also seek shelter in private buildings and be charged with trespassing. They may also steal money or goods so that they can purchase food or a safe place to sleep. These actions may lead to arrests, tickets or fines that youth cannot pay, and ultimately to outstanding warrants. Even after youth finish their justice involvement, juvenile or criminal records may follow them and interfere with employment or housing.

Status Offenses
Status offenses are acts that are only illegal for minors, such as running away, repeatedly skipping school (truancy), being “ungovernable” or “unruly,” or violating a municipal curfew. These behaviors are frequently triggered by family conflict or a youth’s lack of safety at school or home. These acts may lead youth to become involved with the juvenile justice or child welfare system (depending on state law), or to become homeless. Research shows that community-based approaches are most effective for addressing status offenses, yet many states continue to place youth in secure confinement instead, making legal and policy advocacy on behalf of these youth critical.

Education
Although federal law provides youth experiencing homelessness with many protections, including the right to stay in their home school, youth often do not know about their rights, or are unable to enforce them. Youth with disabilities, and youth who are pregnant or parenting may also need assistance accessing relevant services and protections. Overly harsh school discipline, such as “zero tolerance” policies, or overuse of suspension and expulsion, can keep young people, particularly youth of color and girls, out of school, and lead to juvenile or criminal justice involvement. When youth exit the juvenile justice system, they often face challenges re-enrolling in school or receiving services needed to catch up on what they missed.
Housing/Shelter and Employment
In many states, minors are not able to enter or remain in shelters without parental consent and cannot enter into contracts such as rental agreements. Even after they reach age 18, young adults may have trouble obtaining housing because of unresolved credit issues or juvenile or criminal records. These issues, as well as poor educational attainment caused by lack of stability, can also keep youth from obtaining the employment needed to pay for housing. Once housed, youth may also need assistance fighting eviction or enforcing their rights against landlords who fail to meet basic safety standards. Overbroad statutes prohibiting “harboring” runaway youth may also interfere with young people’s access to safe shelter, calling for case-level and policy advocacy.

Public Benefits
There is no specific federal or state public benefits safety net designed specifically for unaccompanied youth. While some programs may contain provisions that anticipate young applicants, public assistance systems are generally designed for adults, and obtaining benefits can be a confusing and complicated process. Yet with assistance, many young people are able to successfully secure benefits to meet their basic needs through programs such as Supplemental Security Income (SSI), Temporary Assistance to Needy Families (TANF), and Supplemental Nutrition Assistance Program (SNAP/formerly known as food stamps).

Race, Ethnicity, Sexual Orientation and Gender Identity/Expression, and Disability
An estimated 30 - 40% of youth experiencing homelessness are African American,7 and up to 40% of youth experiencing homelessness are lesbian, gay, bisexual, transgender or queer/questioning. Further, seventeen percent of homeless students were identified as students with disabilities under the Individuals with Disabilities Education Act (IDEA), compared to 13 percent of all public school students (see indicator Children and Youth With Disabilities).8 These youth face systemic and implicit bias, as well as outright discrimination, as they seek safe housing, and the education, employment and other resources that will allow them to afford that housing. Attorneys can help enforce legal protections against discrimination, as well as help to develop policy that ensures all youth and young adults are safe and have equal opportunities as they transition to adulthood.

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7 As with youth homelessness generally, there is a dearth of good data on the race and ethnicity of youth experiencing homelessness. In a recent study of youth experiencing homelessness in 11 cities across the United States, 41% identified as Black or African-American and almost 26% identified as Hispanic or Latino/Latina. (Note that these categories were not mutually exclusive.) Family and Youth Services Bureau; Administration for Children and Families; U.S. Department of Health and Human Services. Street Outreach Program Data Collection Study Final Report (April 2016).

Immigration
Unaccompanied youth without legal immigration status may require help obtaining legal status and/or advocacy in removal (deportation) proceedings, in addition to all of the needs outlined above. Youth with lawful immigration status may also experience homelessness and need strong advocacy, particularly if their parents are deported, creating a lack of adult connections and support.

Health
Youth frequently report that substance use and mental health issues (their own and their caregivers) lead or contribute to homelessness. Irregular access to medical care, malnutrition, sleeping in unsafe spaces and other circumstances experienced by homeless youth can lead to or aggravate physical health issues as well. Young people’s lack of financial resources and social disconnectedness can also create barriers to accessing health care. Youth under age 18 experience significant additional barriers due to their status as minors and lack of an adult caregiver willing to provide consent. Youth exiting the juvenile justice system or transitioning from foster care may be eligible for Medicaid, but need help applying, as well as assistance obtaining their own—often widely scattered—medical records.

Credit and Debt
Young people may find that they are unable to obtain housing due to credit or debt issues. These may be the result of identity theft, such as when a parent, guardian, or stranger uses the young person’s information for a credit card, utilities, or their own housing. It may also be due to the young person taking on a car or other loan—sometimes with unfair terms—and being unable to pay. Attorneys can help young people discharge debt that was not theirs in the first place, or negotiate payments plans or better terms for legitimate amounts owed.

Conclusion
Assuring meaningful access to justice for all persons is a key objective of the American Bar Association. Youth experiencing homelessness are perhaps the most vulnerable segment of our population. These young people have the capacity to successfully transition to adulthood if they are given a fair chance to obtain the resources and support that they need. Lawyers and the legal community can make access to justice a reality for the over 1 million young people who experience homelessness by engaging in advocacy for individual clients and at the systemic level in collaboration with community-based partners, as described in this report.

Respectfully submitted,

Craig H. Baab
Chair, Commission on Homelessness & Poverty
February, 2018
1. **Summary of Resolution(s).** The American Bar Association supports the development of integrated, systemic approaches within administrative, civil, and criminal court contexts to address the special needs of youth and young adults experiencing homelessness.

2. **Approval by Submitting Entity.** November 15, 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?**

   Although there is no previous ABA policy specifically targeted at the provision of legal services to youth experiencing homelessness, there are many other policies that support the role of the bar in addressing youth homelessness, including a 2010 policy supporting the Runaway and Homeless Youth Act, and a 2007 policy condemning the criminalization of homelessness. ABA policy has also called for an expansion of the federal definition of homelessness (2006)—an issue which particularly impacts unaccompanied youth—and for the progressive realization of the human right to adequate housing (2013).

   Numerous ABA policies address the provision of legal assistance to underserved populations, as well as issues specific to homelessness, housing, and funding for federal programs that provide housing and support services. There are also many ABA policies that touch on the common legal issues faced by youth experiencing homelessness (see below), such as education rights, child welfare, safety issues, diversion of juvenile status offenders, transitioning from foster care, and coordination of services for at-risk youth.

   This policy provides not only a call to action to the lawmakers and the legal community that is specific to youth and young adults experiencing homelessness, but also highlights the critical components to successfully improving outcomes for this vulnerable population—through integrated, systemic approaches and increased funding.
This policy will not adversely impact or conflict with existing ABA policy. Rather, this policy will supplement existing policy by filling gaps and focusing specifically on the special legal needs of this population.

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)

While no pending legislation currently focuses on meeting the legal needs of youth and young adults experiencing homelessness, there is pending legislation (and additional legislation on the horizon—including the forthcoming Runaway and Homeless Youth and Trafficking Prevention Act) that the ABA is likely to weigh in on with regards to removing regulations, policies, practices and systems of care that may act as legal barriers—including S.611 – The Homeless Children and Youth Act of 2017 which seeks to amend the McKinney-Vento Homeless Assistance Act to meet the needs of homeless children, youth, and families, and honor the assessments and priorities of local communities.

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

There has been a great deal of interest among national, state, and local partners—including lawmakers, providers, and both legal and non-legal advocates—to prevent and end youth homelessness. The emerging ABA Homeless Youth Legal Network is collaborating with stakeholders across the country to galvanize the legal community to meet the special needs of homeless youth.

The approval of this recommendation would further enhance the ABA’s commitment to access to justice by supporting the Commission on Homelessness and Poverty’s efforts through the Homeless Youth Legal Network to foster the creation of new and expanded legal services through technical assistance and future pilot efforts (based on the Commission’s successful track record of utilizing ABA policies to foster replication of the Homeless Court Program, Veterans Treatment Courts, and alternatives to the criminalization of homelessness). The proposed recommendation is intended to give jurisdictions guidance on the critical components of successful integrated, systemic efforts while allowing flexibility for jurisdictions to innovate based on their resources and unique challenges.
8. **Cost to the Association.** (Both direct and indirect costs)

None. Existing Commission and Governmental Affairs staff will undertake the Association's advocacy on behalf of these recommendations, as is the case with other Association policies.

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

There are no known conflicts of interest with this resolution.

10. **Referrals.**
The recommendation has been referred to the following ABA entities:

    Administrative Law Section
    Forum on Affordable Housing and Community Development
    Section of Civil Rights and Social Justice
    Criminal Justice Section
    Standing Committee on the Delivery of Legal Services
    Commission on Disability Rights
    Commission on Domestic and Sexual Violence
    Government and Public Sector Lawyers Division
    Commission on Immigration
    Section of International Law
    Commission on Law and Aging
    Law Student Division
    Standing Committee on Legal Aid and Indigent Defendants
    Section of Litigation
    Standing Committee on Pro Bono and Public Service
    Section of Real Property, Trust and Estate Law
    Senior Lawyers Division
    Commission on Sexual Orientation and Gender Identity
    Solo, Small Firm and General Practice Division
    Section of State and Local Government Law
    Young Lawyers Division
    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? 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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(334) 233-7385
craigbaab@gmail.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The American Bar Association supports the development of integrated, systemic approaches within administrative, civil, and criminal court contexts to address the special needs of youth and young adults experiencing homelessness.

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

   Youth and young adults experiencing homelessness often encounter legal barriers to benefits, education, employment, housing, identification, treatment and services. The bench and the bar are in a unique position to help address the circumstances that lead to and prolong homelessness in a wide range of ways, from ensuring access to education and assisting with record expungement to open doors to employment, to fighting housing discrimination and helping youth access basic necessities like food and identification documents. In addition to enforcing existing law, lawyers and lawmakers can craft new policies to minimize the barriers that can lead to homelessness or to help young people exit homelessness quickly and permanently.

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

   This recommendation would enhance the Association’s efforts to foster the creation of integrated, systemic approaches to address the special legal needs of youth and young adults experiencing homelessness by providing not only a call to action to the lawmakers and the legal community that is specific to youth and young adults experiencing homelessness, but also highlights the critical components to successfully improving outcomes for this vulnerable population—through integrated, systemic approaches and increased funding.

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

   None to date
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to provide legal counsel as a matter of right at public expense to low-income persons in all proceedings that may result in a loss of physical liberty, regardless of whether the proceedings are: a) criminal or civil; or b) initiated or prosecuted by a government entity;

FURTHER RESOLVED, That no court should accept an in-court waiver of the right to appointed counsel in a case that may result in a loss of physical liberty unless the person has had the opportunity to confer with a lawyer; and

FURTHER RESOLVED, That a person who has waived appointed counsel should be offered appointed counsel at each subsequent stage of the proceedings at which the person appears without counsel.
The ABA Has Long Supported a Right to Counsel in Cases Involving Basic Human Needs.

In August 2006, under the leadership of then-ABA President Michael S. Greco and Maine Supreme Judicial Court Justice Howard H. Dana, Jr., Chair of the ABA Task Force on Access to Civil Justice, the House of Delegates unanimously adopted a landmark resolution calling on federal, state and territorial governments to provide low-income individuals with state-funded counsel when basic human needs are at stake. The policy adopted pursuant to Recommendation 112A provides as follows:

“RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.”

Because of their direct relevance to the present Recommendation and Report, portions of the 2006 Recommendation and Report are quoted here:

The ABA has long held as a core value the principle that society must provide equal access to justice, to give meaning to the words inscribed above the entrance to the United States Supreme Court – “Equal Justice Under Law.” As one of the Association’s most distinguished former Presidents, Justice Lewis Powell, once observed:

‘Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society... It is fundamental that justice should be the same, in substance and availability, without regard to economic status.’

The ABA also has long recognized that the nation’s legal profession has a special obligation to advance the national commitment to provide equal justice. The Association’s efforts to promote civil legal aid and access to appointed counsel for indigent litigants are quintessential expressions of these principles.

In 1920, the Association created its first standing committee, “The Standing Committee on Legal Aid and Indigent Defendants,” with Charles Evans Hughes as its first chair. With this action, the ABA pledged itself to foster the expansion of legal aid throughout the country. Then, in 1965, under the leadership of Lewis Powell, the ABA House of Delegates endorsed federal funding of legal services for the poor because it was clear that charitable funding would never begin to meet the need. In the early 1970s, the ABA played a prominent role in the creation of the federal Legal Services Corporation to assume responsibility for the legal services program created by the federal Office of Economic Opportunity. Beginning in the 1980s and continuing to the present, the ABA has been a powerful and persuasive voice in the fight to maintain federal funding for civil legal services.
The ABA Has Adopted Policy Positions Favoring a Right to Counsel

The ABA has on several occasions articulated its support for appointing counsel when necessary to ensure meaningful access to the justice system. In its amicus brief in *Lassiter v. Dept of Social Services of Durham County*, 425 U.S. 18 (1981), the ABA urged the U.S. Supreme Court to rule that counsel must be appointed for indigent parents in civil proceedings that could terminate their parental rights, ‘[I]n order to minimize [the risk of error] and ensure a fair hearing, procedural due process demands that counsel be made available to parents, and that if the parents are indigent, it be at public expense. Id. at 3-4. The ABA noted that “skilled counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal. . . . Pro se litigants cannot adequately perform any of these tasks.’”

In 1979 the House of Delegates adopted Standards Relating to Counsel for Private Parties, as part of the Juvenile Justice Standards. The Standards state ‘the participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.’ These standards were quoted in the Lassiter amicus brief. Also, in 1987, the House of Delegates adopted policy calling for appointment of counsel in guardianship/conservatorship cases.1

The ABA stated these positions some years ago, but its continuing commitment to the principles behind the positions was recently restated when it championed the right to meaningful access to the courts by the disabled in its amicus brief in *Tennessee v. Lane*, 541 U.S. 509 (2004). The case concerned a litigant who could not physically access the courthouse in order to defend himself. In terms that could also apply to appointment of counsel, the brief states, ‘the right of equal and effective access to the courts is a core aspect of constitutional guarantees and is essential to ensuring the proper administration of justice.’ ABA Amicus Brief in *Tennessee v. Lane* at 16.

Echoing the Association’s stance in *Lassiter*, the brief continued ‘the right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights . . . . [W]hen important interests are at stake in judicial proceedings, the Due Process Clause requires more than a theoretical right of access to the courts; it requires meaningful access. . . . To ensure meaningful access, particularly

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1 See House of Delegates Resolution adopted in August, 1987 offered by the Special Committee on Legal Problems of the Elderly: “BE IT RESOLVED, That the American Bar Association supports efforts to improve judicial practices concerning guardianship, and adopts the following Recommended Judicial Practices and urges their implementation for the elderly at the state level: . . . C. Representation of the Alleged Incompetent . . . 1. Counsel as advocate for the respondent should be appointed in every case...”
when an individual faces the prospect of coercive State deprivation through the judicial process of life, liberty, or property, due process often requires the State to give a litigant affirmative assistance so that he may participate in the proceedings if he effectively would be unable to participate otherwise.’ Id. at 17-18 (internal citations omitted).

The Resolution Addresses a Perceived Gap in the ABA’s Existing Policy on the Right to Counsel in Civil Cases.

While Resolution 112A called for a right to counsel generally in “those categories of adversarial proceedings where basic human needs are at stake,” it proceeded to list five categories of cases: shelter, sustenance, safety, health, and child custody. These categories are sometimes perceived by the bar or the public to be a definitive list of what constitutes a “basic human need,” rather than just examples. This misunderstanding is potentially furthered by the fact that some types of basic human needs civil cases not included in 112A’s list are addressed by other ABA resolutions: for instance, Resolution 115 (2017) supports a right to counsel in immigration removal proceedings, while Resolution 109A (2010) calls for the provision of counsel in all juvenile status offense proceedings.

Civil proceedings involving physical liberty, such as child support contempt and incarceration for failure to pay court-imposed fees and fines, are not explicitly addressed by any ABA resolution. This omission is in part due to the U.S. Supreme Court taking a surprising direction on the issue. In 1981, the Court stated, “The preeminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.”2 At the time of Resolution 112A’s adoption in 2006, it was believed that this statement essentially established a right to counsel in civil cases involving physical liberty. Then, in 2011 the Court considered whether an indigent parent facing incarceration due to child support contempt proceedings initiated by the other custodial parent has a categorical Fourteenth Amendment right to appointed counsel.3 The ABA filed an amicus brief arguing that the right to counsel should not depend on the “criminal” or “civil” case label and that the provision of counsel where incarceration is at stake “promotes the fair and efficient administration of justice.”4 The Court held, however, that there was no categorical right to counsel, although it suggested the result might be different if the government was the plaintiff.

Since then, state courts have been split on whether a right to counsel exists for civil incarceration. For example, the Maryland Court of Appeals recognized a categorical right to counsel under the state constitution “in any proceeding that may result in the defendant’s incarceration” and the Tennessee Court of Appeals identified a right to counsel in the fees and fines contempt context,6 while the Wyoming Supreme Court declined to recognize a right to counsel for any child support contempt cases even where the government is the plaintiff,7 and the

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4 DeWolfe v. Richmond, 76 A.3d 1019, 1029 (Md. 2013).
Maine Supreme Judicial Court held there was no right to counsel in a fees and fines case. At the same time, the U.S. Commission on Civil Rights has said that “Courts and municipalities should establish a program to provide counsel at no cost at the imposition of a fine or fee and at an indigency determination as appropriate,” based on the following findings:

Lack of counsel in municipal court cases that involve only fines and fees can exacerbate problems that arise when courts fail to conduct ability to pay determinations and consider fee alternatives for indigent defendants. Counsel can assist in presenting evidence regarding a defendant’s ability to pay fines and fees, negotiating lower fines and fees or alternate payment plans, and making sure the defendant understands the implications of any payment commitments made.

The Right to Counsel Should Attach When Incarceration is Threatened, and Not Only When Actual Incarceration Occurs.

In *Scott v. Illinois*, the U.S. Supreme Court took the position that a defendant’s Sixth Amendment right to counsel is not violated in a criminal case if the court imposes a sanction other than incarceration. Consequently, a criminal defendant does not know whether he or she

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10 440 U.S. 367 (1979). Notably, the Court in *Lassiter v. Dep’t of Soc. Servs*, 452 U.S. 18 (1981) referred to the right to counsel in civil cases attaching where the litigant “may lose his personal freedom” (emphasis added), although the Court did also note the holding in *Scott*. In *Lake v. Speziale*, 580 F.Supp. 1318 (D. Conn. 1984), a federal court observed that:

It is the latter phrase, “when, if he loses, he may be deprived of his physical liberty,” ... to which the plaintiffs point as establishing the right to counsel on a “potential incarceration” basis. Certainly the cited language of *Lassiter* is prospective and concerns the potential for incarceration, rather than being retrospective by dealing only with whether actual incarceration resulted from the proceedings. It is unclear to this Court, however, whether the Supreme Court by its language in *Lassiter* intended to adopt a prospective ‘potential incarceration’ test to determine the indigent civil litigant's right to appointed counsel under the Due Process Clause of the Fourteenth Amendment ... It would appear anomalous for an indigent civil litigant to have a more extensive right to appointed counsel based on the “potential incarceration” test which *Lassiter* suggests is appropriate under the Due Process Clause of the Fourteenth Amendment, than would an indigent criminal defendant under the Sixth and Fourteenth Amendments, which right to counsel and appointed counsel is violated only in the event of actual incarceration under the rule of *Scott v. Illinois* ... Nevertheless, the language employed by the Supreme Court in *Lassiter* is prospective, and, on the strength of that language, several courts subsequent to the *Lassiter* decision have held that an indigent individual in a civil contempt proceeding has a right to appointed counsel based on the potential incarceration in which the proceeding may result.”

Many state courts deciding the right to counsel in civil cases have also relied on the threat of incarceration, as opposed to actual incarceration. See, e.g., *Black v. Division of Child Support Enforcement*, 686 A.2d 164, 168 (Del. 1996) ("Lassiter presumes an entitlement to court appointed counsel only when a defendant is faced with the possible deprivation of his physical liberty"); *Carroll v. Moore*, 423 N.W.2d 757, 766-67 (Neb. 1988) (finding right to counsel in paternity cases in part because “[e]ven though a defendant's physical liberty is not immediately at risk if adjudged to be the father of a child in a paternity proceeding, he can lose his physical liberty in later proceedings which arise out of and are based on the initial paternity determination.”)
has a right to counsel until after sentencing. And nothing in *Scott* prevents the prosecutor from threatening an unrepresented defendant with incarceration in order to obtain an unfavorable plea agreement. This is a significant problem given that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”

The Commentary to ABA Standards for Criminal Justice: Providing Defense Services 5-5.1 supports the principle of requiring the appointment of counsel when a litigant is threatened with incarceration, as it states:

> The presence of counsel in cases punishable by incarceration that do not result in the imposition of an actual sentence to jail will help to assure fair proceedings. The Supreme Court stressed in *Argersinger* the need for counsel in order to assure fair trials, and this objective obviously is served regardless of whether incarceration results ... A 'predetermination procedure', discussed in the *Argersinger* decision, by which the court confers with the prosecutor in advance of the proceeding to determine the likelihood of imprisonment being imposed, is also rejected. In addition to being time-consuming, there is substantial risk that the court will receive information about the defendant or the offense charged which will make it exceedingly difficult for the judge to sit as fair and impartial arbiter, regardless of whether it is determined that counsel should be provided. Many states have enacted statutes consistent with standard 5-5.1 requiring, at a minimum, that counsel be afforded wherever there is possibility of imprisonment.

**The Right to Counsel for an Individual Threatened with Incarceration Should Not Depend on the Nature of the Proceeding.**

The threat of incarceration may surface in many different types of civil proceedings, all of which have in common the possibility that, at some point during the litigation, a judge will order that the person be incarcerated. Such proceedings include parole revocation, probation revocation, criminal contempt, and civil contempt, and may arise where there is failure to pay fees/fines, failure to pay child support, and other contexts. Yet the right to counsel relies on meaningless distinctions between these types of cases. For instance, there is a Sixth Amendment right to counsel in parole/probation revocation and civil contempt proceedings where a deferred sentence is activated as part of the proceeding, as well as for criminal contempt proceedings involving failure to pay a fee or fine, but not for other parole/probation revocation proceedings, and it is unclear whether a federal constitutional right to counsel exists for civil contempt proceedings. Additionally, while there is no Sixth Amendment right to counsel when a fine-only criminal

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sentence is imposed, some federal courts have said that the Sixth Amendment bars later incarceration for that un-counselled fine, even if the incarceration occurs within the context of a civil proceeding.¹⁶ Yet all of these proceedings involve the same fundamental determination (whether the person has the ability to pay the court-imposed fee or fine) and the same consequence (incarceration).

Requiring the appointment of counsel without relying on the label of the case is consistent with the spirit of ABA Standards for Criminal Justice: Providing Defense Services, as several of the standards call for looking past the case label in determining what rights should attach. Standard 5-5.1 states:

Counsel should be provided in all proceedings for offenses punishable by death or incarceration, regardless of their denomination as felonies, misdemeanors, or otherwise. An offense is also deemed to be punishable by incarceration if the fact of conviction may be established in a subsequent proceeding, thereby subjecting the defendant to incarceration.

Standard 5-5.2 states:

Counsel should be provided in all proceedings arising from or connected with the initiation of a criminal action against the accused, including but not limited to extradition, mental competency, postconviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature.

The Commentary to 5-5.2 further explains the applicability to civil proceedings:

In recent years, the line between criminal and civil proceedings which give rise to a constitutional right to counsel has become increasingly blurred. Thus, protected liberty interests have extended due process concepts to justify the provision of counsel for indigent litigants in such “quasi-criminal” matters as contempt for failure to make child support payments, termination of parental rights, civil commitment, and civil contempt. The arguments for a right to counsel in these contexts seem to suggest a right to counsel in traditionally civil contexts as well, so long as critical liberty interests are involved. This standard stops at proceedings “arising from or connected with” the commencement of criminal proceedings, but should not be taken to disparage the right to counsel in broader contexts as an essential aspect of a fair trial and access to justice, so long as an effective administrative infrastructure – perhaps like that suggested in this chapter – is provided.

Moreover, the National Task Force on Fines, Fees, and Bail Practices has published a bench card observing that “Case law establishes that the U.S. Constitution affords indigent persons a right to court-appointed counsel in most post-conviction proceedings in which the individual faces actual

¹⁶ Shayesteh v. City of South Salt Lake, 217 F.3d 1281 (10th Cir. 2000), United States v. Foster, 904 F.2d 20 (9th Cir. 1990), United States v. Perez-Macias, 335 F.3d 421 (5th Cir. 2003), United States v. Pollard, 389 F.3d 101 (4th Cir. 2004).
incarceration for nonpayment of a legal financial obligation, or a suspended sentence of incarceration that would be carried out in the event of future nonpayment, even if the original sanction was only for fines and fees.”

The Right to Counsel for an Individual Threatened with Incarceration Should Not Depend on the Nature of the Plaintiff.

Even in seemingly “private” civil contempt actions such as child support proceedings initiated by the custodial parent, the state can still play a sufficient role. Furthermore, the threat of incarceration for the defendant is not diminished in cases where the plaintiff is an individual. The Turner Court reasoned that appointing counsel for a defendant would create an imbalance if the plaintiff is a pro se individual, but did not acknowledge the asymmetry of interests at stake: while both parties have financial interests at stake, only the defendant can be incarcerated, sometimes for years at a time. Incarceration results “in quite serious repercussions affecting [a defendant’s] career and his reputation.” When one looks to the full extent of the burden worn by a defendant, it becomes readily apparent that all defendants merit appointed counsel regardless of the status of the plaintiff. And in fact, prior to the Supreme Court’s 2011 decision, the majority of states provided a right to counsel in all contempt proceedings regardless of the identity of the plaintiff.

Waivers Should Not Be Accepted Unless the Person Has Had An Opportunity to Consult With Counsel, and Should Be Revocable for Further Proceedings.

The Supreme Court has said that “Waiver of the right to counsel ... must be a ‘knowing, intelligent act’ done with sufficient awareness of the relevant circumstances.” As described

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18 See, e.g., In re Marriage of Starhi, 509 N.E.2d 1117, 1122 (Ind. App. 1987) (in privately-initiated child support contempt case, court states, “It is difficult to imagine how the present case does not involve state action. Admittedly, Rebecca initiated this action as a private individual. However, the trial court found John in contempt for failure to pay child support pursuant to Rebecca’s motion and sentenced him to thirty days. Certainly, John’s incarceration, depriving him of his physical liberty for thirty days, amounted to state action. The court enforced a contempt proceeding that was initiated privately.”).
19 Turner, 564 U.S. at 446-47.
21 Argersinger, 407 U.S. at 37, 37 n.6 (noting also that when incarceration lasts thirty days or longer a defendant will generally lose employment to the detriment of the defendant and his family).
22 Dube v. Lopes, 481 A.2d 1293, 1294 (Conn. Super. 1984) (“There is no logical reason why [Lake v. Speciale, 580 F.Supp. 1318 (D. Conn. 1984)] should not apply to contempt proceedings initiated by a private person. The result is the same and that is incarceration for failure to comply with a court order of support. Surely, the requisite state action which is necessary to trigger the due process clauses is present when a person is deprived of his physical liberty by the court. It is crystal clear that a person may not be incarcerated by the state without first being advised of his constitutional right to counsel, and, if indigent, without having counsel appointed to represent him, whether the contempt proceedings are initiated by a private person or the state.”).
above, some persons may be pressured to waive their right to counsel in exchange for a plea agreement involving a reduced incarceration period or additional fees/fines in lieu of incarceration. Others may not understand what an attorney can actually do to help their situation. Ensuring that all defendants consult with an attorney before deciding whether to waive their right to appointed counsel can mitigate this concern. Moreover, a defendant who knowingly and intelligently waives the right to counsel at one proceeding may have a renewed need for counsel at a subsequent proceeding, owing to changed circumstances or the different nature of the subsequent proceeding. Absent being offered counsel again at the subsequent proceeding, the defendant may not understand that the prior waiver decision was not permanent and/or may not sufficiently consider whether his or her legal needs have changed.

This particular language in the resolution is consistent with Standard 5-8.2(b) of the Standards for Criminal Justice, Providing Defense Services, which states:

> If an accused in a proceeding involving the possibility of incarceration has not seen a lawyer and indicates an intention to waive the assistance of counsel, a lawyer should be provided before any in-court waiver is accepted. No waiver should be accepted unless the accused has at least once conferred with a lawyer. If a waiver is accepted, the offer should be renewed at each subsequent stage of the proceedings at which the accused appears without counsel.

Standard 5-8.2 (b) references in-court waiver of counsel to emphasize that the waiver must occur before a judicial officer, which is the only way in which an accused person can relinquish their right to legal representation. Waiver of defense representation conveyed to a prosecutor or other court personnel cannot constitute a valid waiver of the right to a lawyer. Similarly, waiver of counsel conveyed to an arresting officer or other police personnel is not a valid waiver of the right to a lawyer and representation during court proceedings.

**Relevant Current Activities**

Below is a summary of some of the significant steps taken nationwide on the right to counsel in civil cases implicating physical liberty. The efforts that are still in progress or that will be renewed in 2018 would benefit significantly from the ABA’s assertion of clear policy via this resolution.

**Indiana**: A case pending in a state trial court includes a claim that indigent defendants in child support contempt proceedings have a right to appointed counsel.

**Louisiana**: HB 249, enacted in 2017, provides a defendant with a right to counsel at a hearing regarding failure to comply with a criminal fine payment plan.

**Mississippi**: HB 672, HB 1033, and SB 2527 were introduced in 2017 but did not pass. They would have required counsel to be appointed prior to incarceration for failure to pay fees/fines.

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25 Litigation in the fees/fines context that is in in the early procedural stages (which is most such litigation) is not listed below.
Missouri: In Fant v. Ferguson, No. 4-15-CV-00253-AGF (E.D. Mo. 2015), a federal court in 2015 denied the City of Ferguson’s motion to dismiss a claim that indigent persons facing incarceration for failure to pay fees and fines have a right to appointed counsel. The case is still being litigated.

Nebraska: LB 526 was introduced in 2017 but did not pass after receiving a hearing. It would have, among other things, required appointment of counsel for contempt proceedings related to debt collection.

Nevada: A case pending before the Nevada Supreme Court argues that indigent defendants in child support contempt proceedings have a right to appointed counsel.

New Hampshire: SB 200, enacted in 2017, requires appointment of counsel prior to incarcerating a person for failure to pay fines/fees or perform community service.

Pennsylvania: A case pending before the Superior Court (Appellate Division) raises the right to counsel prior to incarceration for failing to pay court-ordered fees and fines.

Utah: SB 71, enacted in 2017, requires counsel to be appointed for collection and enforcement of criminal debt (which is treated as a contempt matter) if the court is considering incarceration.

Conclusion

The threat of incarceration may surface in many types of proceedings, some of which are denominated as “civil,” and some of which are labelled as “criminal.” It is not clear under current law, nor under ABA policy, whether the loss of liberty pursuant to proceedings labelled as “civil” in nature can occur without the benefit of counsel. Moreover, criminal defendants may be deprived of counsel when they are threatened with incarceration, up to the point where actual incarceration is imposed. This resolution articulates a policy position that counsel should be provided in all proceedings where liberty is at risk, and that specific safeguards should be provided to avoid the unwitting or uncounseled waiver of counsel in such situations.

Respectfully submitted,

Lora J. Livingston
Chair, Standing Committee on Legal Aid and Indigent Defendants
February, 2018
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Legal Aid and Indigent Defendants

Submitted By: Lora J. Livingston, Chair

1. **Summary of Resolution(s).** Urges that legal counsel be provided at public expense to low-income persons in all proceedings that may result in a loss of physical liberty, regardless of whether the proceedings are: a) criminal or civil; or b) initiated and/or prosecuted by a government entity. Further, urges that waivers of the right to counsel at all stages of such proceedings should only be accepted after the person has had an opportunity to confer with counsel, and that a person who has waived appointed counsel should be offered appointed counsel at each subsequent stage of the proceedings at which the person appears without counsel.

2. **Approval by Submitting Entity.** The Standing Committee approved this resolution at its meeting on November 3, 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?** This resolution is consistent with, and extends, policy previously adopted concerning a right to counsel in civil matters, and concerning the right to counsel in criminal proceedings.

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 principally be useful in the filing of briefs by litigants or amici in proceedings in state or federal courts, and in legislation at the state level.

8. **Cost to the Association.** (Both direct and indirect costs) No costs are anticipated.

9. **Disclosure of Interest.** (If applicable) No members of the committee have any direct or indirect interests that would be impacted by this proposed policy.
10. **Referrals.** This proposed policy resolution will be forwarded to:

   - Section of Criminal Justice
   - Section of Civil Rights and Social Justice
   - Working Group on Building Public Trust in the American Justice System
   - Judicial Division
   - Section of Litigation

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

   Lora J. Livingston  
   261st Judicial District Court  
   PO Box 1748  
   Austin, TX 78767-1748  
   (512) 854-9481  
   Lora.Livingston@traviscountytx.gov

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.*) Same as above.
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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   Urges that legal counsel be provided at public expense to low-income persons in all proceedings that may result in a loss of physical liberty, regardless of whether the proceedings are: a) criminal or civil; or b) initiated and/or prosecuted by a government entity. Further, urges that waivers of the right to counsel at all stages of such proceedings should only be accepted after the person has had an opportunity to confer with counsel, and that a person who has waived appointed counsel should be offered appointed counsel at each subsequent stage of the proceedings at which the person appears without counsel.

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

   Currently, in many proceedings denominated as “civil” in nature, counsel is not provided as a matter of right, resulting in the incarceration of numerous individuals who never have the opportunity to consult an attorney. Moreover, criminal defendants may be deprived of counsel when they are threatened with incarceration, up to the point where actual incarceration is imposed.

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

   The policy will provide a foundation in ABA policy for advocacy in courts, legislatures and other fora to address the lack of counsel in proceedings that may result in incarceration for “civil” infractions, as well as in criminal proceedings where incarceration is threatened.

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 federal, state, territorial, and tribal governments to adopt or preserve tax code provisions that allow the alimony deduction for payors and treats alimony as taxable income to payees.
I. INTRODUCTION AND SUMMARY

On November 2, 2017, the US House Ways and Means Committee released the Tax Cuts and Jobs Act, which is the House’s proposal to overhaul the federal tax code. The House described the Tax Cuts and Jobs Act as a means to “deliver much-needed tax relief to millions of families, help our workers and job creators compete and win here at home and around the world, and make the tax code simpler and fairer for all Americans.” Among the many tax deductions that the House proposes to eliminate from the federal tax code is the deduction for alimony payments. In promoting the Tax Cuts and Jobs 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. The Senate passed its version of the Tax Cuts and Jobs Act on December 2, 2017, which did not include the elimination of the alimony deduction. Congressional leaders are now in conference committee to work through the differences in both bills.

This Resolution recommends that Congress not eliminate the alimony deduction available to payors of alimony as part of the Tax Cuts and Jobs Act as it may have a negative effect on divorce settlements and because it does not create a subsidy but, rather, puts divorcing spouses in a disadvantageous position compared to their married counterparts. Quite simply, existing law makes sure that the person using the funds pays the taxes on the funds. Alimony is often relied upon to provide ongoing financial support to the lower income spouse following a divorce. The alimony deduction enables divorced families to be able to support two households on the same income that married couples use to support one household by shifting the income to the spouse who is the one receiving and spending the funds and who may be in a lower tax bracket. Without the alimony deduction, alimony paying spouses would pay taxes on money they do not get to spend, and spouse who receives the alimony and already have difficulty making ends meet would likely receive less in net alimony to spend as a result. Overall, this would mean a larger portion of the income going to the government and a smaller portion of the income to be allocated between two households. Divorcing couples would be treated negatively for income tax purposes compared to married couples, since married couples only pay taxes on money they use themselves in one household and not on money they pay to others.

II. BACKGROUND

In a divorce situation, alimony payments are based upon one party’s need and the other party’s ability to pay. 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. It is widely utilized by divorce attorneys to settle cases in a tax advantaged way to both spouses which eases the financial burden on the family. Under the current

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2 Joint Committee on Taxation, Description of the Chairman’s Mark of the “Tax Cuts and Jobs Act” (JCX-51-17) (2017).
Tax Code, alimony and separate maintenance receipts are included in the definition of “Gross Income.” The Internal Revenue Code defines “alimony or separate maintenance payments” as follows:

(1) General. The term “alimony or separate maintenance payment” means any payment in cash if—

(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,

(B) 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,

(C) 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

(D) 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.

With respect to such alimony or separate maintenance payments, the current Tax Code provides:

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.

The Tax Cuts and Jobs Act proposes a repeal of sections 61(a)(8) and 71 of the current Tax Code. The proposal would be effective for any divorce or separation agreements or court orders entered into after December 31, 2017 and for any divorce or separation agreements or court orders entered into before December 31, 2017 that are modified after December 31, 2017. Under the proposal, the party paying alimony will no longer receive a deduction and the party receiving alimony will no longer have to report it as income. The Ways and Means Committee claims that the “intent of the proposal is to follow the rule of the Supreme Court’s holding in Gould v. Gould, in which the Court held that such payments are not income to the recipient.” The Gould decision was based upon the Income Tax Act of October 3, 1913, long before the current law.

III. PURPOSE OF THE RESOLUTION

The purpose of this Resolution is to urge Congress to remove the repeal of the alimony deduction from the proposed Tax Cuts and Jobs Act or any result to come from a conference committee considering the differing versions now under consideration. The Resolution

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7 Committee on Ways and Means, Tax Cuts and Jobs Act, H.R. 1: Section-by-Section Summary, at 61 (2017).
recommends that the current provisions of the Tax Code remain unchanged with respect to the
deductibility of alimony payments. 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 the
dependent spouse to maintain the lifestyle closer to that enjoyed during marriage and has lessened
the financial impact of divorce on countless families.

IV. THE IMPORTANCE OF THE ALIMONY DEDUCTION TO DIVORCED
FAMILIES

The alimony deduction has been an important tool for family law attorneys since 1942 and
has provided many divorced families with the means to maintain the lifestyle closer to that
established during marriage. Allowing the higher income spouse to shift part of the tax liability
on his/her income to the lower income spouse or spouse’s income that is paid to the payee spouse
results is more after-tax income to provide for the two households. Without the alimony tax
deduction, there will be less incentive for the higher income spouse 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 considerable 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 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

For example, assume the former husband earns $415,000 per year and, if filing married
filing separately is in a 33% tax bracket. Former husband agrees to pay $5,000 per month in
alimony to former wife which puts her in the 17% tax bracket. After the alimony tax deduction,
the $5,000 per month payment costs the former husband $3,350. The tax due on the $5,000
payment to former wife is $850 and nets the former wife $4,150 per month. Under the Tax Cuts
and Jobs Act proposal, the elimination of the alimony tax deduction means that former husband
will not be willing to pay $5,000 to the former wife as he will have no incentive to do so. The
former spouse will want to pay the net amount of $3,350 to the former wife, which leaves her with
$800 less funds to support her household. ($4,150 - $3,350 = $800)

If the family were intact, the husband’s tax rate would be 27% as he would be able to file
married filing jointly. The same $5,000 would result in a net tax of $3,650. While the married
couple nets less than the divorce couple under the current Tax Code, they have one household to
support with the same $5,000 that the divorce couple has to use to support two households. Thus,
many family law attorneys view the proposed elimination of the alimony tax deduction as a
“divorce penalty,” but a “divorce subsidy.”

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

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8 Malcom S. Taub, How Tax Reform Could Radically Change Divorce, Forbes (Nov. 9, 2017),
divorce/#6fda6e74e02.
9 Id.
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.\textsuperscript{10} The lifestyle of both parties in the divorcing couple will be negatively affected by the elimination of the alimony deduction – the payor spouse will have a greater tax obligation and the payee spouse will not be able to sustain the same lifestyle. There is also concern that the elimination of the alimony deduction will cause some unhappy couples to remain married because they will simply be unable to afford to get divorced.

This Resolution is urging Congress to consider the detrimental effects on divorced families by the elimination of the alimony deduction and to reject the Tax Cuts and Jobs Act efforts to remove the elimination of the alimony deduction.

Respectfully submitted,

Roberta S. Batley
Chair, Family Law Section

February 2018

GENERAL INFORMATION FORM

Submitting Entity: ABA Section of Family Law
Submitted By: Bobbie Batley, Chair, ABA Section of Family Law

1. **Summary of Resolution(s).** The Resolution urges Congress to remove the elimination of the tax deduction for alimony payments in the proposed Tax Cuts and Jobs Act of 2017 (H.R. 1).

2. **Approval by Submitting Entity.** The ABA Section of Family Law approved submission of this Resolution on November 15, 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?** There is no association policy on this subject so no existing policy would be adversely affected by this Resolution. This resolution strives to give divorcing individuals the same treatments afforded to others and is in harmony with other association policy designed to insure 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 Tax Cuts and Jobs Act of 2017 passed the House of Representative on November 16, 2017. On December 2, 2017, the Senate passed its own version of the Tax Cuts and Jobs Act, which did not include a provision to eliminate the alimony deduction.

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.** The Section of Taxation

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 remove the elimination of the tax deduction for alimony payments in the proposed Tax Cuts and Jobs Act of 2017 (H.R. 1).

2. Summary of the Issue that the Resolution Addresses
   On November 2, 2017, the US House Ways and Means Committee released the Tax Cuts and Jobs Act, which is the House’s proposal to overhaul the federal tax code. Among the many tax deductions that the House proposes to eliminate from the federal tax code is the deduction for alimony payments. Alimony is often relied upon to provide ongoing financial support to the lower income spouse following a divorce. The alimony deduction enables divorced families to be able 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 to be allocated between two households. There is significant concern among the family law bar that the elimination of the alimony deduction from the new tax code will have a chilling effect on divorce settlements; will result in lower alimony awards; and will have a negative effect on divorced families.

3. Please Explain How the Proposed Policy Position will address the issue
   This Resolution recommends that Congress not eliminate the alimony deduction as part of the Tax Cuts and Jobs Act as it may have a negative effect on divorce settlements.

4. Summary of Minority Views
   None.
RESOLUTION

RESOLVED, That the American Bar Association adopts the *ABA Model Act Governing Assisted Reproductive Technology*, dated February 2018 (“2018 Model Act”) to replace the 2008 *ABA Model Act Governing Assisted Reproductive Technology*; and

FURTHER RESOLVED, That the American Bar Association urges appropriate governmental agencies to adopt the 2018 Model Act.
AMERICAN BAR ASSOCIATION
MODEL ACT GOVERNING
ASSISTED REPRODUCTIVE TECHNOLOGY [2018]

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SECTION 1002. DONOR AND COLLABORATIVE REPRODUCTION REGISTRIES
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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:
   (a) Intrauterine insemination;
   (b) Donation of eggs or sperm;
   (c) Donation of Embryos;
   (d) In vitro fertilization and Transfer of Embryos; and
   (e) 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.

4. “Child” means an individual born pursuant to ART whose parentage may be determined under this Act or other law.

5. “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.

6. “Compensation” means payment of any valuable consideration for time, effort, pain and/or risk to health in excess of reasonable medical and ancillary costs.

7. “Consultation” means a meeting with a licensed professional for the purpose of educating the participants about the effects and potential consequences of their participation in any ART procedure.

8. “Court” means the appropriate court with competent jurisdiction as determined by the State.

9. “Donor” means an individual, including an Embryo Donor, 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; (c) a parent under Article 6 or an intended parent under Article 7; or (d) an individual who consents in a record or a written agreement to provide gametes for Assisted Reproduction.
10. “Embryo” means a fertilized egg that has the potential to develop into a fetus if transferred into a uterus.

11. “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.

12. “Embryo Transfer” (also referred to herein as “Transfer”) means the placement of an Embryo into the uterus.

13. “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. “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.

16. “Gamete Provider” means an individual who provides sperm or eggs for use in Assisted Reproduction.

17. “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.

18. “Genetic Surrogacy Agreement” is a written contract between Intended Parent(s) and a Genetic Surrogate.

19. “Genetic Surrogacy Arrangement” means the process by which a Genetic Surrogate intends to carry and give birth to a Child.

20. “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.

21. “Gestational Surrogacy Agreement” is a written contract between Intended Parent(s) and a Gestational Surrogate.
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22. “Gestational Surrogacy Arrangement” means the process by which a Gestational Surrogate intends to carry and give birth to a Child.

23. “Intended Parent” means an individual who intends to be legally bound as a parent of the Child.

24. “Legal Spouse” means an individual married to another.

25. “Medical Evaluation” means a Consultation with and an evaluation by a physician meeting the requirements of Section 903.

26. “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.

27. “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.

28. “Mental Health Evaluation” means a Consultation with and an evaluation by a mental health professional meeting the requirements of Section 301.

29. “Parent” means an individual who has established a Parent-Child Relationship under this Act or other applicable law.

30. “Parent-Child Relationship” means the legal relationship between the Child and a Parent of the Child. The term includes a mother-child relationship and/or the father-child relationship.

31. “Participant” means an Intended Parent, Donor, Gestational or Genetic Surrogate and their Legal Spouse, if applicable, who is involved in Assisted Reproduction under this Act.

32. “Patient” means an individual participating in Assisted Reproduction under the direction of a Provider.

33. “Physician” means an individual licensed to practice medicine.

34. “Provider” means an individual, including all medical, psychological, or counseling professionals: (a) licensed to administer health care; (b) who is qualified under this Act to provide ART services; and (c) has a Provider-Patient relationship with a Participant. Any professional corporation or corporation licensed by the State to provide health care, of which a Provider is an owner or employee, is also a Provider.

35. “Record” means information inscribed in a tangible medium or stored in an electronic or other medium that is retrievable in perceivable form.

36. “Retrieval” means the procurement of eggs or sperm from a Gamete Provider.
37. “State” means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

38. “Surrogacy Agreement” is a written contract between Intended Parent(s) and a Gestational or Genetic Surrogate.

39. “Surrogacy Arrangement” means the process by which a Gestational or Genetic Surrogate intends to carry and give birth to a Child.

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 clinic retains the right to withdraw for reasonable justification and with reasonable notice.

   (c) A statement that the Donor’s, right to withhold or withdraw consent to fertilization terminates upon Retrieval of his or her Gametes, subject only to the terms of any prior agreement in a Record pursuant to Article 5.

   (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 Patient 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 clinic 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 and SART.

(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) If Collaborative Reproduction is utilized, a Record that the parties have entered into a signed legal agreement with independent legal representation between the intended Parent(s) and the Donor(s) and/or Gestational Carrier and her Legal Spouse, if any, prior to the start of any medications.
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(d) Include Legal Clearance as part of the medical record. There shall be a statement of Legal Clearance in a Record clarifying parental rights of all Participants following a legal Consultation regarding the same. Parental rights vary between states and may involve complex legal issues involving statutory and case law.

(e) State that disclosures have been made pursuant to this Act;

(f) Specify the length of time the consent remains valid; and

(g) 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.

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) Transfer;

   (c) Donation:

      (i) To a known individual for Transfer;

      (ii) To an anonymous individual for 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. Transfer disclosure. Before each 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 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 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 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 existence of any financial or professional relationship with any entity accepting the Embryo for research.

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.
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Legislative Note: States should customize this article to comport with the State’s criminal code.

4. Any individual or entity not acting in accordance with this Section may be subject to civil and/or criminal liability.

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.

ARTICLE 3. MENTAL HEALTH CONSULTATION/ADDITIONAL COUNSELING

SECTION 301. CONSULTATION AS TO MENTAL HEALTH

1. All Participants known to the ART Provider must undergo a mental health Consultation with a Mental Health Professional in accordance with the most recently published Professional Guidelines of ASRM and SART prior to the ART procedure. The results of this Consultation shall only be used to determine suitability to participate in Collaborative Reproduction.

2. During the Mental Health Evaluation, the Provider must inform the Participant(s) of additional counseling options. The Participant’s acceptance of additional counseling is voluntary.

3. 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) Where reasonably possible, has received training in, or has knowledge of, reproductive physiology; the testing, diagnosis, and treatment of infertility; and/or 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 Consultation 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 had the 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. Prior to any Transfer of Gametes or Embryos and prior to execution of any Collaborative Reproduction agreement, an Intended Parent shall be informed that, upon Intended Parent’s request, the Mental Health Professional’s recommendation regarding the assessment of a Participant for Collaborative Reproduction shall be provided by the ART Provider.

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:

1. Dissolution of Intended Parents’ relationship (or divorce of Intended Parents, if married); and

2. Incapacity or death of one or both Intended Parents.

2. Such agreements may be amended in a Record, at any time prior to Transfer of an Embryo 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 a Transfer of the Embryo 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 clinic or storage facility of that individual’s intent to avoid 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 a Transfer occurs after receipt of notice in a Record of that individual’s intent to avoid Transfer as set forth in paragraph 5(b) of this Section that Intended Parent will not be the Parent of a resulting Child.

5. 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. 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. No Provider shall Transfer or create any Embryos following the death of an Intended Parent unless the necessary consent referred to in paragraph 5 of this Section is obtained and permanently recorded.

7. 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. 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 interested Participants 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. A Gamete Donor may be liable for Child support only if they fail to enter into a legal agreement in which the Donor relinquishes rights to any Gametes, resulting Embryos, or Child and the Intended Parent(s) fail to enter into an agreement in which the Intended Parent(s) agree to assume all rights and responsibilities for any resulting Child.

3. 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. Consent by an individual who intends 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 during the first two years of the Child’s life, and/or openly held out the Child as their own.

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.

(b) The Legal Spouse never openly held out the Child as his or her own.

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:
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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. 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. 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 Evaluation 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 the ASRM, SART, and the American College of Obstetricians and
Gynecologists (ACOG). 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 separate, independent 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.
4. If none of the above applies, the appropriate State law for determining the Parent-Child Relationship shall be determined under the Uniform Child Custody Jurisdiction and Enforcement Act.

E. A Surrogacy Agreement is enforceable even though it contains one or more of the following provisions:
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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. 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. 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 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

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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.

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), 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. JUDICIAL PRE-APPROVAL OF GENETIC SURROGACY AGREEMENT
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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.

2. If the requirements of paragraph 1 of this Section 706(B) are satisfied, the appropriate Court shall issue an order validating the Genetic Surrogacy Agreement and declaring that the Intended Parent(s) will, subject to the issuance of a final post birth order, be the sole Parent(s) of a Child born during the term of the Genetic Surrogacy Agreement.

3. The Court shall issue an order under this Section 706(B) only on finding that:
   
   (a) The requirements of Section 702 have been satisfied;
   
   (b) The requirements of Section 706(B) have been satisfied;
   
   (c) All parties have voluntarily entered into the Genetic Surrogacy Agreement meeting the requirements of Section 703 and understand its terms;
   
   (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 Section 703(C)(6); and
   
   (e) The consideration, if any, to be paid to the Genetic Surrogate is reasonable.

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.

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 parentage proceeding 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.

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 Arrangement 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 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 their body 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
ARTICLE 9. HEALTH INSURANCE

SECTION 901. INFERTILITY AND EXPERIMENTAL PROCEDURES

1. For the purposes of health insurance coverage, infertility means:

   (a) Resulting from a disease or condition that causes abnormal function of the reproductive system, the inability to:

      (i) Conceive after attempts at conception by unprotected sexual intercourse have been made for at least one year; or

      (ii) Sustain a pregnancy to live birth; or

   (b) The presence of another condition recognized by accepted medical standards as a cause of the inability to achieve or sustain a pregnancy to live birth; or

   (c) The necessity to achieve pregnancy by means other than sexual intercourse. Insurance coverage provided for (a) and (b) above may not be denied on the basis of this subparagraph.

2. 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.

SECTION 902. REQUIRED NOTICE

1. Each group health benefit plan that offers assisted reproductive health services shall provide notice in a Record to each enrollee in the plan of the specific coverage provided for those services.

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.

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.

ARTICLE 10. QUALITY ASSURANCE

SECTION 1001. QUALIFICATIONS OF PROVIDERS

ART Providers, ART clinics, 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 participate 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 shall participate in the College of American Pathologists and the American College of Medical Genetics genetic proficiency testing programs.

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;
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(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 Provider:

(a) Shall attempt to maintain an address 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

(d) Shall maintain an accurate record of the disposition of all Gametes and Embryos.

2. The Program shall maintain all records in compliance with State and Federal law.

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 signed pursuant to Articles 2 and 4 of this Act;
(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

The program shall:

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 of Gamete and Embryo Donors for genetic disorders. The extent of such screening shall be in conformity with guidelines established by the ASRM and SART. 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.

ARTICLE 12. MISCELLANEOUS PROVISIONS

SECTION 1201. LIMITATION OF MEDICAL PROFESSIONAL LIABILITY
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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.

2. The presumption in paragraph 1 is rebuttable only upon a showing that an issue relating to a standard of care not covered in the practice and ethical guidelines or regulatory or statutory standards, as described in paragraph 1, exists, and upon a finding that there has been a breach of the standard of care on that issue.

3. No cause of action initiated more than six years after the birth of a Child from ART, or more than two years after injury resulting from ART could reasonably have been detected, whichever is greater, shall be valid.

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.
REPORT

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”). 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, to adapt to the need for resolution of controversies that are envisioned but that may have not yet occurred, and to guide the expansion of ways by which families are formed. See https://www.americanbar.org/content/dam/aba/publishing/family_law_quarterly/family_flq_artmodelact.authcheckdam.pdf. However, 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.

First and foremost, 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 insure equal treatment of those children born through assisted reproduction to same-sex couples.

Second, 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 address the issue of the resulting children’s right to access information about their gamete (sperm or egg) donor.

**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 are created only by two, heterosexual parents, and render the Act equally applicable to children of all individuals building families through ART.


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\(^1\) 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 2012 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.
4. **2018 Model Act Adds Parental Establishment Provisions via Traditional/Genetic 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 establishing 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
February 2018
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GENERAL INFORMATION FORM

Submitting Entity: Section of Family Law

Submitted By: Roberta S. Batley, Chair, Section of Family Law

1. Summary of Resolution(s). The Resolution adopts the Model Act Governing Assisted Reproductive Technology dated February 2018 and urges its adoption by appropriate governmental agencies and legislatures.

2. Approval by Submitting Entity. The ABA Section of Family Law approved submission of this Resolution on October 5, 2017.

3. Has this or a similar resolution been submitted to the House or Board previously? Yes, see the 2008 Model Act Governing Assisted Reproduction Technologies and any revisions adopted.

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


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Submission to the states for adoption.

8. 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 session on
June 23, 2017: 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, 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.

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 recommends consideration of and adoption by appropriate governmental agencies and legislatures of the Model Act Governing Assisted Reproductive Technology.

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
None.
RESOLVED, That the American Bar Association urges Congress to repeal Section 641 of the National Defense Authorization Act for Fiscal Year 2017, as codified at 10 U.S.C. § 1408 (a)(4); and

FURTHER RESOLVED, That the American Bar Association opposes federal legislation that:

(a) creates a single federal rule for division of military retired pay as a fixed benefit on the date of divorce; and

(b) overrides the discretion and authority of state legislatures and courts to determine the fair, just and equitable division of military pensions.
The issue at hand is a major Congressional amendment in 2016 to the Uniformed Services Former Spouses’ Protection Act (USFSPA), restricting the fair and impartial state court administration of military pension division upon divorce. Absent overriding issues of national importance, state courts must look to state law to prescribe the rules of decision for issues such as divorce and property division. When Congress attempts to specify individual results in state court cases, it can have the unintended but inevitable effect of treating the citizens of one state differently than the citizens of another state.

The Recent Legislation

The 2016 amendment to the USFSPA is found at Section 641 of the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017), which was enacted upon the President’s signature on December 23, 2016. It amends 10 U.S.C. § 1408 (a)(4) of USFSPA. The USFSPA, which was enacted in 1982, made uniformed services retired pay divisible in state courts, but left it to the states to decide whether such pensions would be considered marital or community property and how the property should be divided.

The new statute adds language dictating a single, pre-determined outcome in divorce and property division cases involving military retired pay. That single outcome is the division of only a fictional amount of retired pay of the servicemember, frozen on the date of divorce, as opposed to the actual amount of an individual’s retired pay, the rule in most states. ¹

¹ The text for 10 U.S.C. § 1408 (a)(4) [additions/changes in italics] is as follows:

(A) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled (as determined pursuant to subparagraph (B)) less amounts which—
(i) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
(ii) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
(iii) in the case of a member entitled to retired pay under chapter 61 of this title [10 USCS §§ 1201 et seq.], are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
(iv) are deducted because of an election under chapter 73 of this title [10 USCS §§ 1431 et seq.] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(B) For purposes of subparagraph (A), the total monthly retired pay to which a member is entitled shall be—
(i) the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order, as increased by
(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title [10 USCS § 1401a] between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.

The Defense Finance and Accounting Service published rules in June 2017 specifying that the date of divorce is to be used for the fixing of the pension benefit to be divided. Department of Defense Financial Management Regulation, DoD 7000.14-R, Volume 7B, “Military Pay Policies and Procedures—Retired Pay,” Ch. 29, Sec. 290802.A.
In April 2016 Representative Steve Russell of Oklahoma proposed adoption of the amendment. Newspaper reports indicated that it was intended to benefit military members who divorce after the amendment is enacted into law. In that month, the amendment was inserted in the House and Senate versions of the National Defense Appropriations Bill for Fiscal Year 2017. There were no hearings and no debates. The ABA Section of Family Law was not aware of the proposed change until May 2016, at which time Section members began discussing the issue and contacting members of Congress on an individual basis to oppose passage. While such a provision is indeed controversial, there was no opportunity to raise individual voices without hearings on the proposed legislation. There are no known proposals to amend or revise the statute by members of Congress or others.

The USFSPA applies to serving members of the uniformed services. This means it applies to members of the Army, Navy, Air Force, Marine Corps and Coast Guard, the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration, and the Reserve Component (i.e., members of the National Guard and Reserves).

State Courts and Pension Division – Until Now

For a divorce occurring before retirement, only five states (Kentucky, Tennessee, Oklahoma, Texas and Florida) use a “frozen benefit rule” which fixes the divisible pension as the benefit accrued at the state’s classification date. The classification date may be the date of separation, date of filing for divorce, date of dissolution or some other date set by case law or statute.

This new statutory amendment will pre-empt the law in a majority of the states. Between 40 and 45 states use the “time rule” and divide the actual retired pay of a retiree’s pension, whether military or otherwise. This means the share of the retiree’s pension which was acquired during the marriage (often expressed as a percentage) is multiplied by the retired pay that the individual actually receives upon retirement, not a “snapshot” of what it might have been if the divorce and retirement had occurred on the same day.

No Overriding Federal Interest

Family law and domestic relations law have long been recognized by the U.S. Supreme Court as the province of state laws and judges. U.S. v. Windsor, 133 S.Ct. 2675, 2691 (2013); Sosna v. Iowa, 419 U.S. 393, 423 (1975). With respect to domestic relations law, the Supreme Court itself has stated that “state interests ... in the field of family and family-property arrangements ... should be overridden ... only where clear and substantial interests of the National Government ... will suffer major damage if the state law is applied.” United States v. Yazell, 382 U.S. 341, 352 (1966).

There have been, however, several occasions when Congress has passed laws which amount to federal intervention in the family law field. When this has occurred, the reason for such intervention was enactment of a statute to accomplish a goal of implementing a broad national policy or issue, one transcending the rights of the parties and which prescribed general policies and rules for all cases, not a goal of setting pre-determined outcomes for individual cases. Congress has usually exercised a high degree of caution and discretion to avoid making substantive decisions in federal family-law legislation which ought to be left to the courts and state laws.
Three examples will illustrate this point. The first is the Full Faith and Credit for Child Support Orders Act (FFCCSOA), enacted in 1994. Its purpose was to “provide that a state court may not modify an order of another state court requiring payment of child support unless the payee lives in the state in which the modification is sought or consents to the seeking of the modification in that court.” It imposed the central concept of UIFSA on states that had not yet enacted it. Congress could have - but did not - insert in the FFCCSOA a rule barring the use of the Basic Allowance for Housing or the Basic Allowance for Subsistence of servicemembers in setting the amount of child support in each case. Even though that issue involved a military entitlement, such a law would have been taking away the authority and discretion of the court to judge each case on its own merits.

The Family Support Act, passed by Congress in 1988, provided for the use of child support guidelines and expedited process for child support hearings, among other things. It could have mandated that mothers and fathers share equally in the payment of uncovered medical expenses for their children, or even pay for these costs in proportion to their incomes. It could have required (or forbidden) the use of military medical facilities in child support cases. But it didn’t, for the same reasons as stated above – such insertions into the statute would have taken away the judgment of the courts in deciding cases based on the unique situations of the parties themselves.

Congress implemented The Hague Convention on the Civil Aspects of International Child Abduction by passing the International Child Abduction Remedies Act (ICARA). The Act provides state and federal court remedies for the return of wrongfully abducted or retained children. Congress could have provided in ICARA for predetermined results, such as the automatic return of children who have been wrongfully retained or abducted for less than, say, six months. It also could have required that all children withheld for more than a year were beyond the court’s power for return. It didn’t - for the same reasons as above. Congress has traditionally opted for a restrained and refined rule when it passes legislation in the family law field.

In light of these three examples and the restraint of Congress, it is worth looking at the Uniformed Services Former Spouses’ Protection Act (USFSPA), passed by Congress in 1982 to deal with the division of military pensions in divorce. The areas in the USFSPA which touch on court powers and judicial discretion are really quite limited. The Act limits court jurisdiction over the retired pay of servicemembers in 10 U.S.C. § 1408 (c)(4), but only for the purpose of preventing servicemembers having to fight jurisdictional battles in different states having only limited present contacts with them. It limited the power of judges to divide disability compensation and military disability retired pay in 10 U.S.C. § 1408 (a)(4)(A)(ii) and (iii); however, this was to ensure that these entitlements would belong solely to the servicemember or retiree, based on his or her prior service and service-connected conditions. It limited division of the pension to fifty percent in most cases (10 U.S.C. § 1408 (e)(1)), but this is nothing new; many states already have such limitations, enacted to ensure that the entire pension is not consumed in the court’s equitable division process.

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2 28 U.S.C. § 1738B.
3 The Uniform Interstate Family Support Act.
4 (Public Law 100-485, October 13, 1988, 102 STAT. 2343).
5 Title 22, Chapter 97, U.S. Code.
There was no attempt to define the formula which judges use to divide the pension when Congress passed the USFSPA. Congress did not try to establish a presumptive amount of the marital portion of the pension for the former spouse or the military member. The Act is an “authorization statute.” It allows courts to devise their own rules for division of retired pay, with certain minimum limits placed on that power due to broad policy concerns. Those concerns involve issues of national defense, manpower needs and, above all, fairness to former spouses who, under the McCarty decision, had been barred from sharing in an asset - retired pay which was acquired during the marriage - that was available for division in every other case involving community or marital property.

The way most states presently divide military retired pay is not a unique approach which is inconsistent with the treatment of other marital assets. All defined benefit plans (i.e., pensions) are treated in the same way, regardless of whether they belong to the husband or the wife, whether they were earned by a lifetime (or less) of service, whether they are state pensions, federal pensions, or private ones. The diversity which exists among the states regarding military pension division also exists for federal civil service pensions and those governed by the Railroad Retirement Act, the Foreign Service Pension System, and the Central Intelligence Agency Retirement Act.

Although Congress has plenary authority in matters of national defense legislation, it is clear that there is no important federal policy which is served by enactment of a statute which shifts the balance of power and of assets between the member and the former spouse at the time of divorce. A fair and reasonable balance was struck in 1982, when Congress enacted the USFSPA to allow state courts to strike a balance between the parties, recognizing the importance of those sacrifices which many spouses and former spouses make in a military marriage. State courts are in the business every day of weighing and prioritizing the property and financial decisions in marital dissolutions. Congress is not equipped to make those decisions or to decide on the best theory of marital or community property division – fixed benefit (in five states) or “time rule.” When Congress imposes a particular method of dividing military retired pay in divorce, it is exercising its constitutional authority in a manner that can work unintended consequences. By modifying the USFSPA’s delegation of authority to the states to divide military retired pay by requiring that authority to be exercised in a specific way, it has substituted its judgment over matters traditionally left to the states which do not approach matters of property distribution in divorce in the same manner.

**Overriding State Pension Division Rules**

Congress has created an amendment to the USFSPA which does significant damage to the present state court mechanisms as to division of military retired pay. It will take years of court decisions and legislative revisions to correct the harm and repair the damage to traditional “time rule” division by this effort of Congress to create a national law of pension division. There should be no preference for one system over another in federal law. That is a matter for state legislatures and appellate decisions.

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Giving the military pension unique and preferential treatment which is distinct from all other pensions distorts the ability of state divorce courts to achieve equity between spouses. Many states would be forced to have two separate ways of determining spousal interests in retirement benefits – one for military cases, and one for everyone else. When there are two spouses who have pensions to be divided, there is no way to divide them in the same way, such as giving each party 50% of the marital share of the other’s pension, since the pensions can never be equivalent. The military pension will always yield a shrunken share. When only one party, the one in uniform, has the pension, then the spouse will always receive a shrunken benefit, with no consideration given to the actual retired pay of the individual (as would occur with any other deferred compensation benefit or pension).

Tying the Hands of Judges.

The rules in the various states’ family law courts are straightforward. In divorce cases, a court focuses on a fair, just and equitable division of assets according to the specific facts of the case. There are no cookie-cutter solutions, no rules about “one size fits all” in family court. Deciding property distribution and pension division on a case-by-case basis is the proper method of dividing marital and community property, keeping the focus on the individual facts and finances of the parties. Or it was until now. Unfortunately, the NDAA 2017 removes that discretion from the courts and lets Congress substitute its judgment for that usually exercised by trial court judges in the weighing of equities in a divorce case. It also bars any settlement by the parties, who may want to opt-out of this rigid rule. By attempting to adjust the scales of justice in divorce and property division cases, the NDAA 2017 removes discretion and flexibility from divorce settlements, substituting a fixed benefit approach which is incompatible with the rules in over 40 states.

With this new rule, Congress has taken control of how one particular marital asset is divided and how the division of a preferred asset is accomplished. It creates a federal law of pension division found nowhere else in the U.S. Code, and it creates a special and preferred class of parties in a divorce – servicemembers. This rule treats their pensions in a special way, but for no verifiable reason. Such an outcome runs counter to a long and unbroken history of federal deference to state courts on most issues of family law.

Prior to the enactment of the NDAA 2017, there was diversity among state courts and legislation regarding how pensions are divided, and this applies to all federal pensions (as well as state pensions and private ones, not just military pensions). In some states, military pensions cannot be divided unless they are “vested” (i.e., at least 20 years of creditable service). In Puerto Rico the military pension is entirely exempt from division. In North Carolina and Alabama the military pension cannot be divided unless a present value has been presented in court. And in about 10 states the judge has the power to award present payments to the former spouse if the military member has attained retired-pay eligibility, even if he or she is not yet receiving retired pay. This lack of uniformity is built into the federal-state system of government in the United States. It is not a reason for Washington to start setting down rules for property distribution, divorce and pension division in state courts.

There is no reason to wield this club over state courts. Congress should be guided by this important principle of deferring to state courts and legislatures in a field that involves their unique
perspective and their expertise in weighing and balancing the equities, rather than attempting to federalize the law of pension division when a servicemember is involved.

The States Have Already Addressed Fairly the Division of Military Pensions

The present state-law solutions in dividing retired pay for uniformed service personnel represent by far the better and more effective remedy. All state courts allow the division of uniformed services retired pay. And all states provide in some way for an adjustment or reduction of the pension to be divided in order to account for the portions earned after the divorce and acquired during the marriage. The rules are robust and have stood the test of time. They have been in place for 35 years—since the 1982 passage of USFPSA—and longer.

The NDAA 2017 amendment will do substantial damage to the significant array of state cases setting out the rules and requirements for military pension division, as this federal law preempts any state statute or decision to the contrary. The statute is an unprecedented departure from the long history of state dominion over family law, divorce and property division disputes. This legislation from Washington mandates pension division outcomes in the county courthouse from afar, giving no consideration to the unique factors in individual cases. The current cases, statutes and decisions in most of the states mean nothing when military pension division enters the courtroom, due to this misguided proposal. Congress should establish no single method for dividing retired pay. Congressional legislation should show no preference for a specific rule, any more than it should show favoritism for any particular party in a divorce.

USFSPA and Uniformed Services Pension Division

As originally written, USFSPA provides clear protections for servicemembers and spouses as to division of military retired pay as marital or community property. This should not be changed through the insertion of prescribed results for pension division state-court divorce cases.

In the complex world of family financial relationships, creating a new nationwide rule which will fit all property division cases in all states is a tall order indeed. The proposed standard turns on its head the accepted rule that courts must consider all of the factors in a divorce case. It sets aside the delicate balance achieved in USFSPA regarding state powers and federal rules. This deviation represents a dangerous precedent that ultimately serves no one’s interests, including those of servicemembers or their spouses.

Conclusion

Today as always, the American Bar Association is as resolutely committed to the legal rights of American military personnel as it is to fair treatment of servicemembers and spouses in the divorce process. For this reason, Congressional rule-making in the field of divorce through legislation which pre-ordains an outcome and supplants the historic primacy of the states in domestic relations law, treating military spouses differently than other spouses in pension division disputes should not go without action. This is especially true when the result of the legislation is a rejection of the support for former spouses provided by the USFSPA and articulated by Senator Jeremiah Denton in supporting the Act in 1982: “Those wives who have loved and served as wives
and mothers for many years deserve more than mere recognition. They are entitled to a degree of security.” Whether wives, husbands or simply “former spouses,” these citizens need the protection of the law.

The American Bar Association recognizes the importance of the contributions of servicemembers and spouses to the defense of the nation. We owe them many things, but laws that treat them differently from other spouses is not one of them. The American Bar Association should urge repeal of this federal legislation which interferes with state court rules and decisions regarding divorce and the division of military retired pay. The American Bar Association should urge Congress to reverse this unnecessary incursion into the realm of the states, specifically their primacy and expertise to divide marital or community property. The rights of servicemembers and spouses are best served within the existing framework of state laws and court rules regarding division of military retired pay.

Respectfully submitted,

Roberta S. Batley
Chair, Section of Family Law
February 2018
115C

GENERAL INFORMATION FORM

Submitting Entity: Section of Family Law

Submitted By: Roberta S. Batley, Chair, Section of Family Law

1. Summary of Resolution(s).

The Resolution calls for the American Bar Association to oppose the 2016 amendment to the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, specifically Section 641 of the National Defense Authorization Act for Fiscal Year 2017, as codified in 10 U.S.C. § 1408 (a)(4), and to urge Congress to repeal the amendment. The amendment requires that, in divorce cases involving members of the uniformed services, the court may only divide a hypothetical amount of retired pay, as if the servicemember had retired at the date of divorce. This is contrary to the rules for division of all pensions in a large majority of the states. It would create a federal law of military pension division, tying the hands of judges in these cases and creating a special class of pensions to be divided in divorce. Long the province of state courts, the rules for divorce and property division need to remain in the hands of state and local judges. They need not be imposed in a rule which creates a fictional freeze of the pension at the date of divorce. The new statute will cause substantial disruption to state pension-division schemes and overturn a substantial body of state laws which comprehensively and appropriately address the division of military pensions.

2. Approval by Submitting Entity.

This Recommendation was approved by the Council of the Section of Family Law on October 5, 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?

There are no existing Association policies which are relevant to this Resolution. However, the Association passed a Resolution in 1979 calling upon the Secretaries of the Armed Forces to recognize state court divorce decrees which determine spousal interests and divide retired pay. The Association also passed a Resolution (Report No. 112) at the Midyear Meeting in 1982 which called upon Congress to enact legislation making all federal pension plans subject to state property law, except as specifically exempted by explicit federal legislation.

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.**

   If the Resolution is adopted by the House of Delegates, it will be used by the Section of Family Law to educate Senators, Representatives and their principal staffers, to urge Congress to repeal this ill-advised amendment to USFSPA, and to help persuade other entities to lobby Congress toward this same goal.

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

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

10. **Referrals.**
   - Civil Rights & Social Justice Section
   - Govt. & Public Sector Lawyers Division
   - Litigation Section
   - Real Property, Trust and Estate Law Section
   - Solo, Small Firm & General Practice Division
   - Young Lawyers Division
   - Standing Committee on Armed Forces Law
   - Standing Committee on Legal Assistance for Military Personnel
   - Commission on Veterans Legal Services
   - Judge Advocates Association
   - Section of Labor Law
   - Section of Taxation

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 the Resolution

The Resolution calls for the American Bar Association to oppose the 2016 amendment to the Uniformed Services Former Spouses’ Protection Act (USFSPA), 10 U.S.C. § 1408, specifically Section 641 of the National Defense Authorization Act for Fiscal Year 2017, as codified in 10 U.S.C. § 1408 (a)(4), and to urge Congress to repeal the amendment. The amendment requires that, in divorce cases involving members of the uniformed services, the court may only divide a hypothetical amount of retired pay, as if the servicemember had retired at the date of divorce. This is contrary to the rules for division of all pensions in a large majority of the states. It would create a federal law of military pension division, tying the hands of judges in these cases and creating a special class of pensions to be divided in divorce. Long the province of state courts, the rules for divorce and property division need to remain in the hands of state and local judges. They need not be imposed in a rule which creates a fictional freeze of the pension at the date of divorce. The new statute will cause substantial disruption to state pension-division schemes and overturn a substantial body of state laws which comprehensively and appropriately address the division of military pensions.

2. Summary of the Issue that the Resolution Addresses

The issue which the Resolution addresses is the imposition of a nationwide method of dividing uniformed services retired pay upon divorce. The method involves freezing the pension benefit as of the date of divorce, a rule which only five states have adopted. Congress amended the USFSPA in 2016 to require this division by all courts. This is an area where the states have primacy and where Congress has traditionally opted for a restrained and refined rule when it passes legislation in the family law field. As James Madison wrote in The Federalist No. 45, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” The statutory amendment is an unwise exercise of authority which will set aside the rules for pension division in 40-45 states (in military cases) for no good reason, no purpose of substantial importance which would justify requiring local and state judges to adopt a single uniform method as to how this one asset would be divided in divorce court.

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

The proposed policy will influence the U.S. Senate and House of Representatives to modify or repeal the amendment to USFSPA.

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

We are aware of no minority views within the ABA or any external opposition.
RESOLVED, That the American Bar Association supports an interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), that its prohibition on sex discrimination in employment by covered employers includes discrimination on the bases of sexual orientation and gender identity; 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 workplace discrimination.
The American Bar Association ("ABA") adopts this Resolution to support 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. 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 and Congress 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.

These existing policies support an interpretation of Title VII 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 fully enables the ABA to file amicus curiae briefs in support of parties that take the position that Title VII’s prohibition against sex discrimination includes a prohibition against discrimination on the bases of sexual orientation and gender identity.

Summary

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., prohibits discrimination in employment “because of [an] individual’s sex.” This provision is designed “to strike at the entire spectrum of disparate treatment of men and women in employment.”¹

¹ Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 708 n. 13 (1978) (quoting Sprogis v. United Air Lines Inc., 444 F.2d 1194, 1198 (7th Cir.1971)).
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.2

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. The Seventh Circuit has recently held that Title VII covers discrimination based on sexual orientation.3 The Second Circuit has also recognized that discrimination based on gender stereotypes associated with sexual orientation is prohibited under Title VII.4

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.”5 Numerous federal district courts have agreed.6

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2 Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., No. 16-3522, 2017 WL 2331751, at *9 (7th Cir. May 30, 2017); Chavez v. Credit Nation Auto Sales, LLC, 641 F. App’x 883, 884 (11th Cir. 2016); 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 (9th Cir. 2000); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215 (1st Cir. 2000).

3 Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 351 (7th Cir. 2017) (“common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex”).

4 Christiansen v. Omnicom Grp., Inc., 852 F.3d 195 (2d Cir. 2017).

5 Baldwin v. Department of Transportation (Federal Aviation Administration), EEOC Appeal No. 0120133080 (July 15, 2015), 2015 WL 4397641, at 5, 10.

On October 4, 2017, the United States Department of Justice’s (“DOJ”) Office of the Attorney General Issued a Memorandum (“DOJ Memorandum”) to all United States Attorneys articulating the Department’s interpretation of Title VII of the Civil Rights Act of 1964. The Memorandum explained that the Department had concluded that “Although federal law, including Title VII provides various protections to transgender individuals, Title VII does not prohibit discrimination based upon gender identity per se. This is a conclusion of law, not policy.” This Memorandum contradicts and overrides a December 18, 2014 Memorandum from then-Attorney General Eric Holder determining that “the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status.” The first district court opinion to address the issue since the Department issued its October 4 Memorandum denied summary judgment to the employer without mentioning the DOJ Memorandum.

Additionally, on July 26, 2017, the DOJ filed an amicus curiae brief in the Second Circuit arguing that Title VII does not protect employees from sexual orientation discrimination. The DOJ’s brief contradicted a brief filed in the same case by the EEOC, as the primary agency responsible for interpreting and enforcing Title VII, which argued that because such claims necessarily involve impermissible consideration of a plaintiff’s sex, gender-based associational discrimination, and sex stereotyping, discrimination claims based on sexual orientation “fall squarely within Title VII’s prohibition against discrimination on the basis of sex.”

Evans v. Georgia Regional Hospital

On September 7, 2017, petition for certiorari was filed by the plaintiff in Evans v. Georgia Regional Hospital. The question presented is “Whether the prohibition in Title VII ... against employment discrimination ‘because of...sex’ encompasses discrimination based on an individual’s sexual orientation.”

8 DOJ Memorandum at 1.
Statutory Background

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides, inter alia:

It shall be an unlawful employment practice for an employer
(1) to fail or refuse to hire or to discharge any individual, or otherwise to
discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s … sex…; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s … sex….

The only definition provided regarding the meaning of “sex” in Title VII is as follows:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title [section 703(h)] shall be interpreted to permit otherwise….

History

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.”

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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 discrimination against workers for their failure to conform to sex-based stereotypes in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).^{14}

In *Oncale v. Sundowner Offshore Services*, 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.”^{15} 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.^{16}

The Lower Courts & Gender Identity

As mentioned above, the First, Sixth, Seventh, Ninth, and Eleventh Circuits have found transgender individuals to be protected by Title VII.^{17} 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, or because it is based on their

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^{14} *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group.”)

^{15} Id. at 79.

^{16} Id. at 80.

^{17} *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-3522, 2017 WL 2331751, at *9 (7th Cir. May 30, 2017); *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App’x 883, 884 (11th Cir. 2016); *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 (9th Cir. 2000); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000).
gender transition. Numerous agency administrative decisions and regulations have also made clear that "sex" includes gender identity and transgender status.

The Lower Courts & Sexual Orientation

Courts and enforcement agencies have also been reconsidering the interpretation of Title VII in the context of sexual orientation discrimination. The EEOC identified three bases for its finding that "a complaint alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account." The EEOC found that sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex, because it is associational discrimination on the basis of sex, and because it necessarily involves discrimination based on gender stereotypes.

While several circuit courts previously found sexual orientation not to be protected under Title VII, many of these cases were decided before the Supreme Court’s unanimous holding in Oncale v. Sundowner Offshore Services, Inc. that same-sex sexual harassment...
could constitute discrimination because of sex and therefore violate Title VII and that "statutory prohibitions often go beyond the principal evil [they were passed to combat] 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." Recent cases suggest an evolving understanding in keeping with *Price Waterhouse*, *Oncale* and the EEOC guidance in *Baldwin*.

For example, the Second Circuit is currently reconsidering its precedents *en banc* in *Zarda v. Altitude Express* (2d Cir. No. 15-3775, oral argument Sept. 26, 2017) under the question of ""Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination ‘because of . . . sex’?"" And on April 4, 2017, the Seventh Circuit became the first federal appellate court to hold that Title VII proscribes sexual-orientation discrimination. *Hively v. Ivy Tech Cnty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc). The court agreed with each of the coverage arguments in the EEOC’s *Baldwin* decision. Several district courts have also found sexual orientation covered under Title VII.23

The arguments of the EEOC in *Baldwin* and the reasoning of the Seventh Circuit in *Hively* are persuasive and represent "evolving standards of decency that mark[s] the progress of a maturing society," as Chief Justice Warren famously wrote in *Trop v. Dulles*.

**Conclusion**

In order for Title VII of the Civil Rights Act of 1964 "to strike at the entire spectrum of disparate treatment of men and women" in employment, its provisions must be interpreted to take into full account that sexual orientation and gender identity are inseparable from and inescapably linked to sex.24 In keeping with existing ABA policy and Goals III and IV of the ABA’s Mission, the ABA supports an interpretation of Title VII of the Civil Rights Act of 1964 that prohibits sex discrimination in employment by covered employers on the bases of gender identity and sexual orientation and urges the Attorney General to withdraw DOJ guidance inconsistent with that interpretation.

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24 *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708 n. 13 (1978) (quoting *Sprogis v. United Air Lines Inc.*, 444 F.2d 1194, 1198 (7th Cir.1971)).
116A

Respectfully submitted,

Robert Weiner
Chair, Section of Civil Rights and Social Justice
February 2018
GENERAL INFORMATION FORM

Submitting Entities: ABA Section of Civil Rights and Social Justice

Submitted By: Robert N. Weiner, Chair, Section of Civil Rights and Social Justice

1. Summary of Resolution

This Resolution would establish policy in support of an interpretation of Title VII of the Civil Rights Act of 1964 that prohibits discrimination in employment on the bases of (1) sexual orientation and (2) gender identity.

2. Approval by Submitting Entity

The Section of Civil Rights and Social Justice approved this policy resolution on Friday, October 20, 2017 during its Fall Council Meeting.

3. Has This or a Similar Recommendation Been Submitted to the House or Board Previously?

No.

4. What Existing Association Policies are Relevant to This Resolution and How Would They be Affected by its Adoption?

This resolution is consistent with prior policy supporting laws that prohibit discrimination in employment on the basis of sexual orientation and gender identity in 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. **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 (both direct and indirect costs).**

Adoption of this Resolution would result only in minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. **Disclosure of Interest**

There are no known conflicts of interest to this recommendation.

10. **Referrals**

By copy of this form, this Resolution 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 Business 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
- Section of Tort Trial and Insurance Practice
- Commission on Sexual Orientation and Gender Identity
11. **Contact Persons (prior to meeting)**

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CRSJ Committee on Sexual Orientation and Gender Identity  
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12. **Contact Persons (who will present the report to the House)**

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Tel.: 202/857.1707  
Fax: 202/828.2969  
(alternate address)
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution will establish policy that sex discrimination in employment prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., includes discrimination on the bases of (1) sexual orientation and (2) gender identity.

2. Summary of the Issue that the Resolution Addresses

The Resolution addresses a split of interpretations on the application of Title VII’s prohibition of sex discrimination to claims of discrimination by (1) lesbian, gay, and bisexual individuals challenging discrimination on the basis of their sexual orientation and (2) transgender individuals challenging discrimination on the basis of their gender identity.

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

The Resolution clarifies and emphasizes the ABA’s position on employment 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

No opposing views have been expressed by other ABA entities or organizations as of the preparation of this summary. The Section will work with other ABA entities, as necessary, on wording and scope of this Resolution.
RESOLVED, That the American Bar Association urges Congress to enact legislation overruling *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981); and

FURTHER RESOLVED, That the American Bar Association supports legislation enabling plaintiffs to bring constitutional claims in lieu of a statutory cause of action based upon environmental harm due to governmental acts or omissions.
The Supreme Court’s 1981 ruling in *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*1 ("*Middlesex*") subverted the plain language of the statutes at issue, causing subsequent lower courts to expand the scope of the *Middlesex* holding to broadly foreclose § 1983 constitutional claims. Justice Powell’s *Middlesex* opinion, its weaknesses made clear in Justice Stevens’ dissent, has led to inconsistent holdings. With lower courts lacking a clear guide of what is and is not permitted under the law, victims of man-made harms are left with a diminished ability to adequately and fairly access the justice system.

I. **MIDDLESEX FACTUAL BACKGROUND**

In *Middlesex*, the Supreme Court of the United States held the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1251 (1973), and the Marine Protection, Research, and Sanctuaries Act ("MPRSA"), 33 U.S.C. § 1401 (1974), preempted plaintiffs’ § 19832 claims. The Court determined “[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.” *Id.* at 20. The majority in *Middlesex* cited the “elaborate enforcement provisions” within the FWPCA and MPRSA as evidence that Congress did not intend to authorize “additional judicial remedies for private citizens suing under these Acts.” *Id.* at 2. As a result of this finding, plaintiffs’ § 1983 constitutional claims were precluded, providing no additional statutory remedy for their claims. *Id.* at 30. Four decades later, the Court’s decision still presents a “remedial dead-end” for injured plaintiffs seeking relief under § 1983.

II. **THE MIDDLESEX HOLDING IS PROBLEMATIC BECAUSE THE COURT SUBVERTED THE PLAIN LANGUAGE OF THE STATUTES, AND LOWER COURTS HAVE INTERPRETED THE RULING TO PRECLUDE § 1983 CONSTITUTIONAL CLAIMS.**

The *Middlesex* holding is problematic because the Court subverted the plain language of the statutes, further supported by congressional intent contained in the legislative history, contradicting both the fundamental principles of statutory interpretation and unequivocal congressional intent to preserve all remedial avenues through a savings clause. Relying on this precedent, lower courts have broadly interpreted *Middlesex* also to preclude independent constitutional claims, even when statutory remedial schemes lack the scope to adequately redress constitutional violations. Our jurisprudence dictates that courts interpret a statute based on its plain language and adhere to constitutional principles. *Middlesex* and its subsequent applications represent a departure from this basic tenet of jurisprudence.

A. The Court demonstrated a “remarkable departure”3 from the plain language of the savings clause when it preempted § 1983 claims.

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1 453 U.S. 1 (1981)  
2 The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1996), allows “Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress...”.
3 *Middlesex*, 453 U.S. at 1 n.12.
When interpreting a statute, courts rely on traditional rules of statutory construction, such as plain language, and, if there is ambiguity, other tools such as legislative history, to discern the meaning of the text and decipher congressional intent. To determine the plain language of a statute, judges must discern what the “ordinary, contemporary, common meaning,” of each word was at the time the statute was enacted. *Sandifer v. U.S. Steel Corp*, 134 S.Ct. 870, 876 (2014). This allows courts to establish the “clear meaning of statutes as written.” *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S.Ct. 1002, 1010 (2017).

*Middlesex* demonstrates a “remarkable departure from the ‘plain language’ rule of statutory construction that has dominated [our] recent statutory decisions.” *Middlesex*, 453 U.S. at 1 n.12. In *Middlesex*, plaintiffs asserted claims under the FWPCA and MPRSA, each of which contain saving clauses preserving all other remedial pursuits for plaintiffs.

The savings clause of FWPCA states,

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency.) § 505(e) of the FWPCA, 33 U.S.C. § 1365 (e).

The savings clause of the MPRSA states,

> The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency.) § 105(g)(5) of the MPRSA, 33 U.S.C. § 1415(g)(5).

The language of these statutes is explicit and clear. The repetition of the word “any” in both saving clauses demonstrates Congress did not intend to preclude the remedial provisions of other statutes, including but not limited to constitutional claims. Yet, the Court held otherwise. Justice Stevens regarded the majority’s preclusion of §1983 remedies as “palpably wrong.” *Middlesex*, 453 U.S. at 25. He stated,

> No matter how comprehensive we may consider a statute’s remedial scheme to be, Congress is at liberty to leave other remedial avenues open. Express statutory language or clear references in the legislative history will rebut whatever presumption of exclusivity arises from comprehensive remedial provisions. *Middlesex*, 453 U.S. at 28.

The saving clauses of the FWPCA and MPRSA exemplify “express statutory language” that should rebut the Court’s “presumption of exclusivity.” *Id.* The legislative history of the FWPCA and MPRSA also substantiate rebuttal of this presumption.

In *Middlesex*, the Court began its analysis of the legislative history by reviewing the Senate Reports focused on the FWPCA and MPRSA. The report on the FWPCA states, “[i]t should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available.” S. Rep. No. 92-414, at 3673 (1971). This language is mirrored in the report on the MPRSA, stating the citizen suits provision shall not restrict “any other right to legal action
which is afforded the potential litigant in another statute or the common law.” S. Rep. No. 92-532, at 4250 (1971). The phrases, “any other law” and “any other statute” within these reports, demonstrate “unambiguous expressions of legislative intent” to preserve remedies within other statutes, including § 1983.\(^4\) Despite the alternative holding, Justice Powell undercut his own argument articulated in the majority opinion by essentially agreeing with the reasoning in Justice Stevens’ dissent by stating, in a footnote, “[t]he legislative history makes clear Congress’ intent to allow further enforcement of antipollution standards arising under other statutes or state common law.” Middlesex, 453 U.S. at 1 n.31. Yet, writing for the majority, Justice Powell contradicted this analysis by preempting § 1983 claims, not only contradicting the plain language of the statute and disregarding its legislative history, but also abandoning the purpose of the court system to “fashion remedies for wrongs,” in other words, granting access to justice. Id. at 24.

B. Subsequent courts broadly interpreted Middlesex to preclude § 1983 constitutional claims.

The scope of Middlesex has been expanded to foreclose not only statutory claims, but also § 1983 constitutional claims. In Defeo v. Rose Tree Media Sch. Dist., No. 06-744, 2007 WL 576317, at *3-4 (E.D. Pa. Feb. 20, 2007), the court broadly interpreted Middlesex to dismiss plaintiff’s §1983 Equal Protection claim because it was brought in conjunction with a Title IX claim. When Middlesex is applied to preclude § 1983 constitutional claims in favor of a statutory scheme, it stands in direct contravention of the Supremacy Clause. U.S. Const. art. VI, cl. 2.

“The Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme law of the land.” U.S. Const. art. VI, cl. 2. Independently existing constitutional claims should never be preempted by statutory schemes. See Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009). A constitutional claim is any cause of action predicated on a right or duty established by the Constitution. The Civil Rights Act of 1871 was enacted to provide access to justice for individuals who have been deprived “of any rights, privileges, or immunities secured by the Constitution and laws.” When § 1983 is used as a vehicle for claims predicated on rights established by the Constitution, those claims are distinct from statutory claims.

To adhere to fundamental constitutional principles, a number of courts have recognized that § 1983 constitutional claims should not be foreclosed. In Swartz v. Beach, 229 F. Supp. 2d 1239, 1258 (D. Wyo. 2002), the court declined to apply the Middlesex holding, reasoning that § 1983 constitutional claims would not be preempted regardless of how comprehensive the statutory scheme. The court in Covey v. City of Philadelphia, No. 06-CV-3649 2007 WL 789577, (E.D. Pa. Mar. 13, 2007), recognized that § 1983 claims should not be barred just because the conduct could be the basis of a statutory claim. The court reasoned that plaintiffs should not be forced to bring one type of claim when the facts allow for multiple claims and held that § 1983 constitutional claims would not be precluded when plaintiff could bring either. Id. at *3 In Laird v. Ramirez, the court stated “providing a means to vindicate rights secured by the Constitution has always been the purpose of § 1983.” The court recognized that statutes are inadequate to redress constitutional violations because they were designed to vindicate rights established by that particular statute, not rights secured by the Constitution. Laird v. Ramirez, 884 F. Supp. 1265 (N.D. Iowa 1995).

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\(^{4}\) Middlesex, 453 U.S. at 25 (Stevens, J., dissenting).
These cases illustrate a commitment to the supremacy of the Constitution, while the cases following Middlesex, which preclude §1983 constitutional claims, deviate from rudimentary constitutional principles. Foreclosure of constitutional claims leaves injured plaintiffs without a remedy, thus limiting their access to justice. When Middlesex is applied to preclude §1983 constitutional claims and limit plaintiffs to insufficient statutory schemes as the sole basis for remedy, it limits access to justice.

III. THE MIDDLESEX HOLDING LIMITS ACCESS TO JUSTICE BECAUSE IT IS INTERPRETED AND APPLIED INCONSISTENTLY.

The Supreme Court’s holding in Middlesex has left the law in disarray. The Middlesex analysis has been interpreted and applied inconsistently across the courts, adversely affecting plaintiffs.

Middlesex has yielded paradoxical results and “great disunity among lower court decisions.” Canty v. Old Rochester Reg’l Sch. Dist., 54 F. Supp. 2d 66, 74 (D. Mass. 1999). In Crawford v. Davis, 109 F.3d 1281, 1284 (8th Cir. 1997), the court held it was inappropriate to apply the Middlesex holding because plaintiff’s §1983 claims, based on alleged violations of the Equal Protection Clause, were not preempted by Title IX. However, the court in Bruneau v. South Kortright Centre. Sch. Dist., 163 F.3d 749, 756 (2d Cir. 1998), held it was appropriate to apply the Middlesex holding because plaintiff’s §1983 claim, based on the Equal Protection Clause, was preempted by Title IX and Middlesex did not allow for exceptions. The court in Matthiesen v. Pacific Gas & Elec. Co. PG & E, No. EDCV 16-660-DMG-KK, 2017 WL 555974, at *6 (C.D. Cal. Feb. 20, 2017), held the SDWA preempts §1983 claims, while the court in Boler v. Earley, 865 F.3d 391, 405-06 (6th Cir. 2017), held the opposite, finding plaintiff’s §1983 claim was not precluded by the SDWA. The court in Travis v. Folsom Cordova Unified Sch. Dist., No. 2:06-cv-2074-MCE-EBF, 2007 WL 529840, at 4 (E.D. Cal. Feb. 20, 2007), recognized the disagreement amongst the courts on whether Title VI preempts §1983 claims based on the Middlesex analysis.

[T]he Seventh Circuit, the Western District of New York, and the District of Nevada have found that Title VI is sufficiently comprehensive to preclude a plaintiff from bypassing its enforcement mechanisms through a §1983 action. Conversely, the Third Circuit and the First Circuit have found that Title VI is not sufficiently comprehensive.
<table>
<thead>
<tr>
<th>Cases that Avoided the <em>Middlesex</em> Holding</th>
<th>Cases that Followed the <em>Middlesex</em> Holding</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Crawford v. Davis</strong>, 109 F.3d 1281, 1284 (8th Cir. 1997) (court held it was inappropriate to apply <em>Middlesex</em> to plaintiff’s equal protection claims under § 1983)</td>
<td><strong>Bruneau v. South Kortright Cent. Sch. Dist.,</strong> 163 F.3d 749, 756 (2d Cir. 1998) (court held no constitutional rights exception existed under the <em>Middlesex</em> analysis)</td>
</tr>
<tr>
<td><strong>Classic Commc’ns v. Rural Tel. Serv. Co.,</strong> 956 F. Supp. 896, 906 (D. Kan. 1996) (court distinguished its case from <em>Middlesex</em> by holding the remedial schemes of the Cable Act and Sherman Act did not preempt constitutional claims under § 1983)</td>
<td><strong>Reeger v. Mill Serv., Inc.,</strong> 592 F. Supp. 1266, 1269 (W.D. Pa. 1984) (court applied <em>Middlesex</em> to preclude § 1983 claims because the regulatory scheme of the Clean Air Act was similar to that of the acts considered in <em>Middlesex</em>)</td>
</tr>
<tr>
<td><strong>Boler v. Earley,</strong> 865 F.3d 391, 405-06 (6th Cir. 2017) (court held the district court erred when it applied the <em>Middlesex</em> analysis to dismiss plaintiff’s constitutional claims under § 1983)</td>
<td><strong>Bello v. Vill. of Skokie,</strong> No. 14 C 1718, 2014 WL 4344391, at *5-7 (N.D. Ill. Sept. 2, 2014) (In applying the <em>Middlesex</em> analysis, the court held plaintiff’s Constitutional claims under § 1983 were precluded by the Uniformed Service Employment and Reemployment Rights Act)</td>
</tr>
<tr>
<td><strong>Envtl. Defense Fund, Inc. v. Lamphier,</strong> 714 F.2d 331, 337 (4th Cir. 1983) (Holding <em>Middlesex</em> did not apply because plaintiffs sought civil penalties and an injunction, unlike the plaintiffs in <em>Middlesex</em> who sought damages)</td>
<td></td>
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</table>
Many courts have resorted to circuitous means to avoid applying Middlesex altogether. They narrowly interpret the Supreme Court’s holding and distinguish their cases from Middlesex so as not to preclude § 1983 claims. In Charvat v. E. Ohio Reg’l Wastewater Auth., 246 F.3d 607, 614 (6th Cir. 2001), the court held Middlesex was inapplicable because the plaintiff sought relief for constitutional violations under the 1st Amendment, unlike the Middlesex plaintiffs, who sought to enforce statutory rights. In Envtl. Defense Fund, Inc. (“EDF”) v. Lamphier, 714 F.2d 331, 337 (4th Cir. 1983), the court distinguished its case from Middlesex based on the plaintiff’s remedy. Unlike in Middlesex, where the plaintiffs sought an award of damages, the plaintiffs in EDF sought civil penalties and an injunction. By distinguishing their cases from Middlesex, the courts in Charvat and EDF evaded the Supreme Court’s analysis to allow § 1983 claims. Charvat and EDF illustrate how lower courts’ unwillingness to follow the Supreme Court’s reasoning has led to unnecessarily circuitous holdings to grant access to justice, despite Middlesex.

Contradictory opinions in the lower courts create uncertainty. Without a single, clear rule, plaintiffs cannot anticipate how their claims will be treated. Depending on the forum, similarly situated plaintiffs are treated differently based on the court’s interpretation of Middlesex. This uncertainty should be resolved by the courts and Congress clarifying the problematic Middlesex ruling and restore the plain meaning of the saving clauses, preserving other causes of action. Adoption of this resolution will put the American Bar Association on record as supporting just such a course of action.

IV. MIDDLESEX ADVERSELY AFFECTS VICTIMS SUFFERING ENVIRONMENTAL HARMs, ESPECIALLY VULNERABLE COMMUNITIES OF COLOR AND INDIGENOUS PEOPLES.

The following cases exemplify the damage Middlesex has caused to plaintiffs injured by environmental harms.

In Boler v. Earley, 16-10323, 2016 WL 1573272, at 1,3 (E.D. Mich. Apr. 19, 2016), aff’d in part, rev’d in part sub nom. Boler v. Earley, 865 F.3d 391 (6th Cir. 2017) defendants “knowingly, recklessly and callously” exposed plaintiffs to “toxic and contaminated water unfit for human use and consumption,” thereby denying plaintiff's access to “safe and potable water.” The plaintiffs argued their § 1983 constitutional claim should not be precluded because it was only tangentially related to safe drinking water. The District Court, however, did not find this reasoning persuasive, stating, “the ‘state-created danger’ the plaintiffs complained of was not ‘tangentially’ related to safe drinking water, it [is] solely about safe drinking water.” Id. at 4. Relying on Middlesex, the court in Boler conflated plaintiff’s § 1983 claim with the SDWA, thus denying their claim and any opportunity for redress in federal court.5

Fortunately, Boler was reversed on appeal. Boler, 865 F.3d at 1. The Court of Appeals for the Sixth Circuit reviewed the congressional intent of the SDWA and determined there was no textual indication that Congress chose to preempt § 1983 claims because of a similar clause. Id. at 409. While the appellate court successfully circumvented Middlesex, this ruling represents the exception rather than the rule. Though some courts are recognizing the adverse effects of precluding remedies via § 1983 for plaintiffs suffering environmental harms, other courts are increasing the precedential weight of the Middlesex ruling.

5 Boler, 865 F.3d at 3, 4.
Other plaintiffs have not been so fortunate as those in Boler. In Mattoon v. City of Pittsfield, 980 F2d 1 (First Cir. 1992), plaintiffs filed suit after drinking the city’s contaminated water source. The court analogized the SDWA savings clause with the saving clauses at issue in Middlesex, thereby precluding plaintiff’s § 1983 claim. Id. at 2. In Reynolds v. PBG Enterprises, LLC, 2011 WL 2678589, plaintiffs, living in Section 8 housing, were exposed to and ingested lead paint resulting in health problems. The court dismissed plaintiff’s constitutional claims, because “the amended complaint does not set forth sufficient facts to state a constitutional claim distinct from the statutory claims alleged.” Id. at 9. Until Middlesex is overturned, plaintiffs suffering environmental harms will have no guarantee to adequate access to redress.

V. CONCLUSION

Varying interpretations of Middlesex in the lower courts prevent the emergence of a clear standard on which plaintiffs can rely. Injured plaintiffs depend on the court system to provide redress, but suffer additional harms when deprived of the opportunity to have their claims heard on the merits. Plaintiffs’ § 1983 constitutional claims are wrongly dismissed when lower courts broadly interpret Middlesex to foreclose constitutional claims. The Court’s subversion of the plain language of the saving clauses directly contradicts congressional intent to allow for these types of claims. For justice to be restored and to rectify a path to potential justice, the ABA must adopt policies addressing the abovementioned issues.

The ABA has several policies devoted to promoting access to justice, but there is not yet a policy addressing Middlesex. This new policy would fill a gap in the ABA’s current policies and would work to broaden access to justice and civil rights protections rooted in Constitutional law. By urging Congress to rectify the decision through legislation, explicitly preserving a plaintiff’s right to bring § 1983 claims, and by making it official ABA policy that Middlesex should not be applied to preempt § 1983 remedies, the ABA supports the vital goal of equal access to justice.

Respectfully submitted,

Robert N. Weiner  
Chair, Section of Civil Rights and Social Justice  
February 2018

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6 Section 8 housing is a federal program which provides “rent subsidies for low-and moderate-income participants so that they can afford to lease privately owned housing units.” Reynolds v. PBG Enterprises, LLC, 2011 WL 2678589, n.2.

7 These health problems included, “abnormal behavior, cognitive injuries, brain damage, hyperactivity, loss of appetite, attention deficits, and diminished IQ.” Reynolds v. PBG Enterprises, LLC, 2011 WL, at 1-5.

8 103B – Aug 1988: Regulatory Reform  
103A – Aug 1999: Plain Language Techniques  
304 – Feb 2003: Class Action Practice  
For more information, see attached Addendum: Relevant ABA Policies
GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Robert N. Weiner, Chair, Section of Civil Rights and Social Justice

1. Summary of Resolution(s).

In this Resolution, the American Bar Association urges Congress to enact legislation overruling *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981) and further, that the American Bar Association supports legislation enabling plaintiffs to bring constitutional claims in lieu of a statutory cause of action based upon environmental harm due to governmental acts or omissions.

2. Approval by Submitting Entity.

The Section of Civil Rights and Social Justice approved this policy resolution on Friday, October 20, 2017 during its Fall Council Meeting.

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

No.

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

See Addendum listing prior relevant ABA policies. The adoption of this resolution would be a continuation and expansion of current ABA policies.

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

N/A

6. Status of Legislation. (If applicable)


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

Adoption of this policy would enable the ABA to lobby in support of the legislation mentioned in #5 above, or other legislation consistent with the policy, and to file amicus briefs in litigation regarding remedies for environmental harm, where appropriate.

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

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

N/A

10. Referrals.

By copy of this form, the Resolution will be referred to the following ABA entities that may have an interest in the subject matter:

Section of Administrative Law and Regulatory Practice
Section of Business Law
Criminal Justice Section
Section of Dispute Resolution
Section of Environment, Energy, and Resources
Government and Public Sector Lawyers Division
Health Law Section
Section of International Law
Section of Litigation
Section of Public Contract Law
Section of Public Utility, Communications and Transportation Law
Section of Real Property, Probate and Trust Law
Section of Science and Technology Law
Section of State and Local Government Law
Section of Taxation
Tort Trial and Insurance Practice Section
Judicial Division
Law Student Division
Senior Lawyers Division
Young Lawyers Division

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

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Fax: 202/828.2969
(alternate address)
### ADDENDUM: RELEVANT ABA POLICIES

<table>
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<tr>
<th>Date</th>
<th>Resolution No.</th>
<th>Section</th>
<th>Resolution Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aug. 2013</td>
<td>10D</td>
<td>Access to Justice</td>
<td>This resolution supports the establishment of access to justice commissions in all states and territories and urges ABA members to support efforts to create access to justice commissions and to promote access to justice.</td>
</tr>
<tr>
<td>Aug. 2010</td>
<td>117</td>
<td>Preemption</td>
<td>This resolution urges Congress to address foreseeable preemption issues clearly and explicitly when it enacts a statute that has the potential to displace, supplement or otherwise affect state tort law. This resolution also urges Congress to remain mindful of the historic responsibility that States have exercised over the health and safety of their populace and balance the competing concerns relating to preemption and recommends that independent regulatory agencies which are not covered by Executive Order 13132 voluntarily comply with that order regarding federal actions that may have preemptive effect and sets forth procedures for compliance.</td>
</tr>
<tr>
<td>Feb. 2003</td>
<td>304</td>
<td>Class Action Practice</td>
<td>This resolution believes that some concerns over class action practice should be addressed with federal legislation providing for expanded federal court jurisdiction and recommends that any expansion should preserve a balance between legitimate state court interests and federal court jurisdictional benefits.</td>
</tr>
<tr>
<td>Aug. 1999</td>
<td>103A</td>
<td>Plain Language Techniques</td>
<td>This resolution urges agencies to use plain language in writing regulations, as a means of promoting the understanding of legal obligations, using certain suggested techniques. This resolution also recommends certain steps to avoid problems in the use of plain language techniques.</td>
</tr>
<tr>
<td>Feb. 1995</td>
<td>301</td>
<td>Access to Justice</td>
<td>This resolution reaffirms support for access to the American system of justice without regard to financial wherewithal. This resolution supports the availability of access to the federal courts under the</td>
</tr>
<tr>
<td>Date</td>
<td>Resolution</td>
<td>Title</td>
<td>Text</td>
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<tr>
<td>-----------</td>
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<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Aug. 1993</td>
<td>109</td>
<td>Environmental Equality</td>
<td>This resolution supports actions to achieve implementation and enforcement of environmental laws, regulations and policies so that a disproportionate share of the burden of environmental harm does not fall on minority and/or low-income individuals, communities or populations. This resolution also urges that certain appropriate steps be taken to give priority attention to this problem; urges enactment of legislation, as appropriate, and other appropriate measures to redress and eliminate situations in which minority and/or low-income people have borne a disproportionate share of harm to the environment.</td>
</tr>
<tr>
<td>Aug. 1988</td>
<td>103B</td>
<td>Regulatory Reform</td>
<td>This resolution urges Congress to address foreseeable preemption issues clearly and explicitly when it enacts a statute affecting regulation or deregulation of an area of conduct; urge federal agencies to establish several procedures with respect to the preemption of state laws or regulations.</td>
</tr>
</tbody>
</table>
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

In this Resolution, the American Bar Association urges Congress to enact legislation overruling *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981) and further, that the American Bar Association supports legislation enabling plaintiffs to bring constitutional claims in lieu of a statutory cause of action based upon environmental harm due to governmental acts or omissions.

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

Lower courts have applied the *Middlesex* holding inconsistently, in some cases severely limiting relief to plaintiffs suffering environmental harm. This resolution urges a legislative solution to this inconsistency, clarifying that § 1983 relief is available for violations of the FWPCA and the MPRSA.

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

ABA policy would support legislation to make clear that § 1983 claims under these statutes would be cognizable, allowing greater access to justice for communities suffering from environmental harm.

4. **Summary of Minority Views**

There are no known conflicts of interest.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal courts to recognize that service in the United States Armed Forces should not be restricted and individuals should not be discriminated against on the basis of sexual orientation or gender identity; and

FURTHER RESOLVED, That the American Bar Association urges federal courts to hold that the policies and directives encompassed in President Donald J. Trump’s Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017, and entitled “Armed Forces Service by Transgender Individuals,” violate the Equal Protection and Due Process clauses of the Fifth Amendment of the United States Constitution.
REPORT

Introduction

The American Bar Association ("ABA") adopts this Resolution urging federal, state, local, territorial and tribal courts to recognize that service in the United States Armed Forces should not be restricted and that members should not be discriminated against on the basis of sexual orientation or gender identity. This report addresses the legal authority and extensive research supporting this Resolution.

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. Also, the ABA urged federal, state and local governments to enact laws prohibiting discrimination on the basis of sexual orientation. See 89M8.

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 sexual orientation or 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.
   b. Unit cohesion will not be affected by allowing transgender individuals to serve openly in the Armed Forces.

II. Costs associated with extending health coverage for transgender individuals is negligible.

III. The transgender service ban violates the constitutional guarantees of Equal Protection Clause and Due Process Clause.
   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

On June 30, 2016, the United States Department of Defense (“DoD”) announced that it would allow transgender people to serve openly in the United States Armed Forces.¹ That policy was the result of a lengthy review process by high-ranking military personnel, who concluded that permitting transgender people to serve would have no adverse effect on military readiness or effectiveness.

As a consequence of that announcement, many service members identified themselves as transgender to their commanding officers.

On July 26, 2017, President Trump reversed course and announced that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military.” In the wake of that announcement, transgender service members began to experience a variety of harms, including denial of medical care, reenlistment, promotions, commissions, and deployments.

Shortly thereafter, on June 30, 2017, Defense Secretary Jim Mattis delayed a requirement that military leaders implement policies to enlist incoming transgender service members.²

On August 25, 2017, the President issued a memorandum to the Secretary of Defense and the Secretary of Homeland Security banning transgender people from military service.³ This memo confirmed 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 (entry into the military). The President stated, “In my judgment, the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments’ [DoD’s] 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 would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and that further study is needed to ensure that continued implementation of last year’s policy

changes would not have those negative effects.” As a result of that memorandum, transgender people were indefinitely barred from accession (entry into the military), and currently serving transgender service members will no longer be eligible for service as of March 23, 2018.

Arguments

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 unfit for service. 4

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.5 Thus, it is clear that 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.

Moreover, ensuring appropriate mental and physical screenings will help minimize any readiness concerns. The argument regarding the medical needs of transgender individuals often hinges on the fact that these individuals may be physically affected by hormone therapy or by undergoing gender re-assignment surgery. However, there is no evidence that a transgender member’s medical care would have any significant, long-


5 Schaefer, Agnes Gereben, et al. RAND Corporation. 2016, “Assessing the Implications of Allowing Transgender Personnel to Serve Openly” www.rand.org/pubs/research_reports/RR1530.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 1,326,273 in FY 2014., Summary xi.”
term impact on readiness, unless the member worked in a unique occupation or needed to be available for frequent, unpredicted mobilizations. Even in those instances, however, accommodations can be made to allow the individual to continue to serve.

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 to 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 surgery, 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. Thus, there is no evidence that 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.

In explaining President Donald Trump’s decision that transgender Americans would not be allowed to serve in the U.S. Armed Forces, White House press secretary Sarah Sanders stated that based on consultation with his national security team, the president “came to conclusion that it erodes military readiness and unit cohesion.” 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

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7 Major Alexander A. Cox, U.S. Army, “Unit Cohesion and Morale in Combat: Survival in a Culturally and Racially Heterogeneous Environment,” School of Advanced Military Studies, U.S. Army Command and Staff College at 4 (1995), http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA309830&Location=U2&doc=GetTRDoc.pdf. Early analysis discussed cohesion in monolithic terms as an important contributor to military performance and winning on the battlefield, while more academic study distinguishes between task and social cohesion, a distinction that is now adopted in most academic study on the topic. NATIONAL DEFENSE RESEARCH INSTITUTE, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND’S 1993 STUDY 139 (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.
8 Id. at 5.
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.\(^\text{10}\)

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 gay), this discovery would inhibit bonding within the unit, reducing operational readiness.\(^\text{11}\) 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.\(^\text{12}\) Military officials frequently argued that racial integration of the armed forces would have a negative impact on unit cohesion.\(^\text{13}\) In 1940, President Franklin D. Roosevelt, stated that kept the armed forces segregated because he feared that “at 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.”\(^\text{14}\) 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.”\(^\text{15}\)

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 Truman’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. Currently, the U.S. Armed Forces is regarded as one of the most integrated and diverse institutions in the United States; as exemplified by interracial marriage, which is it is significantly more prevalent in the U.S. military than in civilian society.

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. As with racial integration, many leaders expressed concerns about women having a negative impact on unit cohesion. U.S. Navy surveys of ships’ crews integrating women indicated concerns about unit cohesion. 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.”

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. 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. Congress codified the

16 ROSTKER supra note 13 at 173.
18 ROSTKER supra note 13 at 173.
20 Id. at 86.
21 Id.
22 Id.
23 Id. at 87.
24 ROSTKER supra note 13 at xxii.
25 Id. at 1, 28.
unit cohesion argument in the 1993 “Don’t Ask, Don’t Tell” legislation. In 2010, those who opposed repeal of the “Don’t Ask, Don’t Tell” policy continued to use the same argument. 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 overall military effectiveness was low. 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.

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 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.

In announcing the ban on Twitter, President Trump cited “tremendous medical costs” as another primary basis for his decision. However, research commissioned by the DoD do not bear this statement out.

Instead, the study found that a change in policy that permits transition-related care for transgendered individuals was likely to have marginal impact on health care costs. The

26 10 U.S.C. § 654(a)(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.”).
27 NATIONAL DEFENSE RESEARCH INSTITUTE, supra note 7 at 5.
28 U.S. DEP’T OF DEF., supra note 19 at 129.
29 Id. at 119.
30 SCHAEFER supra note 11 at xii.
31 Id. at 45.
33 AGNES GEREBBEN SCHAEFER ET AL.,
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 $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 troops.

III. The Transgender service ban violates the constitutional guarantees of equal protection and due process.

a. The Transgender Service Member Ban Violates 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 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. Gilliard, 483 U.S. 587, 602 (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 ban 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

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National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, at 2: “Transgender and gender non-conforming people face injustice at every turn: in childhood homes, in school systems that promise to shelter and educate, in harsh and exclusionary workplaces, at the grocery store, the hotel front desk, in doctors’ offices and emergency rooms, before judges and at the hands of landlords, police officers, health care workers and other service providers.”
not rely on a classification whose relationship 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 minis deployability constraints based 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 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; and 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. In contrast, the earlier announcement to permit transgendered individuals to serve freely, the President’s announcement, via Twitter, was seemingly made with no formality or any deliberative processes that generally accompany the development and announcement of major policy changes. These circumstances serve as evidence that the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy. See *Vill. 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”).

Finally as stated above, the President’s stated rationale’s claiming an impact on military readiness and medical costs have not been borne out by facts. The use of unfounded rationalizations is a strong indication that the true motive for the ban is animus. See, e.g., *Romer*, 517 U.S. at 635 (the constitutional guarantee of equal protection under the law will not tolerate "a status-based enactment divorced from any factual context from which [one] could discern a relationship to legitimate state interests"); *Perry*, 671 F.3d at 1081 ("A law that has no practical effect except to strip one group of [a] right … raises an even stronger inference that the disadvantage imposed is born of animosity toward the class of persons affected.") Moreover, the ban’s “sheer breadth is discontinuous with the
reasons offered for it,” so much so that it “seems inexplicable by anything other than animus toward the class it affects.” *Romer*, 517 U.S. at 632. Transgender individuals are banned from military service “in any capacity.” When, as here, the breadth of governmental discrimination “is so far removed from the[] particular justifications” given, it is “impossible to credit them.” *Id.* at 635.

b. *The Transgender Service Member Ban Violates the Due Process Clause of the Fifth Amendment to the United States Constitution*


President Trump’s arbitrary decision to exclude men and women who are transgender, which is inconsistent with and contradicted by the findings of the Department of Defense, serves no legitimate purpose and cannot be reconciled with the liberty and equality protected by the Constitution.

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 government power. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (internal quotations omitted); *Abdelfattah v. U.S. Dep’t of Homeland Sec.*, 787 F.3d 524, 540 (D.C. Cir. 2015). The President’s abrupt reversal of a policy that had been carefully studied, implemented, and in place for more than a year altogether fails that test.

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

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, 225F.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 AirForce, 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").

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.

Finally, transgendered service members have a right not to be discharged on account of their gender identity after having relied upon the Government’s explicit promise that they could serve openly. See Landgraf v. USI Film Prods., 511 U.S. 244, 265-66 (1994) (due process does not permit government to use actions it permitted or encouraged as a ground for punishment); see also Lewis, 523 U.S. at 845-46 ("[T]he substantive due process guarantee protects [the individual] against government power arbitrarily and oppressively exercised.

Conclusion

Men and women who are transgender 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 sexual orientation or gender identity.

Respectfully submitted,

Mark Johnson Roberts,  
Chair, ABA Commission on Sexual Orientation and Gender Identity

February 2018
1. Summary of Resolution

This Resolution would enable the ABA to more specifically address any and all discriminatory actions perpetuated by the federal, state, local, territorial and tribal courts to bar service in the United States armed forces based on one’s sexual orientation or gender identity.

2. Approval by Submitting Entity

November 4, 2017

3. Has This or a Similar Recommendation Been Submitted to the House or Board Previously?

No.

4. What Existing Association Policies are Relevant to This Resolution and How Would They be Affected by its Adoption?

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 the tens of thousands 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 recommendation 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 and OUTServe SLDN. OutServe-SLDN is the association for actively serving LGBT military personnel and veterans.

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 against based on one’s sexual orientation or 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 bases of sexual orientation and/or gender identity and more fully enables the Governmental Affairs Office, the ABA President, and the Standing Committee on Amicus Curiae Briefs to act.

4. **Summary of Minority Views**

   None.
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